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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22523; Directorate Identifier 2005–NM–058–AD; Amendment 39–17379; AD 2013–05–07]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 767 airplanes. This AD was prompted by reports of stiff operation of the elevator pitch control system and jammed elevator controls. This AD requires replacing pressure seal assemblies; doing repetitive inspections for dirt, loose particles, or blockage of the flanged tube and drain hole for the pressure seals, and corrective action if necessary; replacing the aft air-intake duct assembly with a new or modified assembly and installing a dripshield; and installing gutters on the horizontal stabilizer center section and modifying the side brace fittings. We are issuing this AD to prevent moisture from collecting and freezing on the elevator control system components, which could limit the ability of the flightcrew to make elevator control inputs and result in reduced controllability of the airplane.

DATES: This AD is effective April 25, 2013.

The Director of the **Federal Register** approved the incorporation by reference of certain publications listed in the AD as of April 25, 2013.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 917–6490; fax: (425) 917–6590; email: *Kelly.McGuckin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to the specified products. That SNPRM published in the **Federal Register** on August 9, 2012 (77 FR 47563). The original NPRM (70 FR 56386, September 27, 2005) proposed to require drilling a drain hole in the flanged tubes for certain elevator control cable aft pressure seals; doing repetitive inspections for dirt, loose particles, or blockage of the flanged tube and drain hole for the pressure seals, and corrective action if necessary; replacing the aft air-intake duct assembly with a new or modified assembly and installing a dripshield; and installing gutters on the horizontal stabilizer center section and modifying the side brace fittings. The SNPRM proposed to revise the NPRM by requiring replacement of pressure seal assemblies, rather than the proposed drilling of drain holes; revising a certain compliance time and inspection type; adding certain optional actions; and revising the applicability.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the SNPRM (77 FR 47563, August 9, 2012) and the FAA's response to each comment. One commenter, Natalia Budyldina, stated the SNPRM is significant since it is related to airplane safety, would let the pilot better control the airplane, and would reduce airplane delays due to technical problems.

Request To Allow Installing New or Modified Aft Air-Intake Duct Assemblies

UPS requested that we revise paragraph (i) of the SNPRM (77 FR 47563, August 9, 2012) to clarify if operators are allowed to install a ''new or reworked duct'' on all affected airplanes or if operators must strictly follow the service information. UPS stated that paragraph (i) of the SNPRM requires installation of a ''new or modified'' aft air-intake duct assembly in accordance with Boeing Service Bulletin 767–49A0035, Revision 2, dated June 2, 2006, which specifies to install a new duct assembly on the first airplane modified in an operator's fleet and to install reworked duct assemblies on the operator's remaining fleet.

We agree that installing either new or reworked duct assemblies on all airplanes in an operator's fleet addresses the identified unsafe condition. We have revised paragraph (i) of this AD to refer to new paragraph (k)(8) of this AD, which states that where Boeing Service Bulletin 767–49A0035, Revision 2, dated June 2, 2006, specifies installing a new aft air-intake duct assembly on the first airplane in each operator's fleet and installing a reworked aft air-intake duct assembly on all remaining airplanes in each operator's fleet, this AD requires installing either a new or reworked aft air-intake duct assembly on all airplanes.

Request To Extend Compliance Time

Boeing requested that, for airplanes on which Boeing Service Bulletin 767–27A0219 has been done, we extend the compliance time specified in paragraph (g)(1)(ii) of the SNPRM (77 FR 47563, August 9, 2012) from 6 months to 24 months after the effective date of the AD for the inspections specified in Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011; and Boeing Service Bulletin 767–27–0205, Revision 2, dated August 30, 2011. Boeing stated that the 24-month compliance time, which will allow operators to incorporate the drain hole inspection into a standard maintenance interval, is supported by the Boeing analysis in which the compliance recommendation for Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011; and Boeing Service Bulletin 767–27–0205, Revision 2, dated August 30, 2011, was formulated.

We agree. We have determined that, for airplanes on which Boeing Service Bulletin 767–27A0219 has been done as of the effective date of this AD, a compliance time of within 24 months will provide an acceptable level of safety for accomplishing the inspection required by paragraph (g) of this AD. We have revised paragraph (g)(1) of this AD accordingly (and removed paragraphs (g)(1)(i) and (g)(1)(ii) of the SNPRM (77 FR 47563, August 9, 2012)).

Request To Add Exception for Group 4 Airplanes Identified in Boeing Service Bulletin 767–27A0224, Revision 1, Dated December 16, 2011

Boeing requested that we add an exception for Group 4 airplanes identified in Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, to allow operators that have replaced the configuration having two seal plates (part numbers (P/Ns) 255T4847–1 and 65–28174–1) with the configuration having one seal plate (P/N 255T4847–5) to omit the removal/installation of the kept part, named ''SEAL PLATE ASSEMBLY,'' while performing Figures 7 through 10 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011. Boeing also stated that Group 1 though 3 airplanes can use the two-part configuration as an alternative to the one-part configuration while performing Figure 1 and Figures 4 through 6 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011. Boeing stated the installation of P/N 255T4847–5 is equivalent to the combination of P/Ns 255T4847–1 and 65–28174–1 for the purposes of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011.

We agree to add an exception to this AD, for the reasons provided by the commenter. We have revised paragraphs (h) and (l) of this AD to refer to new paragraphs (k)(9) and (k)(10) of this AD:

- Paragraph (k)(9) of this AD specifies, for Group 4 airplanes, as identified in Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, that where Figures 7 through 10 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, specify to replace the seal plate assembly, this AD allows replacing the configuration having two seal plates, P/Ns 255T4847–1 and 65–28174–1, with the configuration having one seal plate, P/N 255T4847–5.
- Paragraph (k)(10) to this AD specifies, for Group 1 through 3 airplanes, as identified in Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, that where Figures 1 and Figures 4 through 6 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, specify to replace the seal plate, this AD allows replacing the configuration having one seal plate, P/N 255T4847–5, with the configuration having two seal plates, P/Ns 255T4847–1 and 65–28174–1.

Request for Exception To Allow Installation of Clamp

Boeing requested that we allow installation of a clamp, P/N AN735–( ), having a larger diameter than the clamp specified in steps 8 and 9 of Figure 4 and steps 8 and 9 of Figure 8 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011. Boeing stated that the existing flanged tube may have a repair that increases its diameter and that installation of a clamp, P/N AN735–( ), of increased diameter would be necessary in order to meet the clamp installation specifications.

We agree to allow installation of the larger clamps, P/N AN735–( ), as requested. We have revised paragraphs (h) and (l) to refer to new paragraph (k)(11) of this AD, which specifies that where steps 8 and 9 of Figure 4 and steps 8 and 9 of Figure 8 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, specify installing clamp P/N AN735–16, this AD allows, for airplanes having increased diameter of the flanged tube due to a repair, installation of a clamp, P/N AN735–( ), that has a larger diameter than P/N AN735–16.

Request To Allow Substitute Fasteners

Boeing requested that we allow substitute fasteners (bolts) for the bolts specified in Figures 6 and 10 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011. Boeing stated that bolts, P/N BACB30NT3K( ), BACB30LK3–( ), BACB30ZG3–( ), and NAS623–3–( ), are substitutes for the bolts specified in steps 1 and 4 of Figure 6 and steps 1 and 4 of Figure 10 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011. Boeing stated that airplanes were delivered with those other equivalent part numbers and that the structural repair manual may not specify that these bolts are acceptable substitutes.

We agree to add an exception to this AD for the reason provided by the commenter. We have revised paragraphs (h) and (l) to refer to new paragraph (k)(12) of this AD, which specifies that where steps 1 and 4 of Figure 6 and steps 1 and 4 of Figure 10 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, specify installing bolts, this AD allows installation of bolts having P/N BACB30NT3K( ), BACB30LK3–( ), BACB30ZG3–( ), or NAS623–3–( ).

Request To Allow Exception for Operators That Have Done a Replacement

Boeing requested that we add an exception for airplanes identified as Group 1, Configuration 2 through 4 airplanes, Group 2 and 3 airplanes, and Group 4, Configuration 2 through 4 airplanes, in Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011 (we referred to that service bulletin as the appropriate source of service information for accomplishing the replacement required by paragraph (h) of the SNPRM (77 FR 47563, August 9, 2012), and the optional replacement specified in paragraph (l) of the SNPRM). Boeing stated the exception would allow operators that replaced a flanged tube with a new flanged tube as a repair (after accomplishing Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011) to install the replacement flanged tube without restoring the drain hole and clamp. Boeing stated that replacement flanged tubes do not have a pre-drilled drain hole, and it is unnecessary to restore the configuration with the drain hole and clamp to cover the drain hole.

We disagree with the request to add an exception to this AD for operators that have accomplished the replacement specified in paragraph (h) or (l) of this AD. Boeing did not submit information (e.g., what specific replacement parts are acceptable) to substantiate that this method of compliance with paragraphs (h) and (l) of this AD addresses the

identified unsafe condition. Once we issue this AD, any person may request approval of an AMOC under the provisions of paragraph (n) of this AD. We have not changed this AD in this regard.

Request To Confirm Credit for a Certain Boeing Service Bulletin

United Airlines requested we confirm that credit is provided for previous accomplishment of Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006. United Airlines noted that paragraph (m)(4) of the SNPRM (77 FR 47563, August 9, 2012) provides credit for Boeing Alert Service Bulletin 767–51A0027, dated December 9, 2004.

We agree to clarify. This AD does provide credit for previous accomplishment (i.e., before the effective date of this AD) of Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006 (the appropriate source of service information for certain Model 767–200, –300, and –300F series airplanes for accomplishing the actions required by paragraph (j) of this AD). Paragraph (f) of this AD states: ''Comply with this AD within the compliance times specified, unless already done.'' The intent of paragraph (f) of this AD is to allow credit for previous accomplishment of the service information required by the AD.

For previous issues of required service information, each AD specifies in a separate paragraph whether credit is given for those previous issues. Paragraph (m)(4) of this AD provides credit for Boeing Alert Service Bulletin 767–51A0027, dated December 9, 2004, which is the previous issue of the required service bulletin, Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006. We have not changed this AD in this regard.

Request To Clarify Paragraphs (g) and (h) of the SNPRM (77 FR 47563, August 9, 2012)

UPS requested that we clarify the requirements of paragraphs (g) and (h) of the SNPRM (77 FR 47563, August 9, 2012). UPS stated that paragraph (g) of the SNPRM requires inspections in accordance with the work instructions contained in Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011, and that Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011, lists Boeing Service Bulletin 767–27A0219, Revision 1, dated February 12, 2009, as a ''concurrent requirement.'' UPS asked if the intent of paragraph (g) of the SNPRM is to mandate the inspections without the ''concurrent requirement'' of the modification specified in Boeing Service Bulletin 767–27A0219, Revision 1, dated February 12, 2009. UPS stated that if the intent is to require the inspections and the modifications, then paragraph (h) of the SNPRM should read: ''Accomplishing this replacement terminates the inspections and modification required by paragraph (g) of this AD.''

We agree to clarify. Paragraph (g) of this AD requires that inspections specified in Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011, be done. The compliance time for doing those inspections is dependent on whether or not any revision of ''Boeing Service Bulletin 767–27A0219'' has been done, as specified in paragraphs (g)(1) and (g)(2) of this AD; however, paragraph (g) of this AD does not require that the modification specified in Boeing Service Bulletin 767–27A0219, Revision 1, dated February 12, 2009, must be done. We have not changed this AD in this regard.

Request for Flexibility in Use of Abrasive

UPS requested that we allow flexibility in the use of abrasive specified in Figure 5 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011. UPS stated that paragraph (h) of the SNPRM (77 FR 47563, August 9, 2012) would require accomplishment of that service bulletin. (Paragraph (l) of the SNPRM would also require that service bulletin, if the actions in paragraph (l) of the SNPRM are done.) UPS stated that Figure 5 specifies to use an abrasive to prepare for adhesive application and that ''80-grit is recommended.'' UPS also noted that Figure 5 refers to standard overhaul practices manual (SOPM) 20–50–12 for adhesive mixing and surface cleaning. UPS asked if operators are allowed the flexibility offered by the SOPM.

We agree that there is flexibility in the use of abrasive specified in Figure 5 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011. There is no requirement in this AD that mandates the use of 80-grit abrasive. As noted by the commenter, Figure 5 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, only recommends the use of 80-grit abrasive and includes a reference to SOPM 20–50–12. Similarly, Figures 4, 8, and 9 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, only recommend the use of 80-grit abrasive. Operators may use an abrasive of the specific grit referenced in SOPM 20–50–12 to accomplish the actions specified in steps 1 and 2 of Figures 4, 5, 8, and 9 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011. We have not changed this AD in this regard.

Request To Revise Effectivity Listed in the Preamble of the SNPRM (77 FR 47563, August 9, 2012)

Boeing requested that we revise the effectivity for Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011, specified in the ''Actions Since Previous NPRM (70 FR 56386, September 27, 2005) was Issued'' section of the preamble of the SNPRM (77 FR 47563, August 9, 2012). Boeing stated that the effectivity listed in the SNPRM should be revised to include line numbers 972 through 974 to match the effectivity listed in Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011.

We acknowledge that the effectivity of Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011, is line numbers 225, 226, 228 through 717, and 719 through 971, except airborne warning and control system (AWACS) airplanes; and line numbers 972 through 974. However, the ''Actions Since Previous NPRM (70 FR 56386, September 27, 2005) was Issued'' section of the SNPRM (77 FR 47563, August 9, 2012) is not restated in this AD. We have not changed this AD in this regard.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously—and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the SNPRM (77 FR 47563, August 9, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the SNPRM (77 FR 47563, August 9, 2012).

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

Costs of Compliance

We estimate that this AD affects about 400 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of the flanged tube and drain hole (300 airplanes).	2 work-hours × $85 per hour = $170 per inspection cycle.	$0	$170 per inspection cycle	$51,000 per inspection cycle.
Pressure seal replacement (300 airplanes).	7 work-hours × $85 per hour = $595.	261	$856	$256,800.
Aft air-intake duct assembly replacement and dripshield installation (358 airplanes).	3 work-hours × $85 per hour = $255.	1,462	$1,717	$614,686.
Horizontal stabilizer gutter installation and modification of the side brace fittings (354 airplanes).	12 work-hours × $85 per hour = $1,020.	1,902	$2,922	$1,034,388.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Cleaning	1 work-hour × $85 per hour = $85	$0	$85

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–05–07 The Boeing Company: Amendment 39–17379; Docket No. FAA–2005–22523; Directorate Identifier 2005–NM–058–AD.

(a) Effective Date

This AD is effective April 25, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category; as identified in the service information specified in paragraphs (c)(1), (c)(2), (c)(3), (c)(4), (c)(5), and (c)(6) of this AD.

(1) Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011.

(2) Boeing Service Bulletin 767–49A0035, Revision 2, dated June 2, 2006.

(3) Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011.

(4) Boeing Service Bulletin 767–27–0205, Revision 2, dated August 30, 2011.

(5) Boeing Service Bulletins 767–51A0027, Revision 1, dated October 12, 2006.

(6) Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 27, Flight controls; 49, Airborne auxiliary power; and 51, Standard practices/ structures.

(e) Unsafe Condition

This AD was prompted by reports of stiff operation of the elevator pitch control system and jammed elevator controls. We are issuing this AD to prevent moisture from collecting and freezing on the elevator control system components, which could limit the ability of the flightcrew to make elevator control inputs and result in reduced controllability of the airplane.

(f) Compliance

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

(g) Inspections and Corrective Actions

For airplanes identified in Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011; and Boeing Service Bulletin 767–27–0205, Revision 2, dated August 30, 2011: At the applicable time specified in paragraph (g)(1) or (g)(2) of this AD, do a general visual inspection for dirt, loose particles, and blockage of the flanged tube and drain hole for the E1A and E1B elevator control cable aft pressure seals, and all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011 (for Model 767–200, –300, and –300F series airplanes); or Boeing Service Bulletin 767–27–0205, Revision 2, dated August 30, 2011 (for Model 767–400ER series airplanes). Do all applicable corrective actions before further flight. Repeat the inspection thereafter at intervals not to exceed 24 months.

(1) For airplanes on which Boeing Service Bulletin 767–27A0219 has been done as of the effective date of this AD: Within 24 months after the effective date of this AD.

(2) For airplanes on which Boeing Service Bulletin 767–27A0219 has not been done as of the effective date of this AD: Do the inspection at the time specified in paragraph (g)(2)(i) or (g)(2)(ii) of this AD, whichever occurs later.

(i) Within 24 months after the effective date of this AD.

(ii) Within 24 months since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness.

(h) Replacement—Pressure Seal Assemblies

For Group 1, Configuration 1 and 2 airplanes; Group 2, Configuration 1 airplanes; and Group 4, Configuration 1 and 2 airplanes; as identified in Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011: Within 24 months after the effective date of this AD, replace the two existing pressure seal assemblies for the left elevator control cables at the aft pressure bulkhead, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, except as provided by paragraphs (k)(9), (k)(10), (k)(11), and (k)(12) of this AD. Accomplishing this replacement terminates the inspections required by paragraph (g) of this AD.

(i) Replacement—Air-Intake Duct Assembly and Installation—Dripshield

For airplanes identified in Boeing Service Bulletin 767–49A0035, Revision 2, dated June 2, 2006: Within 18 months after the effective date of this AD, replace the aft air-intake duct assembly with a new or modified aft air-intake duct assembly and install a dripshield, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–49A0035, Revision 2, dated June 2, 2006, except as provided by paragraphs (k)(1) and (k)(8) of this AD.

(j) Gutter Installation and Side Brace Modification

For airplanes identified in Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006; and Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006: Within 60 months after the effective date of this AD, install gutters on the horizontal stabilizer center section, and modify the side brace fittings, including doing a dye penetrant or high frequency eddy current inspection for cracking and damage of the drain hole and all applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006 (for Model 767–200, –300, and –300F series airplanes); or Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006 (for Model 767–400ER series airplanes); except as provided by paragraphs (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7) of this AD.

(k) Exceptions to Service Information

(1) Where step 1 of Figure 4 of Boeing Service Bulletin 767–49A0035, Revision 2, dated June 2, 2006, specifies installing the forward air-intake duct, that installation is not required by this AD.

(2) Where Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006; and Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006; specify to contact Boeing for appropriate action: Before further flight, repair using a method approved in accordance with the procedures specified in paragraph (n) of this AD.

(3) Where step 8 in Figures 6 and 10 of Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006; and Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006; specify hydraulic hose, part number (P/N) AS115–08D0274, the correct part number is AS115–08D0280.

(4) For steps 4, 8, and 12 in Figures 6 and 10 of Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006; and Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006: Hydraulic hose, P/N AS115–08K0280, is an option to P/N AS115–08D0280.

(5) For steps 2, 6, and 10 in Figures 6 and 10 of Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006; and Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006: Hydraulic hose, P/N AS115–06K0274, is an option to P/N AS115–06D0274.

(6) Steps 3.B.16 and 3.B.17 of Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006; and Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006; are not required by this AD.

(7) Where note (d) of Figure 8 of Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006; and Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006; specifies to ''install collars on the upper surface of the gutter,'' this AD requires that operators install these bolts with the bolt heads either up or down provided that the bolt head direction prevents interference between the collars and the hydraulic lines.

(8) Where Boeing Service Bulletin 767–49A0035, Revision 2, dated June 2, 2006, specifies installing a new aft air-intake duct assembly on the first airplane in each operator's fleet and installing a reworked aft air-intake duct assembly on all remaining airplanes in each operator's fleet, this AD requires installing either a new or reworked aft air-intake duct assembly on all airplanes.

(9) For Group 4 airplanes, as identified in Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011: Where Figures 7 through 10 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, specify to replace the seal plate assembly, this AD allows replacing the configuration having two seal plates, P/Ns 255T4847–1 and 65–28174–1, with the configuration having one seal plate, P/N 255T4847–5.

(10) For Group 1 through 3 airplanes, as identified in Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011: Where Figures 1 and Figures 4 through 6 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, specify to replace the seal plate, this AD allows replacing the configuration having one seal plate, P/N 255T4847–5 with the configuration having two seal plates, P/Ns 255T4847–1 and 65–28174–1.

(11) Where steps 8 and 9 of Figure 4 and steps 8 and 9 of Figure 8 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, specify installing clamp P/N AN735–16, this AD allows, for airplanes having increased diameter of the flanged tube due to a repair, installation of a clamp, P/N AN735–( ), that has a larger diameter than P/N AN735–16.

(12) Where steps 1 and 4 of Figure 6 and steps 1 and 4 of Figure 10 of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, specify installing bolts, this AD allows installation of bolts having P/N BACB30NT3K( ), BACB30LK3–( ), BACB30ZG3–( ), or NAS623–3–( ).

(l) Optional Replacement—Pressure Seal Assemblies

For Group 1, Configuration 3 and 4 airplanes; Group 2, Configuration 2 and 3 airplanes; Group 3 airplanes; and Group 4, Configuration 3 and 4 airplanes; as identified in Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011: Replacing the two existing pressure seal assemblies for the left elevator control cables at the aft pressure bulkhead, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011, except as provided by paragraphs (k)(9), (k)(10), (k)(11), and (k)(12) of this AD, terminates the inspections required by paragraph (g) of this AD.

(m) Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraph (g) of this AD, if the actions were performed before the effective date of this AD using the applicable service information in paragraph (m)(1)(i) or (m)(1)(ii) of this AD, which are not incorporated by reference.

(i) For Model 767–200, –300, and –300F series airplanes: Boeing Service Bulletin 767–27–0204, dated January 27, 2005; or Boeing Service Bulletin 767–27–0204, Revision 1, dated February 12, 2009.

(ii) For Model 767–400ER series airplanes: Boeing Service Bulletin 767–27–0205, dated January 27, 2005; or Boeing Service Bulletin 767–27–0205, Revision 1, dated February 12, 2009.

(2) This paragraph provides credit for the actions required by paragraphs (h) and (l) of this AD, if the actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 767–27A0224, dated June 23, 2011, which is not incorporated by reference.

(3) This paragraph provides credit for the actions required by paragraph (i) of this AD, if the actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 767–49A0035, Revision 1, dated December 11, 2003, which is not incorporated by reference.

(4) This paragraph provides credit for the actions required by paragraph (j) of this AD, if the actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 767–51A0027, dated December 9, 2004 (for Model 767–200, –300, and –300F series airplanes); or Boeing Alert Service Bulletin 767–51A0028, dated December 9, 2004 (for Model 767–400ER series airplanes); which are not incorporated by reference.

(n) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(o) Related Information

For more information about this AD, contact Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 917–6490; fax: (425) 917–6590; email: *Kelly.McGuckin@faa.gov.*

(p) Material Incorporated by Reference

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

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

(i) Boeing Service Bulletin 767–27–0204, Revision 2, dated August 16, 2011.

(ii) Boeing Service Bulletin 767–27–0205, Revision 2, dated August 30, 2011.

(iii) Boeing Service Bulletin 767–27A0224, Revision 1, dated December 16, 2011.

(iv) Boeing Service Bulletin 767–49A0035, Revision 2, dated June 2, 2006.

(v) Boeing Service Bulletin 767–51A0027, Revision 1, dated October 12, 2006.

(vi) Boeing Service Bulletin 767–51A0028, Revision 1, dated October 12, 2006.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on February 28, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–05588 Filed 3–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0847; Directorate Identifier 2008–NM–056–AD; Amendment 39–17375; AD 2013–05–03]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 777–200, –200LR, –300, and –300ER series airplanes. This AD was prompted by fuel system reviews conducted by the manufacturer. This AD requires doing an inspection to identify the part number of the motor-operated valve (MOV) actuators of the main and center fuel tanks; replacing certain MOV actuators with new MOV actuators; and measuring the electrical resistance of the bond from the adapter plate to the airplane structure, and doing corrective actions if necessary. We are issuing this AD to prevent electrical current from flowing through an MOV actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: This AD is effective April 25, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of April 25, 2013.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Rebel Nichols, Aerospace Engineer, Propulsion Branch, ANM–140S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6509; fax: 425–917–6590; email: *rebel.nichols@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a supplemental notice of proposed rulemaking (SNPRM) to amend 14 CFR part 39 to include an

airworthiness directive (AD) that would apply to the specified products. That SNPRM published in the **Federal Register** on December 23, 2010 (75 FR 80738). The original NPRM (73 FR 45893, August 7, 2008) proposed to require doing an inspection of the MOV actuators of the main and center fuel tanks for a certain part number (P/N); replacing the MOV actuator with a new MOV actuator if necessary; and measuring the electrical resistance of the bond from the adapter plate to the airplane structure, and corrective actions if necessary. The original NPRM also proposed to require revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness. The SNPRM proposed to revise the original NPRM by adding airplanes and removing the requirement for revising the Airworthiness Limitations section of the Instructions for Continued Airworthiness.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the SNPRM (75 FR 80738, December 23, 2010) and the FAA's response to each comment.

Support for the SNPRM (75 FR 80738, December 23, 2010)

Continental Airlines has no technical objections, issues, or comments to the SNPRM (75 FR 80738, December 23, 2010).

Request To Revise Applicability To Include Part Number

Boeing requested that the applicability of the SNPRM (75 FR 80738, December 23, 2010) be revised to include the phrase, ''with MOV actuator part number MA20A1001–1 installed.'' Boeing stated that the change will avoid future alternative methods of compliance (AMOC) requests.

We disagree with revising the applicability of this AD because paragraph (c) of this AD clearly defines the airplanes affected by this AD. For those affected airplanes, paragraph (g) of this AD requires inspection of the MOV actuators to determine their part number. If an MOV actuator with P/N MA20A1001–1 is found, that actuator must be replaced, as required by paragraph (h) of this AD. No change has been made to the AD in this regard.

Request To Allow Installation of Certain Parts

Boeing requested that, if the applicability of the SNPRM (75 FR 80738, December 23, 2010) is not revised, we add a statement allowing MOV actuators certified after P/N MA30A1001 to be installed without AMOC approval. Boeing stated that this would allow normal maintenance to resume once P/N MA20A1001–1 is removed. Boeing stated that the aircraft configuration with an MOV actuator having P/N MA30A1001 becomes the mandated configuration, because the SNPRM requires the installation of that specific part number. Boeing stated that the SNPRM would not allow the installation of actuators approved after P/N MA30A1001 without AMOC approval.

We agree with the commenter's request. In the case of this MOV actuator, we will allow—without AMOC approval—replacement of the affected MOV actuator with a Boeing part. The replacement part must be fully interchangeable with the part specified in Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010, and must be approved by the FAA after September 20, 2010. Paragraph (h) of this AD has been revised to include this provision.

Request for Further Investigation

China Southern Airlines requested that we further investigate the ignition potential of P/N MA20A1001–1 to find a better solution that does not require installing the new P/N MA30A1001. The commenter stated that it would like to see P/N MA30A1001 experience better reliability than P/N MA20A1001 before we require a big cost burden on operators.

We disagree with the request to further investigate P/N MA20A1001–1. That part number was identified as unsafe during the Special Federal Aviation Regulation No. 88 (SFAR 88) (66 FR 23086, May 7, 2001) system safety assessment reviews conducted by the manufacturer and must be replaced. Steps have been taken to improve the reliability of P/N MA30A1001, and that part does not have the identified unsafe condition that is the subject of this AD. No change has been made to this AD in this regard.

Request To Remove Paragraph (i) of the SNPRM (75 FR 80738, December 23, 2010)

United Airlines (UAL) requested that we remove paragraph (i) of the SNPRM (75 FR 80738, December 23, 2010), which prohibits installation of MOV actuators having P/N MA20A1001–1 on any airplane as of the effective date of this AD. UAL stated that the 777 Aircraft Maintenance Manual (AMM) does not provide sufficient replacement instructions for operators to maintain compliance with paragraph (i) of the SNPRM. UAL stated that the proposed rule will cause undue economic hardship on operators. UAL also noted that similar ADs do not contain a similar parts prohibition paragraph. UAL also stated that paragraph (h) of the SNPRM specifies to do ''all applicable corrective actions before further flight''; therefore, an operator would have to replace all MOV actuators at the same time.

We disagree with the request to remove paragraph (i) of this AD. Because an unsafe condition has been identified on P/N MA20A1001–1, we have determined that P/N MA20A1001–1 cannot be allowed for installation. This AD requires the replacement of all affected MOV actuators from an operator's fleet within the specified compliance time; however, the AD does not require replacement of all affected MOV actuators on an airplane at the same time. Operators are allowed to replace only one MOV actuator and then bring the aircraft back into service. Paragraph (h) of this AD does specify doing all applicable corrective actions before further flight, but the applicable corrective actions are those associated with the measurement of the electrical resistance of the bond. If an operator encountered unscheduled removal of P/N MA20A1001–1, that part should be replaced with a part having an accepted part number (i.e., P/N MA30A1001 or other FAA-approved replacement). However, according to the provisions of paragraph (m) of this AD, operators may request approval of an AMOC if the request is submitted with substantiating data that prove the requested action will provide an adequate level of safety. No change has been made to the AD in this regard.

Request To Revise Proposed Costs of Compliance

UAL requested that we revise or clarify the Costs of Compliance section of the SNPRM (75 FR 80738, December 23, 2010). UAL considered that the maximum costs are understated in the SNPRM. UAL stated that, since there are 11 actuators on each airplane, the parts costs need to be changed to include 11 actuators.

We agree to revise the cost of parts in the Costs of Compliance section of this AD. Since the labor cost is based on the total number of work-hours required to replace all 11 actuators, the parts cost should also be based on the total cost of 11 actuators. The Costs of Compliance section has been revised accordingly.

Request To Permit Omission of Parts Inspection or Record Check

UAL requested that paragraph (g) of the SNPRM (75 FR 80738, December 23, 2010) be revised to include an additional paragraph that permits operators to omit the parts inspection or records check and to permit removal of the installed MOV, regardless of the part number, and install the new part number, in accordance with Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010. UAL stated that this will allow operators to avoid costs associated with inspections and records checks while achieving the same level of safety by ensuring that P/N MA30A1001 is installed.

We agree to add replacement of the MOV actuators as an optional method of compliance with the inspection or records check required by paragraph (g) of this AD. Replacing actuators with actuators having part numbers other than P/N MA20A1001–1 addresses the identified unsafe condition. We have added new paragraph (l) to this AD to allow the option. We have re-identified subsequent paragraphs accordingly.

Request To Incorporate New Information in Information Notice

UAL requests that operators be allowed to incorporate the information contained in Boeing Service Bulletin Information Notice (IN) 777–28A0034 IN 04, dated January 6, 2011, as an option for compliance with the SNPRM (75 FR 80738, December 23, 1010).

We agree that certain information identified in Boeing Service Bulletin IN 777–28A0034 IN 04, dated January 6, 2011, should be included in this AD. We have added paragraph (k)(1) to this AD to specify the correct equipment number in the title of the work package specified in the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010. Boeing Service Bulletin IN 777–28A0034 IN 04, dated January 6, 2011, also clarifies certain weight and balance changes; however, because this AD does not refer to that section of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010, no change to this AD is necessary in this regard.

Other Changes Made to This AD

We have added paragraph (k)(2) to this AD to exclude airplanes with Airline Information Management System (AIMS) V1 installed from the requirement to replace actuators at the spar valve location. The currently available MOV actuator installed in those locations presents a risk of a latent failure of the indication portion of the actuator, which could lead to the inability to shut fuel off to an engine. For AIMS V1-equipped airplanes, the risk associated with the creation of an ignition source inside the fuel tank will need to be eliminated by means other than replacing the actuator with P/N MA30A1001. Future rulemaking for the AIMS V1-equipped airplanes might be needed to address this SFAR 88 (66 FR 23086, May 7, 2001) issue. We have coordinated this issue with Boeing.

We have also clarified paragraph (j) of this AD by specifying that credit is given for certain actions done ''before the effective date of this AD'' using specific service information. We have also revised the heading and wording of paragraph (j) of this AD. This change does not affect the intent of that paragraph.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the SNPRM (75 FR 80738, December 23, 2010) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the SNPRM (75 FR 80738, December 23, 2010).

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

Costs of Compliance

We estimate that this AD will affect 127 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of MOV Actuators	Up to 6 work-hours × $85 per hour = $510.	$0	Up to $510	Up to $64,770.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement of 11 MOV Actuators Without Fuel Tank Access.	Up to 47 work-hours × $85 per hour = $3,995	Up to $60,247	Up to $64,242.
Replacement of 11 MOV Actuators With Fuel Tank Access.	Up to 423 work-hours × $85 per hour = $35,955	Up to $60,247	Up to $96,202.

Authority for This Rulemaking

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

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

that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–05–03 The Boeing Company: Amendment 39–17375; Docket No. FAA–2008–0847; Directorate Identifier 2008–NM–056–AD.

(a) Effective Date

This AD is effective April 25, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 777–200, –200LR, –300, and –300ER series airplanes, certificated in any category, as identified in Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010.

(d) Subject

Air Transport Association (ATA) of America Code 28, Fuel.

(e) Unsafe Condition

This AD results from fuel system reviews conducted by the manufacturer. The Federal Aviation Administration is issuing this AD to prevent electrical current from flowing through a motor-operated valve (MOV) actuator into a fuel tank, which could create a potential ignition source inside the fuel tank. This condition, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Inspection

Except as provided by paragraph (l) of this AD: Within 60 months after the effective date of this AD, do an inspection of the MOV actuators of the main and center fuel tanks for part number (P/N) MA20A1001–1, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number can be conclusively determined from that review.

(h) Replacement

Except as provided by paragraphs (k)(1) and (k)(2) of this AD, if any MOV actuator having P/N MA20A1001–1 is found during the inspection required by paragraph (g) of this AD, within 60 months after the effective date of this AD, replace the MOV actuator with either a new or serviceable MOV actuator having P/N MA30A1001, or with an MOV actuator that meets the criteria specified in paragraphs (h)(1) and (h)(2) of this AD; and, as applicable, measure the electrical resistance of the bond from the adapter plate to the airplane structure and do all applicable corrective actions; in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010. Do all applicable corrective actions before further flight.

(1) The replacement MOV actuator must be a Boeing part that is approved after the issuance of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010, by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to approve the part.

(2) The replacement MOV actuator must be fully interchangeable with the part specified in Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010.

(i) Part Installation Prohibition

As of the effective date of this AD, no person may install an MOV actuator, P/N MA20A1001–1, on any airplane.

(j) Credit for Previous Actions

This paragraph provides credit for the actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007; or Boeing Alert Service Bulletin 777–28A0034, Revision 1, dated May 20, 2010; except that replacement of an MOV actuator must also include cap sealing the bonding jumper, as described in Boeing Alert Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010; and provided that the replacement is an MOV actuator identified in paragraph (j)(1) or (j)(2) of this AD. Boeing Alert Service Bulletin 777–28A0034, dated August 2, 2007; and Boeing Alert Service Bulletin 777–28A0034, Revision 1, dated May 20, 2010; are not incorporated by reference in this AD.

(1) An MOV actuator that has P/N MA30A1001.

(2) An MOV actuator that has a part number other than P/N MA20A1001–1 and meets the criteria specified in paragraphs (h)(1) and (h)(2) of this AD.

(k) Exceptions to Service Information

(1) Work Package 9 of the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010, refers to an incorrect part number, P/N V8166; the correct part number that must be used is P/N V28166.

(2) For airplanes with Airline Information Management System (AIMS) V1 installed: MOV actuators at the spar valve locations (Work Packages 1 and 2 of the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010), are not required to be replaced.

(l) Optional Method of Compliance

Replacing all MOV actuators at the main and center fuel tanks, as specified in Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010, with new or serviceable MOV actuators identified in paragraph (l)(1) or (l)(2) of this AD; and, as applicable, measuring the electrical resistance of the bond from the adapter plate to the airplane structure and doing all applicable corrective actions; in accordance with the Accomplishment Instructions of Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010; is an acceptable method of compliance with the actions required by paragraph (g) of this AD.

(1) MOV actuators that have P/N MA30A1001.

(2) MOV actuators that have a part number other than P/N MA20A1001–1 and meet the criteria specified in paragraphs (h)(1) and (h)(2) of this AD.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly

to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(n) Related Information

(1) For more information about this AD, contact Rebel Nichols, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6509; fax: 425–917–6590; email: *rebel.nichols@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(o) Material Incorporated by Reference

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

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

(i) Boeing Service Bulletin 777–28A0034, Revision 2, dated September 20, 2010.

(ii) Reserved.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on February 25, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–05199 Filed 3–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0597; Directorate Identifier 2012–NM–054–AD; Amendment 39–17377; AD 2013–05–05]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 777–200, –200LR, –300, and –300ER series airplanes. This AD was prompted by reports of in-service events related to electrical power system malfunctions resulting in damage to electrical load management system (ELMS) P200 and P300 power panels and the surrounding area. This AD requires installing enclosure trays to contain debris in certain ELMS panels, and replacing certain ELMS contactors. We are issuing this AD to prevent contactor failures, which could result in uncontained hot debris flow due to ELMS contactor breakdown, consequent smoke and heat damage to airplane structure and equipment during ground operations, and possible injuries to passengers and crew.

DATES: This AD is effective April 25, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of April 25, 2013.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6482; fax: 425–917–6590; email: *georgios.roussos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM published in the **Federal Register** on June 18, 2012 (77 FR 36206). That NPRM proposed to require installing enclosure trays to contain debris in certain ELMS panels, and replacing certain ELMS contactors in the P200 and P300 ELMS panels.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal (77 FR 36206, June 18, 2012) and the FAA's response to each comment.

Request To Allow Certain Installations of Removed Contactors

Cathay Pacific Airways (Cathay) and All Nippon Airways (All Nippon) requested that we clarify the proposed requirement to discard the removed contactors. The commenters requested that we identify certain inspection criteria that would allow further use of these contactors on non-AD-affected locations and ease the financial burden of discarding removed but serviceable power contactors.

We partially agree with the request. The note in paragraphs 3.B.3 and 3.B.4 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–24–0112, Revision 2, dated December 14, 2011, specifies discarding these parts. We agree that power contactors that have been appropriately overhauled to the manufacturer's original specifications may meet criteria for safe operation in non-AD-affected locations. But this AD applies to the affected airplanes, not the contactors; the AD therefore cannot mandate the disposition of contactors removed from

the airplane. Further, power contactors that are removed from the AD-affected ELMS panel location are considered compromised parts and may not be installed ''as is'' in other non-AD-affected locations. We have added new paragraph (j)(2) in this final rule to provide for the re-installation of the contactors, provided they are first inspected and tested, and repaired if necessary, in accordance with a method approved by the Seattle Aircraft Certification Office (ACO).

Concern for Effect of Ongoing Maintenance on AD Compliance

Cathay was concerned that operators would have difficulty ensuring compliance with the proposed requirements in ongoing maintenance. According to Cathay, operators are unable to purge the stock with part number (P/N) ELM827–1 contactors still installed on the P100 panel.

We acknowledge Cathay's concern for allowing installation of the P/N ELM827–1 contactors within the P100 ELMS panel. We disagree, however, with Cathay's inference that this is difficult to accomplish on the other panel, because proper maintenance documentation and personnel training can secure ongoing compliance with the AD requirements. Furthermore, we are not aware of any issues associated with these power contactors within the P100 ELMS panel that would warrant any regulatory action against this panel installation. We have not changed the final rule regarding this issue.

Request To Allow Contactor Replacement as Optional

Korean Air Lines and Air France requested that we reconsider the proposed requirement to replace the power contactors. Korean Air Lines stated that Boeing introduced, in addition to the tray installation, certain improvements to the ELMS panel, such as the installation of a cooling duct and internal inspection of the panel. Korean Air Lines considered these additional improvements sufficient to provide safety for the passengers. Korean Air Lines requested that the power contactor replacement become optional if the tray enclosures and the cooling duct were installed. Air France explained its choice to replace the power contactor within the P300 ELMS panel because inspections revealed a number of panels and contactors with evidence of overheating and/or silver deposits. Air France further pointed to inspections on the P200 ELMS panel that did not identify any damage. Air France asserted that there is no technical or reliability benefit to the requirement to replace the power contactors, and requested that we reconsider the requirement.

We disagree. Our data indicate a number of in-service failures of power contactors installed within the P200 and P300 ELMS panels. While installation of the tray enclosures may limit the extent of the damage within the affected power panel, power contactor failures nevertheless generate excessive heat and smoke that may lead to aircraft emergency evacuation and potential passenger injuries. While the cooling duct provides a better operating environment for the power contactors, its installation does not necessarily address the kind of internal contactor failures that may result from operating at power levels so near the rated capacity and could lead to thermal degradation of materials, which further reduce contactor protection and can lead to loose parts within the contactor that may increase the probability of arcing. We have not changed the final rule regarding this issue.

Request To Clarify Cost Estimate

United Airlines questioned the high cost of the replacement parts relative to parts outsourcing and liability concerns. Air France considered that the cost of the replacement is not justified by any technical or reliability benefit, and offered two solutions: (1) a substantially reduced contactor price or (2) use of P/N ELM827–1 as spares, provided certain preventive measures were taken.

We partially agree. We have been informed that Boeing is negotiating certain price reductions with its contactor supplier. However, we have determined that replacement of these parts is necessary for continued safe flight, and we have therefore not changed the final rule regarding this issue. Regarding use of P/N ELM827–1 as spares, as discussed previously, we have added new paragraph (j)(2) in this final rule to provide for re-installation of the contactors, if done using a method approved by the Seattle ACO.

Request To Allow Credit for Certain Revised Service Information

Boeing requested that we revise Note 1 to paragraph (g) of the NPRM (77 FR 36206, June 18, 2012) to include prior revisions of the specified Smiths service information. Boeing added that Boeing Special Attention Service Bulletin 777–24–0106, dated July 20, 2007 (referenced in the NPRM as the appropriate source of service information for the tray installation), does not identify a specific revision level of the Smiths service information. Boeing reported that the next revision of Boeing Service Bulletin 777–24–0106 will include the revision levels per the proposed AD, but that the subsequent changes, which are related to ease of installation only, were not necessary to ensure safety.

We agree that the changes introduced to the referenced revised GE Aviation (Smiths) service information are not necessary to ensure safety. We have determined that the information in Note 1 to paragraph (g) of the NPRM (77 FR 36206, June 18, 2012), as well as Note 2 to paragraph (h) of the NPRM, is unnecessary; these notes have been removed from the AD.

Concern Regarding Quality Oversight

Recognizing the proposed requirement to upgrade to the more robust contactors, as specified in the NPRM (77 FR 36206, June 18, 2012), and noting the benefits of containment trays, United Airlines expressed its hope that the NPRM addressed all compromised areas of concern regarding the equipment. The commenter also expressed concern about contactor quality oversight.

We infer that the commenter agrees with the requirements of this final rule. We also recognize the importance of parts quality oversight to prevent failures on high-power contactors that could potentially cause significant airplane damage. We understand that both Boeing and the parts supplier have increased their quality oversight of the contactors. There is no need to change the final rule regarding this issue.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 36206, June 18, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 36206, June 18, 2012).

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

Costs of Compliance

We estimate that this AD affects 128 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Tray installation	3 work-hours × $85 per hour = $255	$1,729	$1,984	$253,952
Contactor replacement	6 work-hours × $85 per hour = $510	49,317	49,827	6,377,856

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–05–05 The Boeing Company: Amendment 39–17377; Docket No. FAA–2012–0597; Directorate Identifier 2012–NM–054–AD.

(a) Effective Date

This AD is effective April 25, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 777–200, –200LR, –300, and –300ER series airplanes; certificated in any category; as identified in Boeing Special Attention Service Bulletin 777–24–0106, dated July 20, 2007; and Boeing Special Attention Service Bulletin 777–24–0112, Revision 2, dated December 14, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 24, Electrical power.

(e) Unsafe Condition

This AD was prompted by reports of in-service events related to electrical power system malfunctions resulting in damage to electrical load management system (ELMS) P200 and P300 power panels and the surrounding area. We are issuing this AD to prevent contactor failures, which could result in uncontained hot debris flow due to ELMS contactor breakdown, consequent smoke and heat damage to airplane structure and equipment during ground operations, and possible injuries to passengers and crew.

(f) Compliance

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

(g) Tray Installation

For airplanes identified in Boeing Special Attention Service Bulletin 777–24–0106, dated July 20, 2007: Within 36 months after the effective date of this AD, install enclosure trays to contain debris in the ELMS panels, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–24–0106, dated July 20, 2007.

(h) Contactor Replacement

For airplanes identified in Boeing Special Attention Service Bulletin 777–24–0112, Revision 2, dated December 14, 2011: Within 60 months after the effective date of this AD, replace specified electrical power contactors in the ELMS P200 and P300 power panels with new contactors, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–24–0112, Revision 2, dated December 14, 2011, except as provided by paragraph (j)(2) of this AD.

(i) Credit for Previous Actions

This paragraph provides credit for the replacement of the ELMS contactors required by paragraph (h) of this AD, if those actions were performed before the effective date of this AD using Boeing Special Attention Service Bulletin 777–24–0112, dated February 19, 2009; or Revision 1, dated June 30, 2011. These service bulletins are not incorporated by reference in this AD.

(j) Parts Installation

(1) Except as required by paragraph (j)(2) of this AD: As of the effective date of this AD, no person may install, on any airplane, a contactor having part number ELM827–1 in the ELMS panels and locations identified in this AD, except as required by paragraph (j)(2) of this AD.

(2) This paragraph provides operators with the option not to discard the removed power contactors, in contrast with the note in steps 3.B.3 and 3.B.4 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–24–0112, Revision 2, dated December 14, 2011. This AD allows re-installation of removed power contactors, if done using a method approved in accordance with the procedures specified in paragraph (k) of this AD.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov*.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(l) Related Information

(1) For more information about this AD, contact Georgios Roussos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6482; fax: 425–917–6590; email: *georgios.roussos@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(m) Material Incorporated by Reference

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

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

(i) Boeing Special Attention Service Bulletin 777–24–0106, dated July 20, 2007.

(ii) Boeing Special Attention Service Bulletin 777–24–0112, Revision 2, dated December 14, 2011.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on February 28, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–05589 Filed 3–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0004; Directorate Identifier 2012–NE–01–AD; Amendment 39–17390; AD 2013–05–18]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding an existing airworthiness directive (AD) for all Rolls-Royce plc (RR) RB211 Trent 500 series turbofan engines. That AD currently requires a one-time inspection of the fuel tubes and fuel tube clips for evidence of damage, wear, and fuel leakage. This AD requires the same inspection, and adds additional repetitive inspections. This AD was prompted by additional RR engineering analysis. We are issuing this AD to prevent engine fuel leaks, which could result in engine damage and damage to the airplane.

DATES: This AD is effective April 5, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of April 5, 2013.

We must receive any comments on this AD by May 6, 2013.

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

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

For service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; phone: 011–44–1332–242424; fax: 011–44–1332–249936; or email: *http://www.rolls-royce.com/contact/civil_team.jsp.* You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *Robert.Green@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On January 19, 2012, we issued AD 2012–02–04, Amendment 39–16927 (77 FR 6668, February 9, 2012), for all RR RB211 Trent 500 series turbofan engines. That AD requires a one-time inspection of the fuel tubes and fuel tube clips for evidence of damage, wear, and fuel leakage. That AD resulted from reports of wear found between the securing clips and the low-pressure (LP) fuel tube outer surface, which reduces the fuel tube wall thickness, leading to fracture of the fuel tube and consequent fuel leakage. We issued that AD to prevent engine fuel leaks, which could result in engine damage and damage to the airplane.

Actions Since AD Was Issued

Since we issued AD 2012–02–04, Amendment 39–16927 (77 FR 6668, February 9, 2012), RR engineering determined that additional repetitive inspections are required. The European Aviation Safety Agency (EASA) has notified us of this unsafe condition and corrective actions in EASA AD 2012–0237R1, dated November 14, 2012.

Relevant Service Information

We reviewed RR Alert Non-Modification Service Bulletin (NMSB) RB.211–73–AG948, dated September 28, 2012. The NMSB describes procedures for inspection and possible removal and replacement of the LP fuel tubes, fuel

tube clips, and fuel-to-oil heat exchanger mounts.

FAA's Determination

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

AD Requirements

This AD requires a one-time inspection, and additional repetitive inspections of the fuel tubes, fuel tube clips, and fuel-to-oil heat exchanger mounts for evidence of damage, wear, and fuel leakage.

FAA's Justification and Determination of the Effective Date

The FAA has found that notice and comment prior to adoption of this rule is unnecessary because no engines are used on U.S. registered airplanes. Therefore, we find that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2012–0004 and directorate identifier 2012–NE–01–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD will not affect any engines installed on airplanes of U.S. registry. Therefore, we estimate the cost of this AD to U.S. operators to be $0.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2012–02–04, Amendment 39–16927 (77 FR 6668, February 9, 2012) and adding the following new AD:

2013–05–18 Rolls-Royce plc: Amendment 39–17390; Docket No. FAA–2012–0004; Directorate Identifier 2012–NE–01–AD.

(a) Effective Date

This AD is effective April 5, 2013.

(b) Affected ADs

This AD supersedes AD 2012–02–04, Amendment 39–16927 (77 FR 6668, February 9, 2012).

(c) Applicability

This AD applies to Rolls-Royce plc (RR) RB211 Trent 553–61, RB211 Trent 553A2–61, RB211 Trent 556–61, RB211 Trent 556A2–61, RB211 Trent 556B–61, RB211 Trent 556B2–61, RB211 Trent 560–61, and RB211 Trent 560A2–61 turbofan engines that have any of the following fuel tube part numbers installed: FW57605, FW17689, FW57604, FK30710, FW57578, or FK30713.

(d) Unsafe Condition

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

(e) Actions and Compliance

Unless already done, do the following actions.

(1) Inspect the LP fuel system of engines that are on wing within 1,600 flight hours after February 24, 2012, or before the next flight after the effective date of this AD, whichever occurs later. Use the procedures in the Accomplishment Instructions, paragraph 3.A, of RR Alert Non-Modification Service Bulletin (NMSB) RB.211–73–AG948, dated September 28, 2012, to do the inspection.

(2) For engines that are in shop for any reason, after the effective date of this AD, inspect the LP fuel system. Use the procedures in the Accomplishment Instructions, paragraph 3.B, of RR Alert NMSB RB.211–73–AG948, dated September 28, 2012, to do the inspection.

(3) Thereafter, reinspect the LP fuel system within every 6,000 flight hours since last inspection. Reinspection may be on-wing or in the shop. Use the procedures in the Accomplishment Instructions, paragraph 3.A or 3.B, as appropriate, of RR Alert NMSB RB.211–73–AG948, dated September 28, 2012, to do the inspection.

(4) If the LP fuel system fails the inspections required by this AD, replace the part(s) that failed the inspection with hardware eligible for installation.

(f) Definitions

For the purpose of this AD, a shop visit is the induction of an engine into the shop for maintenance or overhaul. The separation of engine flanges solely for the purposes of transporting the engine without subsequent engine maintenance does not constitute an engine shop visit.

(g) Credit for Previous Actions

You may take credit for the initial inspection required by paragraph (e)(1) of this AD if you performed the initial inspection before the effective date of this AD using RR Alert NMSB RB.211–73–AG948, dated September 28, 2012; RR NMSB RB.211–73–G723, dated September 26, 2011, or Revision 1, dated January 31, 2012; or RR Alert NMSB RB.211–73–AG797, dated October 26, 2011, or Revision 1, dated January 31, 2012, or Revision 2, dated June 13, 2012.

(h) Alternative Methods of Compliance (AMOCs)

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

(i) Related Information

(1) For more information about this AD, contact: Robert Green, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7754; fax: 781–238–7199; email: *Robert.Green@faa.gov.*

(2) Refer to European Aviation Safety Agency AD 2012–0237R1, dated November 14, 2012, for related information.

(j) Material Incorporated by Reference

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

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

(i) Rolls-Royce plc (RR) Alert Non-Modification Service Bulletin RB.211–73–AG948, dated September 28, 2012.

(ii) Reserved.

(3) For RR service information identified in this AD, contact Rolls-Royce plc, Corporate Communications, P.O. Box 31, Derby, England, DE248BJ; phone: 011–44–1332–242424; fax: 011–44–1332–249936; email: *http://www.rolls-royce.com/contact/civil_team.jsp.*

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

(5) You may view this service information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, Massachusetts, on March 7, 2013.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–06161 Filed 3–20–13; 8:45 am]

BILLING CODE 4910–13–P

Proposed Rules

Federal Register

Vol. 78, No. 55

Thursday, March 21, 2013

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.

OFFICE OF MANAGEMENT AND BUDGET

2 CFR Chapters I and II

Reform of Federal Policies Relating to Grants and Cooperative Agreements; Cost Principles and Administrative Requirements (Including Single Audit Act)

AGENCY: Executive Office of the President, Office of Management and Budget (OMB).

ACTION: Extension of comment period; proposed guidance.

SUMMARY: The Office of Management and Budget is extending the comment period for the Proposed Guidance on Reform of Federal Policies Relating to Grants and Cooperative Agreements; Cost Principles and Administrative Requirements (Including Single Audit Act) published February 1, 2013. The original comment period was scheduled to end on May 2, 2013. Today, OMB is extending the time period in which to provide public comments until June 2, 2013. This will allow interested parties additional time to analyze the issues and prepare their comments.

DATES: To be assured of consideration, comments must be received by OMB electronically through *www.regulations.gov* docket OMB–2013–0001 no later than 11:59 p.m. Eastern Standard Time (E.S.T.) on June 2, 2013.

ADDRESSES: Comments on this proposal must be submitted electronically at *www.regulations.gov.* In submitting comments, please search for docket OMB–2013–0001, which includes the full text of this proposal as well as supporting materials, and submit comments there.

FOR FURTHER INFORMATION CONTACT: For general information, please contact Victoria Collin at (202) 395–7791. For more information on grants management and the Council on Financial Assistance Reform please visit *www.cfo.gov/cofar.*

Daniel I. Werfel,

Controller.

[FR Doc. 2013–06455 Filed 3–20–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28059; Directorate Identifier 2007–NE–13–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce plc Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) for all Rolls-Royce plc (RR) RB211-Trent 553–61, 553A2–61, 556–61, 556A2–61, 556B–61, 556B2–61, 560–61, 560A2–61, 768–60, 772–60, 772B–60, 875–17, 877–17, 884–17, 884B–17, 892–17, 892B–17, and 895–17 turbofan engines. The existing AD currently requires inspection of the intermediate-pressure (IP) compressor rotor shaft rear balance land for cracks. Since we issued that AD, a crack was detected in a Trent 500 IP compressor rotor shaft rear balance land during a shop visit, and further engineering evaluation done by RR concluded that the cracking may also exist in Trent 900 engines. This proposed AD would require inspections of the IP compressor rotor shaft as required by the existing AD while adding on-wing inspections for the Trent 500 engines, and on-wing and in-shop inspections for the Trent 900 engines. We are proposing this AD to detect cracking on the IP compressor rotor shaft rear balance land, which could lead to uncontained engine failure and damage to the airplane.

DATES: We must receive comments on this proposed AD by May 20, 2013.

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

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

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Frederick Zink, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7779; fax: 781–238–7199; email: *frederick.zink@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–28059; Directorate Identifier 2007–NE–13–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy

aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On May 15, 2012, we issued AD 2012–10–12, Amendment 39–17061 (77 FR 31176, May 25, 2012), for all RR RB211-Trent 553–61, 553A2–61, 556–61, 556A2–61, 556B–61, 556B2–61, 560–61, 560A2–61, 768–60, 772–60, 772B–60, 875–17, 877–17, 884–17, 884B–17, 892–17, 892B–17, and 895–17 turbofan engines. That AD requires continuing initial inspections, adding additional inspections, and a mandatory terminating action. That AD resulted from reports of additional cracking on RB211-Trent 700 and RB211-Trent 800 IP compressor rotor shafts. We issued that AD to detect cracking on the IP compressor rotor shaft rear balance land, which could lead to uncontained engine failure and damage to the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 2012–10–12, Amendment 39–17061 (77 FR 31176, May 25, 2012), a crack in a Trent 500 IP compressor rotor shaft rear balance land was detected during a shop visit. Further engineering evaluation, done by RR, concluded that the cracking may also exist in Trent 900 engines.

Relevant Service Information

We reviewed RR Non-Modification Alert Service Bulletin (NMASB) No. RB.211–72–AH058, dated December 13, 2012, and RR NMASB No. RB.211–72–AH059, dated December 11, 2012. NMASB No. RB.211–72–AH058 describes procedures for inspection of RB211-Trent 553–61, 553A2–61, 556–61, 556A2–61, 556B–61, 556B2–61, 560–61, and 560A2–61 engines. NMASB No. RB.211–72–AH059 describes procedures for inspection of RB211-Trent 970–84, 970B–84, 972–84, 972B–84, 977–84, 977B–84, and 980–84 engines.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would retain all the requirements of AD 2012–10–12, Amendment 39–17061 (77 FR 31176, May 25, 2012). This proposed AD would add requirements to perform on-wing inspections for the Trent 500 and on-wing and in-shop inspections for the Trent 900 engines.

Costs of Compliance

We estimate that this proposed AD would affect about 136 engines installed on airplanes of U.S. registry. We also estimate that it would take about 14 hours per engine to perform required inspections. The average labor rate is $85 per hour. Replacement parts are estimated to cost about $2,271 per engine. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $470,696.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 2012–10–12, Amendment 39–17061 (77 FR 31176, May 25, 2012), and adding the following new AD:

Rolls-Royce plc: Docket No. FAA–2007–28059; Directorate Identifier 2007–NE–13–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by May 20, 2013.

(b) Affected ADs

This AD supersedes AD 2012–10–12, Amendment 39–17061 (77 FR 31176, May 25, 2012).

(c) Applicability

This AD applies to Rolls-Royce plc (RR) RB211-Trent 553–61, 553A2–61, 556–61, 556A2–61, 556B–61, 556B2–61, 560–61, 560A2–61, 768–60, 772–60, 772B–60, 875–17, 877–17, 884–17, 884B–17, 892–17, 892B–17, 895–17, 970–84, 970B–84, 972–84, 972B–84, 977–84, 977B–84, and 980–84 turbofan engines.

(d) Unsafe Condition

This AD was prompted by detection of a crack in a Trent 500 intermediate-pressure (IP) compressor rotor shaft rear balance land with follow-on RR engineering evaluation concluding that cracking may also exist in Trent 900 engines. We are issuing this AD to detect cracking on the IP compressor rotor shaft rear balance land, which could lead to uncontained engine failure and damage to the airplane.

(e) Compliance

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

(f) RB211-Trent 700 Series Engines—Rear Balance Land Inspections

(1) Within 625 cycles-in-service (CIS) after June 29, 2012, or before the next flight after the effective date of this AD, whichever occurs later, borescope inspect the IP compressor rotor shaft rear balance land. Use RB211 Trent 700 Series Propulsion System Non-Modification Alert Service Bulletin (NMASB) No. RB.211–72–AG270, Revision 4, dated March 21, 2011, sections 3.A.(2)(a) through 3.A.(2)(c) and 3.A.(3)(a) through 3.A.(3)(c) for in-shop procedures, or 3.B.(2)(a) through 3.B.(2)(c) and 3.B.(4)(a) through 3.B.(4)(c) for on-wing procedures, to do the inspection.

(2) Thereafter, repeat the inspection within every 625 cycles-since-last inspection (CSLI). You may count CSLI from the last borescope inspection or the last eddy current inspection (ECI), whichever occurred last.

(3) At each shop visit after the effective date of this AD, perform an ECI and visually inspect the IP compressor rotor shaft rear balance land, and visually inspect the balance weights. Use RB211 Trent 700 and Trent 800 Series Propulsion Systems NMASB No. RB.211–72–AG085, Revision 2, dated July 7, 2011, sections 3.A. through 3.C., to do the inspections.

(g) RB211-Trent 800 Series Engines—Rear Balance Land Inspections

(1) Within 475 CIS after June 29, 2012, or before the next flight after the effective date of this AD, whichever occurs later, borescope inspect the IP compressor rotor shaft rear balance land. Use RB211 Trent 800 Series Propulsion System NMASB No. RB.211–72–AG264, Revision 5, dated March 21, 2011, sections 3.A.(2)(b) through 3.A.(2)(c) and 3.A.(3)(a) through 3.A.(3)(c) for in-shop procedures, or 3.B.(2)(a) through 3.B.(2)(c) and 3.B.(4)(a) through 3.B.(4)(c) for on-wing procedures, to do the inspection.

(2) Thereafter, repeat the inspection within every 475 CSLI. You may count CSLI from the last borescope inspection or the last ECI, whichever occurred last.

(3) At each shop visit, perform an ECI and visually inspect the IP compressor rotor shaft rear balance land, and visually inspect the balance weights. Use RB211 Trent 700 and Trent 800 Series Propulsion Systems NMASB No. RB.211–72–AG085, Revision 2, dated July 7, 2011, sections 3.A. through 3.C., to do the inspections.

(h) RB211-Trent 500 Series Engines—Rear Balance Land Inspections

(1) Within 340 CIS after the effective date of this AD, borescope inspect the IP compressor rotor shaft rear balance land. Use RB211 Trent 500 Series Propulsion Systems NMASB No. RB.211–72–AH058, dated December 13, 2012, sections 3.A.(2)(a) through 3.A.(2)(c), 3.A.(3)(a) through 3.A.(3)(d), and 3.A.(5)(a) through 3.A.(5)(c) for on-wing procedures, to do the inspection.

(2) Thereafter, repeat the inspection within every 340 CSLI. You may count CSLI from the last borescope inspection or the last ECI, whichever occurred last.

(3) At each shop visit, perform an ECI and visually inspect the IP compressor rotor shaft rear balance land, and visually inspect the balance weights. Use RB211 Trent 500 and Trent 900 Series Propulsion Systems Non-Modification Service Bulletin (NMSB) No. RB.211–72–G448, Revision 3, dated July 7, 2011, sections 3.D.(4) through 3.D.(5), 3.D.(6)(f) through 3.D.(7)(w), 3.D.(8)(f) through 3.D.(8)(w), 3.D.(11), and 3.D.(12), to do the inspections.

(i) RB211-Trent 900 Series Engines—Rear Balance Land Inspections

(1) Within 280 flight cycles after the effective date of this AD, borescope inspect the IP compressor rotor shaft rear balance land. Use RB211 Trent 900 Series Propulsion Systems NMASB No. RB.211–72–AH059, dated December 11, 2012, sections 3.A.(2)(a) through 3.A.(2)(c), 3.A.(3)(a) through 3.A.(3)(d), and 3.A.(5)(a) through 3.A.(5)(c), to do the inspection.

(2) Thereafter, repeat the inspection within every 280 CSLI. You may count from the last borescope inspection or the last ECI, whichever occurred last.

(3) At each shop visit after the effective date of this AD, perform an ECI and visually inspect the IP compressor rotor shaft rear balance land, and visually inspect the balance weights. Use RB211 Trent 500 and Trent 900 Series Propulsion Systems NMSB No. RB.211–72–G448, Revision 3, dated July 7, 2011, sections 3.D.(4) through 3.D.(5), 3.D.(6)(f) through 3.D.(7)(w), 3.D.(8)(f) through 3.D.(8)(w), 3.D.(11), and 3.D.(12), to do the inspection.

(j) Mandatory Termination Action for RB211-Trent 700 and RB211-Trent 800 Engines

(1) For RB211-Trent 700 engines. At the next shop visit in which any level of inspection or strip is scheduled to be carried out on the IP compressor, remove the existing IP compressor balance weights.

(2) For RB211-Trent 800 engines. At the next shop visit in which any level of inspection or strip is scheduled to be carried out on the IP compressor, remove the existing IP compressor balance weights.

(3) Once you have removed the balance weights, do not re-install them on any IP compressor shaft rear balance land.

(k) Credit for Previous Actions

(1) For RB211-Trent 700 series engines:

(i) If you borescope inspected your RB211-Trent 700 series engine using RB211 Trent 700 Series Propulsion System NMASB No. RB.211–72–AG270, Revision 1, dated December 14, 2009, or Revision 2, dated December 21, 2010, or Revision 3, dated February 25, 2011, before the effective date of this AD, you have satisfied the requirements of paragraph (f)(1) of this AD.

(ii) If you performed the ECI and visual inspection of your RB211-Trent 700 series engines using RB211 Trent 700 and Trent 800 Series Propulsion Systems NMASB No. RB.211–72–AG085, Revision 1, dated September 27, 2010, before the effective date of this AD, you have satisfied the ECI and visual inspections required by paragraph (f)(3) of this AD.

(2) For RB211-Trent 800 series engines:

(i) If you borescope inspected your RB211-Trent 800 series engine using RB211 Trent 800 Series Propulsion System NMASB No. RB.211–72–AG264, Revision 3, dated December 21, 2010, or Revision 4, dated February 25, 2011, before the effective date of this AD, you have satisfied the requirements of paragraph (g)(1) of this AD.

(ii) If you performed the ECI and in-shop visual inspection of your RB211-Trent 800 series engines using RB211 Trent 700 and Trent 800 Series Propulsion Systems NMASB No. RB.211–72–AG085, Revision 1, dated September 27, 2010, before the effective date of this AD, you have satisfied the ECI and visual inspections required by paragraph (g)(3) of this AD.

(3) For RB211-Trent 500 and 900 series engines:

(i) If you performed the ECI of your RB211-Trent 500 series engines using RB211 Trent 500, 700 and 800 Series Propulsion Systems NMASB No. RB.211–72–AF260, Revision 4, dated July 28, 2009, and RB211 Trent 500 and Trent 900 Series Propulsion Systems NMSB No. RB.211–72–G448, Revision 2, dated December 23, 2010 before the effective date of this AD, you have satisfied the ECIs required by paragraph (h)(3) of this AD.

(ii) If you performed the in-shop visual inspection of your RB211-Trent 500 series engines using RB211 Trent 500 and Trent 900 Series Propulsion Systems NMSB No. RB.211–72–G448, Revision 2, dated December 23, 2010, before the effective date of this AD, you have satisfied the in-shop visual inspections required by paragraph (h)(3) of this AD.

(l) Definitions

For the purpose of this AD, a shop visit is defined as introduction of an engine into a shop and disassembly sufficient to expose the IP compressor module rear face.

(m) Alternative Methods of Compliance (AMOCs)

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

(n) Related Information

(1) For more information about this AD, contact Frederick Zink, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7779; fax: 781–238–7199; email: *frederick.zink@faa.gov*.

(2) European Aviation Safety Agency AD 2013–0002, dated January 4, 2013 also pertains to the subject of this AD.

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

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

Issued in Burlington, Massachusetts, on March 13, 2013.

Colleen M. D'Alessandro,

Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–06498 Filed 3–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 203

[Docket No. FR–5658–N–01]

Federal Housing Administration (FHA): Direct Endorsement Program Solicitation of Comment on Timeframe for Conducting Pre-Endorsement Review

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Request for comments.

SUMMARY: HUD is seeking comment on moving the timeframe that FHA conducts its pre-endorsement review of loans originated by Direct Endorsement lenders from a time that is prior to the lender closing each loan and before FHA's endorsement of the mortgage for insurance to a period after the loan has been closed. Comment is sought on whether this shift in time, as further described in this document, would reduce the processing time before the loans may be closed, and facilitate loan closing.

DATES: *Comment Due Date.* April 22, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, 451 7th Street SW., Room 10276, Department of Housing and Urban Development, Washington, DC 20410–0500. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the notice.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., Eastern Time, weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joy Hadley, Director, Office of Lender Activities and Program Compliance, Office of Housing, U.S. Department of Housing and Urban Development, 490 L'Enfant Plaza East SW., Room P3214, Washington, DC 20024–8000; telephone number 202–708–1515 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

FHA grants lenders unconditional Direct Endorsement authority to close loans without prior FHA approval in accordance with the terms and conditions of HUD's regulations in 24 CFR 203.3. Under the Direct Endorsement program, the lender underwrites and closes the mortgage loan without prior FHA review or approval. Before being granted unconditional Direct Endorsement authority, the lender must submit a specified number of loan files for review and approval by FHA as described in 24 CFR 203.3(b)(4). The regulations provide for the review of each loan file to be conducted by FHA, and the lender to be notified of the acceptability of the mortgage, prior to FHA endorsement of the mortgage for insurance. The Direct Endorsement program has been designed to give the lender sufficient certainty of FHA endorsement requirements to justify the assumption of the responsibilities involved in originating and closing mortgage loans without prior FHA review.

At present, FHA generally conducts this review of the loan files required under 24 CFR 203.3(b)(4) prior to closing and, if acceptable, issues a commitment to the lender at that time. After closing, the mortgage is then submitted to FHA for endorsement for insurance. While this is the general procedure utilized by lenders seeking unconditional Direct Endorsement approval, FHA currently allows lenders to close the loans before submission for review. A lender is eligible for unconditional Direct Endorsement authority once FHA has reviewed and found acceptable the requisite number of loan files, at either pre-closing or pre-endorsement review, provided that the lender has met the other requirements for Direct Endorsement approval under 24 CFR 203.3.

II. This Request for Comments

Proposed Transition of FHA's Review to Post-Closing, Pre-Endorsement

Through this document FHA proposes for consideration and public comment shifting the timeframe for FHA's review of loans prior to endorsement from pre-closing to post-closing. FHA proposes that a lender applying for unconditional Direct Endorsement authority submit the loan files required under 24 CFR 203.3(b)(4) only after closing. After determining that the mortgage is acceptable and meets all FHA requirements, FHA will notify the lender that the loan has been endorsed.

Feedback is sought on whether the proposed change in review time would benefit the lender by reducing the amount of time between loan origination and closing, and would result in operational savings of time and costs associated with approval timeframes, which FHA recognizes can be lengthy at times. Feedback is also sought on whether the proposed change in review time would benefit the borrower; that is, would the borrower be able to take advantage of shorter interest rate lock-in periods, which could help to ensure that the borrower receives the

best interest rate available at the lowest possible cost to the borrower.

The proposed change in review time should not alter the current quality of review of the loan file or the quality of the Direct Endorsement lender approval process. FHA guidance, issued in accordance with 24 CFR 203.3(b)(2), already requires the lender to certify that their underwriter(s) have the qualifications, expertise, and experience to underwrite mortgage loans in accordance with FHA requirements. Given the certification required of lenders, the shift in the timeframe for review may in fact result in enhanced lender accountability; that is, the lender will place more emphasis on ensuring that their underwriting staff is sufficiently trained prior to requesting Direct Endorsement authority. Properly trained underwriters will help to increase the number of loans that are found to be acceptable, resulting in an even higher percentage of loan files that meet FHA policies and guidelines.

FHA analyzed data for mortgage loans that were submitted for review during the period beginning October 1, 2009 through June 30, 2012. The data demonstrated that 86.7 percent of all loans reviewed during this time period, and 90.5 percent of all loans reviewed year to date in FY 2012, were found to meet FHA policies and guidelines and were subsequently endorsed. In addition, of the lenders entering the Direct Endorsement review process during the October 1, 2009 through June 30, 2012 timeframe, 48.6 percent did not receive an unacceptable rating on any loan submitted for review, while 28 percent of lenders had only one loan rated unacceptable and 10.9 percent of lenders had two loans rated unacceptable. Overall, 87.4 percent of lenders had two or fewer loans rated unacceptable. Currently, in FY 2012, the percentage of lenders with two or fewer loans rated unacceptable has increased to 93.3 percent and is expected to continue to improve.

When material violations of FHA policies and procedures are uncovered during the loan file review, FHA will notify the lender that a preliminary assessment, based on file documentation, indicates that the loan contains material findings such that FHA is exposed to an unacceptable level of risk. FHA will provide the lender with an opportunity to present missing information or documentation to address the review findings and permit subsequent submission for endorsement. As is the current practice, if the lender is unable to adequately respond (or fails to respond) to the material findings, FHA will notify the lender that the loan is not eligible for endorsement.

The lender will have satisfied the pre-endorsement review requirements necessary to be approved for unconditional Direct Endorsement authority once FHA has reviewed and found acceptable the requisite number of loan files pursuant to 24 CFR 203.3(b)(4).

III. Solicitation of Comment

Comment is solicited on the proposed shift in the timeframe for conducting its pre-endorsement review of the loans originated by prospective Direct Endorsement lenders from prior to the lender closing each loan to before FHA's endorsement of the mortgage for insurance. Comment is also solicited on other proposals that would reduce the processing time and facilitate loan closing.

Dated: March 12, 2013.

Carol J. Galante,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2013–06110 Filed 3–20–13; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2011–0884, FRL– 9791–7]

Approval and Promulgation of Implementation Plans; Oregon: Infrastructure Requirements for the 1997 and 2006 Fine Particulate Matter and 2008 Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve the State Implementation Plan (SIP) submittals from the State of Oregon to demonstrate that the SIP meets the infrastructure requirements of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) promulgated for fine particulate matter ($PM_{2.5}$) on July 18, 1997 and October 17, 2006, and for ozone on March 12, 2008. The EPA is proposing to find that the Federally-approved provisions currently in the Oregon SIP meet the CAA infrastructure requirements for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and the 2008 ozone NAAQS. The EPA is also proposing to find that the Federally-approved provisions currently in the Oregon SIP meet the interstate transport requirements of the CAA related to prevention of significant deterioration for the 2008 ozone NAAQS, and related to visibility for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS. This action does not propose to approve any additional provisions into the Oregon SIP but is a proposed finding that the current provisions of the Oregon SIP are adequate to satisfy the above-mentioned infrastructure elements required by the CAA.

DATES: Comments must be received on or before April 22, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2011–0884, by any of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: R10-Public_Comments@epa.gov.*
- *Mail:* Kristin Hall, EPA Region 10, Office of Air, Waste and Toxics (AWT–107), 1200 Sixth Avenue, Suite 900, Seattle WA 98101.
- *Hand Delivery/Courier:* EPA Region 10 Mailroom, 9th Floor, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101. Attention: Kristin Hall, Office of Air, Waste and Toxics, AWT–107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2011–0884. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your

comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle WA 98101.

FOR FURTHER INFORMATION CONTACT: Kristin Hall at (206) 553–6357, *hall.kristin@epa.gov,* or the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'', ''us'' or ''our'' are used, it is intended to refer to the EPA. Information is organized as follows:

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VIII. Statutory and Executive Order Reviews

I. Proposed Action

The EPA is proposing to approve the State Implementation Plan (SIP) submittals from the State of Oregon to demonstrate that the SIP meets the requirements of CAA section 110(a)(1) and (2) for the NAAQS promulgated for particulate matter on July 18, 1997 and October 17, 2006, and for ozone on March 12, 2008. The EPA is proposing to find that the Federally-approved provisions currently in the Oregon SIP meet the following CAA section 110(a)(2) infrastructure elements for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). The EPA is also proposing to find that the Federally-approved provisions currently in the Oregon SIP meet the requirements of CAA section 110(a)(2)(D)(i)(II) as it applies to prevention of significant deterioration for the 2008 ozone NAAQS, and CAA section 110(a)(2)(D)(i)(II) as it applies to visibility for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS.

CAA section 110(a)(1) requires that each state, after a new or revised NAAQS is promulgated, review their SIPs to ensure that they meet the requirements of the ''infrastructure'' elements of CAA section 110(a)(2). The State of Oregon made multiple submittals to satisfy the infrastructure requirements for the 1997 and 2006 $PM_{2.5}$ NAAQS and the 2008 ozone NAAQS. On September 25, 2008, the State submitted to the EPA a certification that the State's SIP meets the infrastructure obligations for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. Subsequently, on December 23, 2010, the State submitted the ''Oregon SIP Infrastructure for Addressing the Interstate Transport of Ozone and Fine Particulate Matter'' to address the requirements of CAA section 110(a)(2)(D)(i) for multiple NAAQS, including the 2006 $PM_{2.5}$ and 2008 ozone NAAQS. On August 17, 2011, the State submitted to the EPA a certification that the State's SIP meets the infrastructure requirements for the 2006 $PM_{2.5}$ NAAQS. Finally, on December 19, 2011, the State submitted to the EPA a certification that the State's SIP meets the infrastructure requirements for the 2008 ozone NAAQS.

At this time, the EPA is acting on the infrastructure submittals for the CAA section 110(a)(2) required elements as they relate to the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS. This action does not address infrastructure requirements with respect to the 1997 ozone NAAQS which the EPA previously approved on May 21, 2012 (77 FR 29904). This action also does not address the requirements of CAA section 110(a)(2)(D)(i) for the 1997 $PM_{2.5}$ NAAQS which have previously been approved by the EPA in three separate actions on June 9, 2011 (76 FR 33650), July 5, 2011 (76 FR 38997), and December 27, 2011 (76 FR 80747).

In addition, this action does not address the requirements of CAA section 110(a)(2)(D)(i)(II) as it relates to prevention of significant deterioration for the 2006 $PM_{2.5}$ NAAQS, which the EPA approved on December 27, 2011 (76 FR 80747). This action also does not address the requirements of CAA section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS which the EPA will address in a future action. Furthermore, the EPA interprets the CAA section 110(a)(2)(J) provision on visibility as not being triggered by a new NAAQS because the visibility requirements in part C are not changed by a new NAAQS.

II. Background

On July 18, 1997, the EPA promulgated a new 24-hour and a new annual NAAQS for $PM_{2.5}$ (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) (62 FR 38652). More recently, on October 17, 2006 (effective date December 18, 2006), the EPA revised the standards for particulate matter, tightening the 24-hour $PM_{2.5}$ standard from 65 micrograms per cubic meter (μ/m^3) to 35 μ/m^3, and retaining the current annual fine particle standard at 15 μ/m^3 (71 FR 61144). On March 12, 2008, the EPA revised the levels of the primary and secondary 8-hour ozone standards to 0.075 parts per million (73 FR 16436).

The CAA requires State Implementation Plans (SIPs) meeting the requirements of sections 110(a)(1) and (2) be submitted by states within three years after promulgation of a new or revised standard. CAA sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards, so-called ''infrastructure'' requirements. CAA section 110(a) imposes the obligation upon states to make a SIP submission to the EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains.

To help states meet this statutory requirement, the EPA issued guidance to states. On October 2, 2007, the EPA issued guidance to address infrastructure SIP requirements for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS.[1] On September 25, 2009, the EPA issued guidance to address infrastructure SIP requirements for the 2006 24-hour $PM_{2.5}$ NAAQS.[2] These guidance documents

[1] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards.'' Memorandum to EPA Air Division Directors, Regions I–X, October 2, 2007.

[2] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-hour Fine Particle ($PM_{2.5}$) National Ambient Air

Continued

provide that, to the extent an existing SIP already meets the CAA section 110(a)(2) requirements, states may submit a certification to the EPA.

III. CAA Sections 110(a)(1) and (2) Infrastructure Elements

CAA section 110(a)(1) provides the procedural and timing requirements for SIP submissions after a new or revised NAAQS is promulgated. CAA section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. These requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements, with their corresponding CAA subsection, are listed below:

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.
- 110(a)(2)(D): Interstate transport.
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.
- 110(a)(2)(J): Consultation with government officials; public notification; and Prevention of Significant Deterioration (PSD) and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

The October 2, 2007 and September 25, 2009 EPA infrastructure guidance clarify that two elements identified in CAA section 110(a)(2) are not governed by the three-year submission deadline of CAA section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather, are due at the time the nonattainment area plan requirements are due pursuant to CAA section 172. These requirements are: (i) submissions required by CAA section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D, Title I of the CAA, and (ii) submissions required by CAA section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. As a result, this action does not address infrastructure elements related to CAA section 110(a)(2)(C) with respect to nonattainment new source review (NSR) or CAA section 110(a)(2)(I). Furthermore, the EPA interprets the CAA section 110(a)(2)(J) provision on visibility as not being triggered by a new NAAQS because the visibility requirements in part C, Title I of the CAA are not changed by a new NAAQS.

IV. Scope of Action on Infrastructure Submittals

This rulemaking will not cover four substantive issues that are not integral to acting on a state's infrastructure SIP submission: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and the EPA's policies addressing such excess emissions (''SSM'') [3]; (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by the EPA, that may be contrary to the CAA (''director's discretion''); (iii) existing provisions for minor source NSR programs that may be inconsistent with the requirements of the CAA and the EPA's regulations that pertain to such programs (''minor source NSR''); and, (iv) existing provisions for PSD programs that may be inconsistent with current requirements of the EPA's ''Final NSR Improvement Rule,'' 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007). The EPA has indicated that it has other authority to address any such existing SIP defects in other rulemakings, as appropriate. A detailed rationale for why these four substantive issues are not part of the scope of infrastructure SIP rulemakings can be found in the EPA's previous action to approve the State of Oregon 1997 ozone infrastructure SIP submittal (proposed action on February 7, 2012, 77 FR 6044; final action on May 21, 2012, 77 FR 29904).

V. Analysis of the State's Submittal

The State of Oregon SIP submittals list specific provisions of the Oregon Revised Statutes (ORS) Chapter 468 Environmental Quality Generally, Public Health and Safety, General Administration; ORS Chapter 468A Air Quality, Public Health and Safety, Air Quality Control; Oregon Administrative Rules (OAR) Chapter 340, and the Oregon SIP. The specific sections are listed below, with a discussion of how the State submittals meet the requirements.

110(a)(2)(A): Emission limits and other control measures

CAA section 110(a)(2) requires SIPs to include enforceable emission limits and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA.

State submittal: The State SIP submittals cite multiple State air quality laws and previously SIP-approved regulations to address this element for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS. ORS 468A.035 ''General Comprehensive Plan'' provides authority to the Oregon Department of Environmental Quality (ODEQ) to develop a general comprehensive plan for the control or abatement of air pollution. ORS 468A.020 ''Rules and Standards'' gives the State Environmental Quality Commission (EQC) authority to adopt rules and standards to perform functions vested by law. ORS 468A.025 ''Air Purity Standards'' provides the EQC with the authority to set air quality standards, emission standards, and emission treatment and control provisions. ORS 468A.040 ''Permits; Rules'' provides that the EQC may require permits for air contamination sources, type of air contaminant, or specific areas of the State. The State submittals cite the following additional laws and regulations that establish emission limits and pollution controls:

- ORS 468A.045 Activities Prohibited Without Permit; Limit on Activities with Permit
- ORS 468A.050 Classification of Air Contamination Sources; Registration and Reporting of Sources; Rules; Fees

Quality Standards (NAAQS).'' Memorandum to Regional Air Division Directors, Regions I–X, September 25, 2009. The EPA has not yet issued guidance to states to address the infrastructure SIP requirements for the 2008 ozone NAAQS.

[3] For further description of EPA's SSM Policy, see, *e.g.,* a memorandum dated September 20, 1999, titled, ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. Also, the EPA issued a proposed action on February 12, 2013, titled ''State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction.'' This rulemaking responds to a petition for rulemaking filed by the Sierra Club that concerns SSM provisions in 39 states' SIPs (February 22, 2013, 78 FR 12460).

• ORS 468A.055 Notice Prior to Construction of New Sources; Order Authorizing or Prohibiting Construction; Effect of No Order; Appeal
• ORS 468A.070 Measurement and Testing of Contamination Sources; Rules
• ORS 468A.085 Residential Open Burning of Vegetative Debris
• ORS 468A.315 Emission Fees for Major Sources; Base Fees; Basis of Fees; Rules
• ORS 468A.350–.455 Motor Vehicle Pollution Control
• ORS 468A.460–.520 Woodstove Emissions Control
• ORS 468A.550–.620 Field Burning and Propane Flaming
• ORS 468A.625–.645 Chlorofluorocarbons and Halon Control
• ORS 468A.650–.660 Aerosol Spray Control
• ORS 468A.990 Penalties
• OAR 340–200 General Air Pollution Procedures and Definitions
• OAR 340–202 Ambient Air Quality Standards and PSD Increments
• OAR 340–204 Designation of Air Quality Areas
• OAR 340–222 Stationary Source Plant Site Emission Limits
• OAR 340–224 Major New Source Review
• OAR 340–226 General Emission Standards
• OAR 340–228 Requirements for Fuel Burning Equipment and Fuel Sulfur Content
• OAR 340–232 Emission Standards for VOC Point Sources
• OAR 340–234 Emission Standards for Wood Products Industries
• OAR 340–236 Emission Standards for Specific Industries
• OAR 340–240 Rules for Areas with Unique Air Quality Needs
• OAR 340–242 Rules Applicable to the Portland Area
• OAR 340–250 General Conformity
• OAR 340–252 Transportation Conformity
• OAR 340–256 Motor Vehicles
• OAR 340–258 Motor Vehicle Fuel Specifications
• OAR 340–262 Residential Woodheating
• OAR 340–266 Field Burning Rules (Willamette Valley)
• OAR 340–268 Emission Reduction Credits

EPA analysis: The State regulations identified above were previously approved by the EPA into the Oregon SIP and demonstrate that the Oregon SIP includes enforceable emission limits and other control measures to implement the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS. OAR 340–200 ''General Air Pollution Procedures and Definitions'' defines direct $PM_{2.5}$, nitrogen oxides (NO_X) and sulfur dioxide (SO_2) as precursors to $PM_{2.5}$, and NO_X and volatile organic compounds (VOCs) as precursors to ozone. This rule also defines significant emissions rates, *de minimis* emission levels, and plant site emission rates for air pollutants including direct $PM_{2.5}$, NO_X and SO_2 as precursors to $PM_{2.5}$, and NO_X and VOCs as precursors to ozone. OAR 340–202 ''Ambient Air Quality Standards and PSD Increments'' includes the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS. The EPA most recently approved into the State's SIP revisions to OAR 340–200 and OAR 340–202 on December 27, 2011 (76 FR 80747).

The State of Oregon has no areas designated nonattainment for the 1997 $PM_{2.5}$ standard and no areas designated nonattainment for the 2008 ozone standard. The State has two areas designated nonattainment for the 2006 $PM_{2.5}$ standard (Klamath Falls and Oakridge). However, the EPA does not consider SIP requirements triggered by the nonattainment area mandates in part D, Title I of the CAA to be governed by the submission deadline of CAA section 110(a)(1).

The State generally regulates emissions of $PM_{2.5}$, $PM_{2.5}$ precursors, and ozone precursors through its SIP-approved New Source Review (NSR) permitting programs, in addition to other rules and control programs identified below. The EPA most recently approved revisions to the State's major and minor NSR permitting programs on December 27, 2011 (76 FR 80747), to regulate direct $PM_{2.5}$ emissions, in addition to NO_X and SO_2 as precursors to $PM_{2.5}$. The State's SIP-approved major and minor NSR permitting programs regulate NO_X and VOCs as precursors to ozone. In addition to the State's NSR permitting regulations, the State's SIP contains rules that establish various controls on emissions of particulate matter, NO_X, SO_2, and VOCs. These controls include rules for operational and work practices standards, fuel burning equipment and fuel sulfur content, grain loading, specific industry sectors, motor vehicle pollution, industrial emission management, residential wood heating, field burning, and banking of emission reduction credits. Based on the analysis above, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(A) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

The EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during startup, shutdown, or malfunction (SSM) of operations at a facility. The EPA believes that a number of states may have SSM provisions that are contrary to the CAA and existing EPA guidance and the EPA has recently proposed action to address such state regulations.[4]

The EPA is not proposing to approve or disapprove any existing State rules with regard to director's discretion or variance provisions. The EPA believes that a number of states may have such provisions that are contrary to the CAA and existing EPA guidance (November 24, 1987, 52 FR 45109), and the Agency plans to take action in the future to address such state regulations. In the meantime, the EPA encourages any state having a director's discretion or variance provision that is contrary to the CAA and the EPA guidance to take steps to correct the deficiency as soon as possible.

110(a)(2)(B): Ambient air quality monitoring/data system

CAA section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collecting and analyzing ambient air quality data, and making these data available to the EPA upon request.

State submittal: The State submittals reference ORS 468.035(a–e, m) ''Functions of the Department'' which provides authority to conduct and supervise inquiries and programs to assess and communicate air conditions and to obtain necessary resources (assistance, materials, supplies, etc) to meet these responsibilities. In addition, the State references ORS 468A.070 ''Measurement and Testing of Contamination Sources; Rules'' which provides ODEQ authority to establish a measurement and testing program pursuant to rules adopted by the EQC. The State also references the following regulations pertaining to air quality monitoring and data:

• OAR 340–200 General Air Quality Definitions
• OAR 340–206 Air Pollution Emergencies
• OAR 340–212 Stationary Source Testing and Monitoring
• OAR 340–214 Stationary Source Reporting
• OAR 340–216 Air Contaminant Discharge Permits
• OAR 340–222 Stationary Source Plant Site Emission Limits
• OAR 340–225 Air Quality Analysis Requirements

[4] See footnote 3.

• OAR 340–226 General Emission Standards
• OAR 340–232 Emission Standards for VOC Point Sources
• OAR 340–256 Motor Vehicles

EPA analysis: A comprehensive air quality monitoring plan, intended to meet the requirements of 40 CFR part 58 was submitted by the State to the EPA on December 27, 1979 (40 CFR 52.1970) and approved by the EPA on March 4, 1981 (46 FR 15136). This air quality monitoring plan has been subsequently updated, with the most recent submittal dated July 1, 2012 and approved by the EPA on October 25, 2012.[5] This plan includes, among other things, the locations for the particulate matter monitoring network and ozone monitoring network. The State provides an annual air quality data report to the public at *http://www.deq.state.or.us/aq/forms/annrpt.htm.* In addition, the State sends real time air monitoring information for ozone and particulate matter to the EPA's AIRNow Web page at *http://www.airnow.gov* and also provides the information on the ODEQ Air Quality Index (AQI) Web site at *http://www.deq.state.or.us/aqi.* Based on the foregoing, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(B) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(C): Program for enforcement of control measures

CAA section 110(a)(2)(C) requires states to include a program providing for enforcement of all SIP measures, and the regulation of construction of new or modified stationary sources, including a permitting program to meet PSD and nonattainment NSR requirements as required by parts C and D of this subchapter.

State submittal: The State submittals refer to ORS 468.090–.140 ''Enforcement'' which provide ODEQ with authority to investigate complaints, investigate and inspect sources for compliance, access records, commence enforcement procedures, and impose civil penalties. In addition, ORS 468.035 (j, k) ''Functions of the Department'' provide ODEQ with authority to enforce State air pollution laws and compel compliance with any rule, standard, order, permit or condition. The State submittals cite the following Oregon laws and regulations related to enforcement and permitting:

• ORS 468.065 Issuance of Permits; Consent; Fees; Use
• ORS 468.070 Denial, Modification, Suspension or Revocation of Permits
• ORS 468.090–.140 Enforcement
• ORS 468.920–.963 Environmental Crimes
• ORS 468.996–.997 Civil Penalties
• ORS 468A.040 Permits; Rules
• ORS 468A.045 Activities Prohibited without Permit
• ORS 468A.055 Notice Prior to Construction of New Sources
• ORS 468A.060 Duty to Comply with Laws, Rules, and Standards
• ORS 468A.105 Formation of Regional Air Quality Control Authorities
• ORS 468A.155 Rules Authorizing Regional Permit Programs
• ORS 468A.165 Compliance with State Standards Required; Hearing; Notice
• ORS 468A.990 Penalties for Air Pollution Offenses
• OAR 340–012 Enforcement Procedure and Civil Penalties
• OAR 340–200 General Air Pollution Procedures and Definitions
• OAR 340–202 Ambient Air Quality Standards and PSD Increments
• OAR 340–210 Stationary Source Notification Requirements
• OAR 340–214 Stationary Source Reporting Requirements
• OAR 340–216 Air Contaminant Discharge Permits (ADCP)
• OAR 340–224 Major New Source Review

EPA analysis: The EPA is proposing to find that the State code provisions referenced in the State submissions provide ODEQ with authority to enforce the air quality laws, regulations, permits, and orders promulgated pursuant to ORS Chapters 468 and 468A. ODEQ staffs and maintains an enforcement program to ensure compliance with SIP requirements. The ODEQ Director, at the direction of the Governor, may enter a cease and desist order for polluting activities that present an imminent and substantial danger to public health (ORS 468–115). Enforcement cases may be referred to the State Attorney General's Office for civil or criminal enforcement. Therefore, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(C) related to a program of enforcement measures for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

The EPA is also proposing to find that the Oregon SIP meets the requirements related to PSD under CAA section 110(a)(2)(C) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS. As discussed below, the State's previously-approved SIP provisions are adequate to satisfy the requirements of CAA section 110(a)(2)(C) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS because they meet current Federal standards. The State's major NSR program includes requirements for major source permitting in nonattainment areas, maintenance areas, and attainment and unclassifiable areas (OAR 340–224). The State's Federally-enforceable state operating permit program is found at OAR 340–216 ''Air Contaminant Discharge Permits,'' and is also the administrative permit mechanism used to implement the notice of construction and major new source review programs. ODEQ delegates authority to Lane Regional Air Protection Agency (LRAPA) to implement the source permitting programs within LRAPA's area of jurisdiction. The requirements and procedures contained in OAR 340–216, OAR 340–222 and OAR 340–224 are used by LRAPA to implement its permitting programs until it adopts rules which are at least as restrictive as State rules. The EPA most recently approved revisions to the State's major NSR rules on December 27, 2011 (76 FR 80747), including approval of PSD permitting requirements for $PM_{2.5}$ and greenhouse gases.[6] The State's SIP-approved PSD permitting program regulates NO_X and VOCs as precursors to ozone.

The State's SIP-approved minor NSR program applies major source NSR/PSD requirements to any source with emissions over the significant emission rate, through the administrative mechanisms laid out in OAR 340–216 ''Air Contaminant Discharge Permits.'' The EPA has determined that the State's minor NSR program, adopted pursuant to section 110(a)(2)(C) of the CAA, regulates emissions of $PM_{2.5}$, NO_X and SO_2 as precursors to $PM_{2.5}$, and NO_X and VOCs as precursors to ozone. In this action, the EPA is not evaluating the State's SIP for consistency with the EPA's regulations governing minor NSR. The EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. The EPA intends to work with states to reconcile

[5] Oregon Monitoring Network Approval Letter dated October 25, 2012.

[6] Federal requirements pertaining to the permitting programs required under Subparts C and D of Title I of the CAA have not changed since the EPA last reviewed and approved changes to Oregon's Federally-approved PSD and NSR SIP provisions. Accordingly, the EPA incorporates by reference the rationale for its approval of Oregon's major source permitting program as discussed in its September 23, 2011, proposed rule and its December 27, 2011, final rule. See 76 FR 59090 (September 23, 2011) and 76 FR 80747 (December 27, 2011).

state minor NSR programs with the EPA's regulatory provisions for the program. The statutory requirements of CAA section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and the EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

Based on the analysis above, the EPA is proposing to find that the Oregon SIP includes enforcement, PSD, and minor source permitting provisions that are adequate to satisfy the requirements of CAA section 110(a)(2)(C) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(D): Interstate transport

CAA section 110(a)(2)(D)(i) requires that SIPs contain adequate provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, or interfering with maintenance of the NAAQS in another state, or from interfering with measures required to prevent significant deterioration of air quality or to protect visibility in another state.

State submittal: The State submitted the ''Oregon SIP Infrastructure for Addressing the Interstate Transport of Ozone and Fine Particulate Matter'' (2010 Interstate Transport SIP) to satisfy the interstate transport requirements for multiple NAAQS, including the 2006 $PM_{2.5}$ and 2008 ozone NAAQS. The 2010 Interstate Transport SIP references the State's SIP-approved PSD program and the State's collaborative work with neighboring states on regional haze SIPs, which include plans and requirements for addressing visibility impairment caused by fine particulate matter and ozone in national parks and wilderness areas. In addition, the 2010 Interstate Transport SIP references the consultation ODEQ conducted with air agency staff in Washington, Idaho, Nevada and California in preparing the 2010 Interstate Transport SIP, specifically to identify and understand relevant air pollution issues in neighboring states, and whether these problems could be impacted by interstate transport.

EPA analysis: CAA section 110(a)(2)(D)(i) addresses four separate elements, or ''prongs.'' CAA section 110(a)(2)(D)(i)(I) requires state SIPs contain adequate provisions prohibiting emissions which will contribute significantly to nonattainment of the NAAQS in any other state (prong 1), and adequate provisions prohibiting emissions which will interfere with maintenance of the NAAQS by any other state (prong 2). CAA section 110(a)(2)(D)(i)(II) requires that state SIPs contain adequate provisions prohibiting emissions which will interfere with any other state's required measures to prevent significant deterioration (PSD) of its air quality (prong 3), and adequate provisions prohibiting emissions which will interfere with any other state's required measures to protect visibility (prong 4).

As noted above, this action does not address the requirements of CAA section 110(a)(2)(D)(i) for the 1997 $PM_{2.5}$ NAAQS which the EPA approved in three previous actions: June 9, 2011 (76 FR 33650), July 5, 2011 (76 FR 38997) and December 27, 2011 (76 FR 80747). In addition, this action does not address the requirements of CAA section 110(a)(2)(D)(i)(I) for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS which the EPA will address in a separate action. This action also does not address the requirements of CAA section 110(a)(2)(D)(i)(II) with regards to prevention of significant deterioration (prong 3) for the 2006 $PM_{2.5}$ NAAQS, which the EPA approved in a previous action on December 27, 2011 (76 FR 80747).

In this action, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to PSD (prong 3) for the 2008 ozone NAAQS and the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility (prong 4) for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS.

To address whether emissions from sources in Oregon interfere with any other state's required measures to prevent significant deterioration of air quality, the State's 2010 Interstate Transport SIP references the SIP-approved Oregon PSD program. The EPA approved revisions to the State's major NSR rules on December 27, 2011 (76 FR 80747), including approval of PSD permitting requirements for $PM_{2.5}$ and greenhouse gases. The State's SIP-approved PSD program regulates NO_X and VOCs as precursors to ozone. As discussed in the EPA's 2011 analysis of the State's PSD permitting requirements, the Federally-approved provisions of the State's SIP meet current Federal PSD requirements. Federal PSD requirements have not changed since the date of the EPA's most recent PSD-related SIP approval and the Oregon SIP provisions continue to meet Federal PSD permitting standards. Therefore, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to PSD (prong 3) for the 2008 ozone NAAQS.

To address whether emissions from sources in the State interfere with any other state's required measures to protect visibility, the 2010 Interstate Transport SIP refers to the Oregon Regional Haze SIP which was submitted to the EPA on December 14, 2010, and addresses $PM_{2.5}$ and $PM_{2.5}$ and ozone precursor visibility impacts across states within the region. On July 5, 2011, the EPA approved portions of the Oregon Regional Haze SIP including the requirements for best available retrofit technology (BART) (76 FR 38997). The EPA approved the remaining elements of the Oregon Regional Haze SIP on August 22, 2012 (77 FR 50611).

The EPA's September 25, 2009, infrastructure guidance states that the EPA believes the requirement for state SIPs to include adequate provisions prohibiting interference with measures to protect visibility in another state could be satisfied by an approved SIP addressing regional haze. The EPA's reasoning was that the development of the regional haze SIPs was intended to occur in a collaborative environment among the states, and that through this process states would coordinate on emissions controls to protect visibility on an interstate basis. The 2010 Interstate Transport SIP describes the State's participation in the Western Regional Air Partnership (WRAP), which is a regional planning organization created to address regional haze and related issues. WRAP member states include: Alaska, Arizona, California, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming, in addition to member tribes. In developing their respective regional haze SIPs, WRAP states, including Oregon, consulted with each other through the WRAP's work groups. As a result of this process, the common understanding was that each state would take action to achieve the emissions reductions relied upon by other states in their reasonable progress demonstrations in their regional haze SIPs.

Because Oregon has a Federally-approved Regional Haze SIP that meets current requirements, the EPA concludes that the State's SIP contains adequate provisions to address the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility (prong 4) for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS. Therefore, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA

section 110(a)(2)(D)(i)(II) as it applies to visibility for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS (prong 4).

Interstate and International transport provisions

CAA section 110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with the applicable requirements of CAA sections 126 and 115 (relating to interstate and international pollution abatement). Specifically, CAA section 126(a) requires new or modified major sources to notify neighboring states of potential impacts from the source.

State submittal: The State submittals state that State regulations are consistent with Federal requirements in Appendix N of 40 CFR part 50 pertaining to the notification of interstate pollution abatement. The State refers to OAR 340–202 ''Ambient Air Quality and PSD Increments.''

EPA analysis: The EPA most recently approved revisions to the State's NSR regulations on December 27, 2011 (76 FR 80747). The State's public notice requirements at OAR 340–209–0060 require that for major NSR actions, ODEQ will provide notice to neighboring states, among other officials and agencies. The State has no pending obligations under section 115 or 126(b) of the Act. Accordingly, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(D)(ii) for the 1997 $PM_{2.5,}$ 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(E): Adequate resources

CAA section 110(a)(2)(E) requires each state SIP to provide: (i) Necessary assurances that the State will have adequate personnel, funding, and authority under State law to carry out the SIP (and is not prohibited by any provision of Federal or State law from carrying out the SIP or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 128, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any SIP provision, the State has responsibility for ensuring adequate implementation of such SIP provision.

State submittal: The State submittals cite ORS 468.035 ''Functions of Department'' which provides ODEQ authority to employ personnel, purchase supplies, enter into contracts, and to receive, appropriate, and expend federal and other funds for purposes of air pollution research and control. In addition, ORS 468.045 ''Functions of Director; Delegation'' provides the ODEQ Director with authority to hire, assign, reassign, and coordinate personnel of the department and to administer and enforce the laws of the state concerning environmental quality. ORS 468.035(c) ''Functions of Department'' provides ODEQ authority to advise, consult, and cooperate with other states, state and federal agencies, or political subdivisions on all air quality control matters. ORS 468A.010 ''Policy'' calls for a coordinated statewide program of air quality control with responsibility allocated between the state and the units of local government. ORS 468A.100–180 ''Regional Air Quality Control Authorities'' describes the establishment, role and function of regional air quality control authorities. State regulations at OAR 340–200 ''General Air Quality Definitions'' specify LRAPA has authority in Lane County and defines the term ''Regional Agency.'' OAR 340–204 ''Designation of Air Quality Areas'' includes designation of control areas within Lane County. OAR 34–216 ''Air Contaminant Discharge Permits'' includes permitting authorities for LRAPA.

EPA analysis: The EPA proposes to find that the Oregon SIP meets the adequate personnel, funding and authority requirements of CAA section 110(a)(2)(E)(i). The State of Oregon receives sections 103 and 105 grant funds from the EPA and provides State matching funds necessary to carry out SIP requirements. For purposes of CAA section 110(a)(2)(E)(ii), the EPA approved OAR 340–200–0100 through OAR 340–200–0120 as meeting the requirements of CAA section 128 on January 22, 2003 (68 FR 2891). Finally, regarding CAA section 110(a)(2)(E)(iii) state responsibility and oversight of local and regional entities, the EPA is proposing to find that State law and regulation detailed above provides ODEQ with adequate authority to carry out SIP obligations with respect to the 1997 $PM_{2.5,}$ 2006 $PM_{2.5}$, and 2008 ozone NAAQS. Therefore the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(E) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(F): Stationary source monitoring system

CAA section 110(a)(2)(F) requires (i) The installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to the CAA, which reports shall be available at reasonable times for public inspection.

State submittal: The State submittals refer to the following statutory and regulatory provisions which provide authority and requirements for source emissions monitoring, reporting, and correlation with emission limits or standards:

- ORS 468.035 (b, d) Functions of Department
- ORS 468A.025(4) Air Purity Standards; Air Quality Standards; Treatment and Control of Emissions; Rules
- ORS 468A.070 Measurement and Testing of Contamination Sources; Rules
- OAR 340–212 Stationary Source Testing and Monitoring
- OAR 340–214 Stationary Source Reporting Requirements
- OAR 340–222 Stationary Source Plant Site Emission Limits
- OAR 340–225 Air Quality Analysis Requirements
- OAR 340–234 Emission Standards for Wood Products Industries: Monitoring and Reporting
- OAR 340–236 Emission Standards for Specific Industries: Emissions Monitoring and Reporting
- OAR 340–240 Rules for Areas with Unique Air Quality Needs

EPA analysis: The State statutory provisions listed above provide authority to establish a program for measurement and testing of sources, including requirements for sampling and testing. The State regulations cited above require facilities to monitor and report emissions, including requirements for monitoring methods and design, and monitoring and quality improvement plans. In addition, stationary source reporting requirements include maintaining written records to demonstrate compliance with emission rules, limitations, or control measures, and requirements for reporting and recordkeeping. Therefore, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(F) for the 1997 $PM_{2.5,}$ 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(G): Emergency episodes

CAA section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs.

State submittal: The State submittals cite ORS 468–115 ''Enforcement in Cases of Emergency'' which authorizes the ODEQ Director, at the direction of the Governor, to enter a cease and desist order for polluting activities that present an imminent and substantial danger to public health. In addition, OAR 340–206 ''Air Pollution Emergencies'' authorizes the ODEQ Director to declare an air pollution alert or warning, or to issue an ozone advisory to notify the public. OAR 340–214 ''Stationary Source Reporting Requirements'' requires reporting of emergencies and excess emissions and reporting requirements.

EPA analysis: ORS 468–115 ''Enforcement in Cases of Emergency'' provides emergency order authority comparable to CAA Section 303. Emergency episode SIP requirements are set forth at 40 CFR part 51 subpart H (prevention of air pollution emergency episodes, sections 51.150 through 51.153). The EPA has not promulgated revisions to these rules for $PM_{2.5}$. However, the EPA's September 25, 2009 guidance [7] made recommendations on how states could address emergency episode and contingency plans for $PM_{2.5}$. Subsequently, on December 27, 2011 (76 FR 80747), the EPA approved State revisions to OAR 340–206 ''Air Pollution Emergencies'' to add a significant harm level, air pollutant alert level, air pollution warning level, and air pollutant emergency level for $PM_{2.5}$, consistent with the EPA's September 25, 2009 guidance. OAR 340–206 ''Air Pollution Emergencies'' is consistent with the requirements of 40 CFR 51.150 through 51.153 for ozone. Therefore, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(G) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(H): Future SIP Revisions

CAA section 110(a)(2)(H) requires that SIPs provide for revision of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii), except as provided in paragraph 110(a)(3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the SIP is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements under the CAA.

[7] See footnote 2.

State submittal: The State submittals refer to ORS 468A.025 ''Air Purity Standards; Air Quality Standards; Treatment and Control of Emissions; Rules'' which provides authority for the EQC to establish areas of the state that require controls necessary to achieve the NAAQS. The submittals also refer to OAR 340–200 ''General Air Pollution Procedures and Definitions'' –0040 ''State of Oregon Clean Air Act Implementation Plan'' which provides for revisions to the Oregon SIP and submittal of revisions to the EPA, including standards submitted by a regional authority and adopted verbatim into ODEQ rules.

EPA analysis: As cited above, the State's SIP provides for revisions, and in practice, the State regularly submits SIP revisions to the EPA to take into account revisions to the NAAQS and other Federal regulatory changes. On December 27, 2011, the EPA approved numerous revisions to the Oregon SIP, including updates to the State's rules to reflect Federal changes to the NAAQS for $PM_{2.5}$, ozone and lead (76 FR 80747). The EPA proposes to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(H) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(I): Nonattainment area plan revision under part D

CAA section 110(a)(2)(I) requires states, in the case of a plan or revision for an area designated as nonattainment, to meet the applicable requirements of part D of Title I of the CAA relating to nonattainment areas.

EPA analysis: There are two elements identified in CAA section 110(a)(2) not governed by the three-year submission deadline of CAA section 110(a)(1). SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but are, rather, due at the time of the nonattainment area plan requirements pursuant to section 172. These requirements are: (i) submissions required by CAA section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D, Title I of the CAA, and (ii) submissions required by CAA section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Because the nonattainment planning requirements are not governed by the three-year submission deadline of CAA section 110(a)(1), this infrastructure action does not address to the requirements of CAA section 110(a)(2)(C) with respect to nonattainment NSR or CAA section 110(a)(2)(I).

110(a)(2)(J): Consultation with government officials

CAA section 110(a)(2)(J) requires states to provide a process for consultation with local governments and Federal Land Managers who are carrying out NAAQS implementation requirements pursuant to CAA section 121, relating to consultation. CAA section 110(a)(2)(J) further requires states to notify the public if NAAQS are exceeded in an area and to enhance public awareness of measures that can be taken to prevent exceedances. Lastly, CAA section 110(a)(2)(J) requires states to meet applicable requirements of part C, title I of the CAA related to prevention of significant deterioration and visibility protection.

State submittal: The State submittals reference specific laws and regulations relating to consultation, public notification, and PSD and visibility protection:

- ORS 468.020 Rules and Standards
- ORS 468.035(a, c, f–g) Functions of Department
- ORS 468A.010 (1) (b, c) Policy
- ORS 468A.025 Air Purity Standards; Air Quality Standards; Treatment and Control of Emissions; Rules
- OAR 340–202 Ambient Air Quality Standards and PSD Increments
- OAR 340–204 Designation of Air Quality Areas
- OAR 340–206 Air Pollution Emergencies
- OAR 340–209 Public Participation
- OAR 340–224 Major New Source Review
- OAR 340–225 Air Quality Analysis Requirements

EPA analysis: The EPA proposes to find that the State's Federally-approved SIP includes specific provisions for consulting with local governments and Federal Land Managers as specified in CAA section 121. ODEQ coordinates with local governments, states, Federal Land Managers and other stakeholders on air quality issues and provides notice to appropriate agencies related to permitting actions. The State regularly participates in regional planning processes including the Western Regional Air Partnership, which is a regional planning organization made up of states, tribes, Federal Land Managers, local air agencies, whose purpose is to understand current and evolving regional air quality issues in the West. The EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(J) for

consultation with government officials for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

The State of Oregon sends real time air monitoring information for ozone, particulate matter, and carbon monoxide to the EPA's AIRNow Web page at *http://www.airnow.gov* and also provides the information on the ODEQ Air Quality Index (AQI) Web site at *http://www.deq.state.or.us/aqi* including measures that can be taken to improve air quality. The EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(J) for public notification for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

The requirement in CAA section 110(a)(2)(J) that the SIP meet the applicable requirements of part C, title I of the CAA is the same as described earlier at CAA section 110(a)(2)(C) as it relates to PSD. The EPA most recently approved revisions to the State's Federally-approved PSD program on December 27, 2011 (76 FR 80747), including PSD program regulation of direct $PM_{2.5}$, NO_X and SO_2 as precursors to $PM_{2.5}$, and PSD permitting of greenhouse gas-emitting sources. The State's SIP-approved PSD permitting program regulates NO_X and VOCs as precursors to ozone. Therefore, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(J) for PSD for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

With regard to the applicable requirements for visibility protection, the EPA recognizes that states are subject to visibility and regional haze program requirements under part C of Title I of the CAA. In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C, Title I of the CAA do not change. Thus we find that there is no new visibility obligation triggered under CAA section 110(a)(2)(J) when a new NAAQS becomes effective.

Based on the analysis above, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(J) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(K): Air quality and modeling/data

CAA section 110(a)(2)(K) requires that SIPs provide for (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

State submittal: The State submittals refer to ORS 468.035 ''Functions of Department'' which provides ODEQ authority to conduct studies and investigations to determine air quality. OAR 340–202 ''Ambient Air Quality Standards and PSD Increments'' establishes standards and procedures for modeling and reporting data on air emissions. OAR 340–216 ''Air Contaminant Discharge Permits'' establishes requirements for testing, monitoring, recordkeeping, and reporting requirements to determine compliance with emission standards. OAR 340–225 ''Air Quality Analysis Requirements'' includes modeling requirements for analysis and demonstration of compliance with standards and increments in specified areas. OAR 340–226 ''General Emission Standards'' provides authority for ODEQ to establish additional controls through permitting to prevent violation of ambient air quality standards from a source as determined by modeling, monitoring or a combination thereof.

EPA analysis: The EPA previously approved the State's regulations on air quality modeling into the SIP on January 22, 2003 (68 FR 2891) and these rules require all modeled estimates of ambient concentrations be based on 40 CFR part 51, Appendix W (Guidelines on Air Quality Models). Any change or substitution from models specified in 40 CFR part 51, Appendix W is subject to notice and opportunity for public comment and must receive prior written approval from ODEQ and the EPA.

As an example of the State's modeling capacity, the State of Oregon has submitted a recent SIP revision, supported by modeling for ozone. The Portland and Salem areas were historically nonattainment under the 1-hour ozone standard and require maintenance plans that ensure on-going compliance with the 1997 8-hour ozone standard. On May 22, 2007, the State submitted these maintenance plans to the EPA, supported by extensive modeling. The EPA approved the SIP revision on December 19, 2011 (76 FR 78571). Based on the foregoing, the EPA is proposing to approve the Oregon SIP as meeting the requirements of CAA section 110(a)(2)(K) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(L): Permitting fees

CAA section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to cover the cost of reviewing, approving, implementing and enforcing a permit, until such time as the SIP fee requirement is superseded by the EPA's approval of the state's title V operating permit program.

State submittal: The State submittals refer to ORS 468.065 ''Issuance of Permits: Content; Fees; Use'' which provides the EQC authority to establish a schedule of fees for permits based upon the costs of filing and investigating applications, issuing or denying permits, carrying out Title V requirements and determining compliance. ORS 468A.050 ''Classification of Air Contamination Sources; Registration and Reporting of Sources; Rules; Fees'' provides authority to the EQC to establish fee schedules for air contamination sources. OAR 340–216 ''Air Contaminant Discharge Permits'' requires payment of permit fees based on a specified table of sources and fee schedule. In addition, the State submittals point to the State's approved title V program.

EPA analysis: On September 28, 1995, the EPA fully approved the State's title V program (60 FR 50106) (effective November 27, 1995). While the State's operating permit program is not formally approved into the State's SIP, it is a legal mechanism the State can use to ensure that ODEQ has sufficient resources to support the air program, consistent with the requirements of the SIP. The State's title V program included a demonstration the State will collect a fee from title V sources above the presumptive minimum in accordance with 40 CFR 70.9(b)(2)(i). The EPA's review process prior to the approval of the State's Title V permitting program included an evaluation of the State's ability to collect adequate fees. Therefore, the EPA proposes to find that the State has satisfied the requirements of CAA section 110(a)(2)(L) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

110(a)(2)(M): Consultation/participation by affected local entities

CAA section 110(a)(2)(M) requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP.

State submittal: The State submittals refer to the following laws and regulations:

- ORS 468.035 (a, c, f–g) Functions of Department
- ORS 468A.010 (1) (b, c) Policy
- ORS 468A.100–180 Regional Air Quality Control Authorities
- ORS 468A.405 Authority to Limit Motor Vehicle Operation and Traffic; Rules

• OAR 340–200 General Air Pollution Procedures and Definitions
• OAR 340–204 Designation of Air Quality Areas
• OAR 340–216 Air Contaminant Discharge Permits

EPA analysis: The regulations cited by the State were previously approved on December 27, 2011 (76 FR 80747), and provide for consultation and participation in SIP development by local political subdivisions affected by the SIP. Therefore the EPA proposes to find that the State's SIP meets the requirements of CAA section 110(a)(2)(M) for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and 2008 ozone NAAQS.

VI. Scope of Proposed Action

Oregon has not demonstrated authority to implement and enforce the Oregon Administrative rules within ''Indian Country'' as defined in 18 U.S.C. 1151. ''Indian country'' is defined under 18 U.S.C. 1151 as: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, the EPA treats as reservations trust lands validly set aside for the use of a Tribe even if the trust lands have not been formally designated as a reservation. Therefore, this SIP approval does not extend to ''Indian Country'' in Oregon. See CAA sections 110(a)(2)(A) (SIP shall include enforceable emission limits), 110(a)(2)(E)(i) (State must have adequate authority under State law to carry out SIP), and 172(c)(6) (nonattainment SIPs shall include enforceable emission limits).

VII. Proposed Action

The EPA is proposing to find that the Federally-approved provisions currently in the Oregon SIP meet the following CAA section 110(a)(2) infrastructure elements for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, and the 2008 ozone NAAQS: (A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). The EPA is also proposing to find that the Federally-approved provisions currently in the Oregon SIP meet the requirements of CAA section 110(a)(2)(D)(i)(II) as it applies to prevention of significant deterioration for the 2008 ozone NAAQS, and CAA section 110(a)(2)(D)(i)(II) as it applies to visibility for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS. This action does not propose to approve any additional provisions into the Oregon SIP but is a proposed finding that the current provisions of the Oregon SIP are adequate to satisfy the above-mentioned infrastructure elements required by the CAA. This action is being taken under section 110 of the CAA.

VIII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves the state's law as meeting Federal requirements and does not impose additional requirements beyond those imposed by the state's law. For that reason, this proposed action:

• Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
• does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
• is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
• does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
• does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
• is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
• is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
• is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
• does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate Matter, and Reporting and recordkeeping requirements.

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

Dated: March 6, 2013.

Dennis J. McLerran,

Regional Administrator, Region 10.

[FR Doc. 2013–06309 Filed 3–20–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[REG–122706–12]

RIN 1545–BL50

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AB56

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 144, 146, and 147

[CMS–9952–P]

RIN 0938–AR77

Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act

AGENCY: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Proposed rules.

SUMMARY: These proposed rules implement the 90-day waiting period limitation under section 2708 of the Public Health Service Act, as added by the Patient Protection and Affordable Care Act (Affordable Care Act), as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code. They also propose amendments to regulations to conform to Affordable Care Act provisions already in effect as well as those that will become effective beginning 2014. The proposed conforming amendments make changes to existing requirements such as preexisting condition limitations and other portability provisions added by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and implementing regulations because they have become moot or need amendment due to new market reform protections under the Affordable Care Act.

DATES: Comments are due on or before May 20, 2013.

ADDRESSES: Written comments may be submitted to the Department of Labor as specified below. Any comment that is submitted will be shared with the other Departments and will also be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Comments, identified by ''Waiting Periods'', may be submitted by one of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail or Hand Delivery: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N–5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, *Attention:* Waiting Periods.

Comments received will be posted without change to *www.regulations.gov* and available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Elizabeth Schumacher, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; Karen Levin or Kathryn Johnson, Internal Revenue Service, Department of the Treasury, at (202) 927–9639; or Cam Moultrie Clemmons, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (410) 786–1565.

Customer service information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department of Labor's Web site (*www.dol.gov/ebsa*). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) Web site (*www.cciio.cms.gov/*) and information on health reform can be found at *www.HealthCare.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act, Public Law 111–148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111–152, was enacted on March 30, 2010. (They are collectively known as the ''Affordable Care Act''.) The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The term ''group health plan'' includes both insured and self-insured group health plans.[1] The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by these references are sections 2701 through 2728.

PHS Act section 2708, as added by the Affordable Care Act and incorporated into ERISA and the Code, provides that a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period (as defined in PHS Act section 2704(b)(4)) that exceeds 90 days. PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period to be the period that must pass with respect to an individual before the individual is eligible to be covered for benefits under the terms of the plan. In 2004 regulations implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) portability provisions (2004 HIPAA regulations), the Departments of Labor, Health and Human Services, and the Treasury (the Departments) defined a waiting period to mean the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective.[2] PHS Act section 2708 applies to both grandfathered and non-grandfathered group health plans and group health insurance coverage for plan years beginning on or after January 1, 2014.

PHS Act section 2708 does not require an employer to offer coverage to any particular employee or class of employees, including part-time employees. PHS Act section 2708 merely prevents an otherwise eligible employee (or dependent) from being required to wait more than 90 days before coverage becomes effective. Furthermore, nothing in the Affordable Care Act penalizes small employers for choosing not to offer coverage, or applicable large employers, as defined in the employer shared responsibility provisions under Code section 4980H, for choosing to limit their offer of coverage to full-time employees (and their dependents), as defined in the employer shared responsibility provisions under Code section 4980H.

On February 9, 2012, the Departments issued guidance[3] outlining various approaches under consideration with respect to both the 90-day waiting period limitation and the employer shared responsibility provisions under Code section 4980H (February 2012 guidance). Public comments were invited generally, as well as specifically, regarding how rules relating to the potential look-back/stability period safe harbor method for determining the number of full-time employees under Code section 4980H should be coordinated with the 90-day waiting period limitation.

[1] The term ''group health plan'' is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term ''health plan,'' as used in other provisions of title I of the Affordable Care Act. The term ''health plan'' does not include self-insured group health plans.

[2] 26 CFR 54.9801–3(a)(3)(iii), 29 CFR 2590.701–3(a)(3)(iii), and 45 CFR 146.111(a)(3)(iii).

[3] Department of Labor Technical Release 2012–01, IRS Notice 2012–17, and HHS FAQs issued February 9, 2012.

On August 31, 2012, following their review of the comments on the February 2012 guidance, the Departments provided temporary guidance,[4] to remain in effect at least through the end of 2014, regarding the 90-day waiting period limitation, and described the approach they intended to propose in rulemaking in the future (August 2012 guidance). The August 2012 guidance provides that employers, plans, and issuers may rely on the compliance guidance at least through the end of 2014 and that, for purposes of enforcement by the Departments, compliance with the approach set forth in the August 2012 guidance will be considered compliance with the provisions of PHS Act section 2708 at least through the end of 2014.

In general, the August 2012 guidance provides, among other things, that eligibility conditions based solely on the lapse of a time period are permissible for no more than 90 days. Other conditions for eligibility under the terms of a group health plan are generally permissible under PHS Act section 2708, unless the condition is designed to avoid compliance with the 90-day waiting period limitation. The August 2012 guidance further clarifies that if, under the terms of a plan, an employee may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, the 90-day waiting period limitation is considered satisfied and, accordingly, a plan or issuer will not be considered to have violated PHS Act section 2708 solely because employees may take additional time to elect coverage.

The August 2012 guidance also addresses the application of PHS Act section 2708 to variable-hour employees in cases in which a specified number of hours of service per period is a plan eligibility condition. Specifically, the guidance provides that if a group health plan conditions eligibility on an employee regularly working a specified number of hours per period (or working full-time), and it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours per period (or work full-time), the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, which may include a measurement period that is consistent with the timeframe permitted for such determinations under Code section 4980H.[5] Except in cases in which a waiting period that exceeds 90 days is imposed in addition to a measurement period, the time period for determining whether such an employee meets the plan's eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date, plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month.

The August 2012 guidance also addresses application of the rules to plans with cumulative hours-of-service requirements. The August 2012 guidance includes an example stating that, if a plan's cumulative hours-of-service requirement is more than 1,200 hours, the Departments would consider the requirement to be designed to avoid compliance with the 90-day waiting period limitation.

After consideration of all of the comments received in response to the February 2012 guidance and in response to the August 2012 guidance, the Departments are proposing these regulations. Public comments on these proposed regulations are invited.

II. Overview of the Proposed Regulations

A. Prohibition on Waiting Periods That Exceed 90 Days

These regulations propose that a group health plan, and a health insurance issuer offering group health insurance coverage, not apply any waiting period that exceeds 90 days. (Neither a plan nor an issuer offering coverage is required to have any waiting period.) If, under the terms of the plan, an employee can elect coverage that becomes effective on a date that does not exceed the 90-day waiting period limitation, the coverage complies with the waiting period rules, and the plan or issuer will not be considered to violate the waiting period rules merely because individuals choose to elect coverage beyond the end of the 90-day waiting period.

In these proposed regulations, the definition of waiting period is the same as that used in the 2004 HIPAA regulations. (However, the definition is proposed to be moved from the section on preexisting condition exclusions to this section. See below for an explanation of other technical and conforming changes proposed to be made to the 2004 HIPAA regulations.) Accordingly, under these proposed regulations, waiting period would continue to be defined as the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective. These proposed regulations would also continue to include the clarification that, if an employee or dependent enrolls as a late enrollee or special enrollee, any period before such late or special enrollment is not a waiting period. The effective date of coverage for special enrollees continues to be that set forth in the Departments' 2004 HIPAA regulations governing special enrollment.[6]

Paragraph (c) of the proposed regulations sets forth rules governing the relationship between a plan's eligibility criteria and the 90-day waiting period limitation. Specifically, this paragraph provides that being otherwise eligible to enroll in a plan means having met the plan's substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms). However, the 90-day waiting period limitation generally does not require the plan sponsor to offer coverage to any particular employee or class of employees (including, for example, part-time employees). Instead, these proposed regulations would prohibit requiring otherwise eligible participants and beneficiaries to wait more than 90 days before coverage is effective.[7]

Under these proposed regulations, eligibility conditions that are based solely on the lapse of a time period would be permissible for no more than 90 days. Other conditions for eligibility under the terms of a group health plan (*i.e.,* those that are not based solely on the lapse of a time period) are generally permissible under PHS Act section 2708 and these proposed regulations unless the condition is designed to avoid compliance with the 90-day waiting period limitation.

These regulations propose an approach when applying waiting periods to variable-hour employees in

[4] Department of Labor Technical Release 2012–02, IRS Notice 2012–59, and HHS FAQs issued August 31, 2012.

[5] The August 2012 guidance provides that an employer may use a measurement period that is consistent with Code section 4980H, whether or not it is an applicable large employer subject to Code section 4980H.

[6] 26 CFR 54.9801–6, 29 CFR 2590.701–6, and 45 CFR 146.117.

[7] While a substantive eligibility condition that denies coverage for employees may be permissible under PHS Act section 2708, an applicable large employer's denial of coverage to a full-time employee may, nonetheless, give rise to an assessable payment under section 4980H of the Code and its implementing regulations.

cases in which a specified number of hours of service per period (such as 30 hours per week or 250 hours per quarter) is a plan eligibility condition. Under these proposed regulations, if a group health plan conditions eligibility on an employee regularly having a specified number of hours of service per period (or working full-time), and it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours per period (or work full-time), the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, which may include a measurement period of no more than 12 months that begins on any date between the employee's start date and the first day of the first calendar month following the employee's start date. (This is consistent with the timeframe permitted for such determinations under Code section 4980H and its implementing regulations.) Except for cases in which a waiting period that exceeds 90 days is imposed in addition to a measurement period, the time period for determining whether a variable-hour employee meets the plan's hours of service per period eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date, plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month.

Some commenters requested clarification regarding employees with specific or unique work schedules, and whether they would be treated as variable-hour employees. In this regard, unlike the rules under Code section 4980H, whether an employee has been appropriately classified as part-time, full-time, or variable-hour is of limited application under PHS Act section 2708. That is, conditions for eligibility under the terms of a group health plan are generally permissible under PHS Act section 2708, unless based solely on the lapse of time or designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan provisions that base eligibility on whether an employee is, for example, meeting certain sales goals or earning a certain level of commission, are generally substantive eligibility provisions that do not trigger the 90-day waiting period limitation. Some plan eligibility provisions, such as whether an employee has a specified number of hours of service per period (such as 30 hours per week or 250 hours per quarter) necessarily require the passage of time in order to determine whether the plan's substantive eligibility provision has been met. These proposed regulations set forth an approach under which such plan provisions will not be considered to be designed to avoid compliance with the 90-day waiting period limitation. However, whether a particular employee is classified appropriately as part-time, full-time, or variable-hour is generally not an issue under PHS Act section 2708, although other provisions of law (such as Code section 4980H, the HIPAA nondiscrimination provisions, and other provisions of ERISA) may be applicable.

Another type of plan eligibility provision addressed in the August 2012 guidance was cumulative hours-of-service requirements, which use more than solely the passage of a time period in determining whether employees are eligible for coverage. Specifically, the August 2012 guidance included an example stating that if a plan's cumulative hours-of-service requirement were more than 1,200 hours, the Departments would consider the requirement to be designed to avoid compliance with the 90-day waiting period limitation. Under these proposed regulations, if a group health plan or health insurance issuer conditions eligibility on any employee's (part-time or full-time) having completed a number of cumulative hours of service, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the cumulative hours-of-service requirement does not exceed 1,200 hours.[8] Under the proposed rules, the plan's waiting period must begin once the new employee satisfies the plan's cumulative hours-of-service requirement and may not exceed 90 days. Furthermore, this provision is designed to be a one-time eligibility requirement only; these proposed regulations do not permit, for example, re-application of such a requirement to the same individual each year.

In response to the August 2012 guidance, some commenters requested clarification regarding application of the rule to plan provisions that require employees to work sufficient number of hours per measurement period but permit employees, if they do not have a sufficient number of hours, to make a self-payment (or buy-in) equal to the amount which would allow them to have a sufficient number of hours within the measurement period. PHS Act section 2708 and these proposed regulations do not prohibit plan procedures permitting self-payment (or buy-in) to satisfy any otherwise permissible hours-of-service requirement.

Some commenters raised concerns about communication between a plan and issuer regarding the 90-day limitation on waiting periods. Commenters stated that many issuers rely on the plan sponsor for information about an individual's eligibility for coverage and that issuers may not have knowledge of certain plan terms, such as eligibility conditions and waiting periods. These commenters expressed concern that health insurance issuers are required to comply with the requirements of PHS Act section 2708, but must rely on the information plan sponsors and employers report to them regarding eligibility information such as an employee's start date. At the same time, small employers purchasing insurance coverage often rely on their issuers for compliance assistance. Therefore, while the requirements of PHS Act section 2708 and these proposed regulations would be applicable to both the plan and issuer, to the extent coverage under a group health plan is insured by a health insurance issuer, paragraph (f) of the proposed regulations would provide that the issuer can rely on the eligibility information reported to it by an employer (or other plan sponsor) and will not be considered to violate the requirements of these proposed regulations in administering the 90-day waiting period limitation if the issuer requires the plan sponsor to make a representation regarding the terms of any eligibility conditions or waiting periods imposed by the plan sponsor before an individual is eligible to become covered under the terms of the employer's plan (and requires the plan sponsor to update this representation with any changes), and the issuer has no specific knowledge of the imposition of a waiting period that would exceed the permitted 90-day period.

Paragraph (d) of the proposed regulations clarifies the method for counting days when applying a 90-day waiting period. Some commenters stated that it is common practice to have a 90-day waiting period with coverage effective the first day of the month after the 90-day waiting period and requested flexibility for administrative ease. Others requested the Departments to create a *de minimis* exception for the

[8] While a cumulative hours-of-service eligibility condition up to 1,200 hours may be permissible under PHS Act section 2708, an applicable large employer's denial of coverage to a full-time employee may, nonetheless, give rise to an assessable payment under section 4980H of the Code and its implementing regulations.

difference between 90 days and 3 months. Under these proposed regulations, due to the clear text of the statute, the waiting period may not extend beyond 90 days and all calendar days are counted beginning on the enrollment date, including weekends and holidays. For a plan with a waiting period, ''enrollment date'' is defined as the first day of the waiting period.[9] If, with respect to a plan or issuer imposing a 90-day waiting period, the 91st day is a weekend or holiday, the plan or issuer may choose to permit coverage to be effective earlier than the 91st day, for administrative convenience. However, a plan or issuer may not make the effective date of coverage later than the 91st day.

The Departments recognize that multiemployer plans maintained pursuant to collective bargaining agreements have unique operating structures and may include different eligibility conditions based on the participating employer's industry or the employee's occupation. For example, some comments received on the August 2012 guidance gave examples of plan eligibility provisions based on complex formulas for earnings and residuals. As discussed earlier, the Departments view eligibility provisions that are based on compensation as substantive eligibility provisions that are not designed to avoid compliance with the 90-day waiting period limitation. In addition, hours banks, which are common multiemployer plan provisions that allow workers to bank excess hours from one measurement period and then draw down on them to compensate for any shortage in a succeeding measurement period and prevent lapses in coverage, function as buy-in provisions, which were discussed earlier as permissible. It is the Departments' view that the proposed rules provide flexibility to both multiemployer and single-employer health plans to meet their needs in defining eligibility criteria, while also ensuring that employees are protected from excessive waiting periods. Comments are invited on these proposed rules and on whether any additional examples or provisions are needed to address multiemployer plans.

These proposed regulations generally would apply for plan years beginning on or after January 1, 2014, consistent with the statutory effective date of PHS Act section 2708. The rules would apply to both grandfathered and non-grandfathered group health plans and health insurance issuers offering group health insurance coverage. As with the applicability of the 2004 HIPAA regulations, with respect to individuals who are in a waiting period for coverage before the applicability date, beginning on the first day these rules apply to the plan, any waiting period can no longer apply in a manner that exceeds 90 days. However, as discussed below, the proposed amendment to eliminate the requirement to issue a certificate of creditable coverage is proposed to apply December 31, 2014, so that individuals needing to offset a preexisting condition exclusion under a plan that operates with a plan year beginning later than January 1 would still have access to the certificate for proof of coverage. Comments are invited on these proposed applicability dates.

The August 2012 guidance provided that group health plans and health insurance issuers may rely on the compliance guidance through at least the end of 2014. In the Departments' view, these proposed regulations are consistent with, and no more restrictive on employers than, the August 2012 guidance. Therefore, the Departments will consider compliance with these proposed regulations as compliance with PHS Act section 2708 at least through the end of 2014. (However, for changes outside of PHS Act section 2708 made to existing HIPAA regulations, such as the elimination of the requirement to provide a certificate of creditable coverage, the existing HIPAA regulations continue to apply until amended in new final regulations.) To the extent final regulations or other guidance with respect to the 90-day waiting period limitation is more restrictive on plans and issuers than these proposed regulations, the final regulations or other guidance will not be effective prior to January 1, 2015.

B. Conforming Changes to Existing Regulations

Sections 9801 of the Code and 701 of ERISA, and section 2701 of the PHS Act as originally added by HIPAA included requirements pertaining to the application of preexisting condition exclusions and waiting periods, as well as methods of crediting coverage. Final regulations implementing Code section 9801, ERISA section 701, and PHS Act section 2701 (as originally added by HIPAA) were adopted in 2004. The 2004 HIPAA regulations permit limited exclusions of coverage based on a preexisting condition under certain circumstances. PHS Act section 2704, added by the Affordable Care Act and incorporated into ERISA and the Code, amends the HIPAA requirements relating to preexisting conditions to provide that a group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion.[10] PHS Act section 2704 and the interim final regulations implementing that section are generally effective with respect to plan years (in the individual market, policy years) beginning on or after January 1, 2014, but for enrollees who are under 19 years of age, this prohibition became effective for plan years (in the individual market, policy years) beginning on or after September 23, 2010.[11] Therefore, these proposed regulations would amend the 2004 HIPAA regulations implementing Code sections 9801, ERISA section 701, and PHS Act section 2701 (as originally added by HIPAA), to remove provisions superseded by the prohibition on preexisting conditions under PHS Act section 2704 and the implementing regulations. Additionally, these regulations propose to amend examples in 26 CFR Part 54, 29 CFR Part 2590, and 45 CFR Parts 144 and 146 to conform to other changes made by the Affordable Care Act, such as the elimination of lifetime and annual limits under PHS Act section 2711 and its implementing regulations,[12] as well as the provisions governing dependent coverage of children to age 26 under PHS Act section 2714 and its implementing regulations.[13]

C. Technical Amendment Relating to OPM Multi-State Plan Program and External Review

Section 1334 of the Affordable Care Act creates the Multi-State Plan Program (MSPP) to foster competition in the Affordable Insurance Exchanges (Exchanges) and directs the U.S. Office of Personnel Management (OPM) to contract with private health insurance issuers to offer at least two multi-state plans (MSPs) on each of the Exchanges in the 50 states and the District of Columbia. Under Affordable Care Act section 1334(a)(4), OPM is to administer this program ''in a manner similar to the manner in which'' it implements the contracting provisions of the Federal Employee Health Benefits Program (FEHBP). OPM has interpreted Affordable Care Act section 1334(a)(4) to require implementation of a uniform, nationally applicable external review

[9] *See* 26 CFR 54.9801–3(a)(3)(i); 29 CFR 2590.701–3(a)(3)(i); and 45 CFR 146(a)(3)(i), which would be moved under these proposed rules to 26 CFR 54.9801–2; 29 CFR 2590.701–2; and 45 CFR 144.103.

[10] Affordable Care Act section 1201 also moved those provisions from PHS Act section 2701 to PHS Act section 2704.

[11] 75 FR 37188 (June 28, 2010).

[12] 75 FR 37188 (June 28, 2010).

[13] 75 FR 27122 (May 13, 2010).

process consistent with the requirements of PHS Act section 2719 for MSPs similar to that administered by OPM under FEHBP,[14] to ensure that the MSPP contract is administered consistently throughout all 51 jurisdictions that would be served by an MSP (as FEHBP currently does).

The ''level playing field'' requirement in section 1324 of the Affordable Care Act provides that ''[n]otwithstanding any other provision of law,'' requirements under State or Federal law in 13 categories (including appeals) ''shall not'' apply to ''health insurance offered by a private health insurance issuer'' if the requirement does not apply to MSPs established under the Affordable Care Act. Non-grandfathered health insurance coverage is generally required to comply with PHS Act section 2719 and its implementing regulations regarding internal claims and appeals and external review processes.[15] As a result, MSPP plans must also so comply, or other non-grandfathered insurance coverage would have to be similarly exempted.[16]

PHS Act section 2719 and its implementing regulations provide that group health plans and health insurance issuers must comply with either a State external review process or the Federal external review process. Generally, if a State has an external review process that meets, at a minimum, the consumer protections set forth in the interim final regulations, then the issuer (or a plan) subject to the State process must comply with the State process.[17] For plans and issuers not subject to an existing State external review process (including self-insured plans), a Federal external review process applies.[18] The statute requires the Departments to establish standards, ''through guidance,'' governing a Federal external review process. Among such guidance that has been issued by the Departments, HHS has established a Federal external review process for self-insured nonfederal governmental health plans, as well as for plans and issuers in States that do not meet the minimum consumer protections in the regulations.

In this rule, the Departments propose to clarify that MSPs will be subject to the Federal external review process under PHS section 2719(b)(2) and paragraph (d) of the internal claims and appeals and external review regulations. In doing so, the Departments interpret section 2719(b)(2) to apply to all plans *not subject to a State's external review process* (emphasis added).[19] OPM's final rule on the establishment of the multi-State plan program[20] requires the MSPP external review process to meet the requirements of PHS Act section 2719 and its implementing regulations.

Additionally, the Departments propose to clarify that the scope of the Federal external review process, as described in paragraph (d)(1)(ii) of the regulations, is the minimum required scope of claims eligible for external review for plans using a Federal external review process, and that Federal external review processes developed in accordance with paragraph (d) may have a scope that exceeds the minimum requirements. For example, OPM stated that the scope of the MSP external review process would allow for appeals of all disputed claims.[21] This clarification would reiterate that the proposed external review process would meet the minimum requirement for the scope of a Federal external review process under the regulations.

III. Economic Impact and Paperwork Burden

A. Executive Order 12866 and 13563—Department of Labor and Department of Health and Human Services

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, a regulatory action deemed ''significant'' is subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

These proposed regulations are not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, OMB has determined that the actions are significant within the meaning of section 3(f)(4) of the Executive Order. Therefore, OMB has reviewed these proposed regulations, and the Departments have provided the following assessment of their impact.

1. Summary

As stated earlier in this preamble, these proposed regulations would implement PHS Act section 2708, which provides that a group health plan, and a health insurance issuer offering group health insurance coverage, may not apply any waiting period that exceeds 90 days. The proposed regulations define ''waiting period'' as the period that must pass before coverage for an

[14] OPM published a final rule on establishment of the MSPP on March 11, 2013 at 78 FR 15559.

[15] The interim final regulations relating to internal claims and appeals and external review processes are codified at 26 CFR 54.9815–2719T, 29 CFR 2590.715–2719, and 45 CFR 147.136. These requirements do not apply to grandfathered health plans. The interim final regulations relating to status as a grandfathered health plan are codified at 26 CFR 54.9815–1251T, 29 CFR 2590.715–1251, and 45 CFR 147.140.

[16] The amendments in these proposed regulations only seek to address the differences that exist between the proposed MSPP external review process and the external review requirements for group health plans and health insurance issuers. While MSPP is also required to comply with the requirements related to internal claims and appeals, OPM's proposed process does not differ from the internal claims and appeals requirements for group health plans and health insurance issuers.

[17] More information on the regulatory requirements for State external review processes, including the regulations, Uniform Health Carrier External Review Model Act promulgated by the National Association of Insurance Commissioners, technical releases, and other guidance, is available at *http://www.dol.gov/ebsa* and *http://cciio.cms.gov.*

[18] More information on the regulatory requirements for the Federal external review process, including the regulations, technical releases, and other guidance, is available at *http://www.dol.gov/ebsa* and *http://cciio.cms.gov.*

[19] We note that this interpretation of section 2719(b)(2) as applicable to MSPs is supported by the fact that Congress directed that the MSPP be implemented by OPM, and OPM is not a state.

[20] *See 45 CFR 800.115(k)* and *45 CFR part 800.*

[21] 45 CFR 800.504(a). See also 78 FR 15559, 15582–15584 (March 11, 2013), the Preamble to the Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges; Final Rule.

employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective, which is the same definition used in the 2004 HIPAA regulations. The proposed regulations would generally apply to plan years beginning on or after January 1, 2014, consistent with the statutory effective date of PHS Act section 2708.[22]

The Departments have crafted these proposed regulations to secure the protections intended by Congress in an economically efficient manner. The Departments do not have sufficient data to quantify the regulations' economic cost or benefits; therefore, they have provided a qualitative discussion of their economic impacts and request detailed comment and data that would allow for quantification of the costs, benefits, and transfers that would be brought about by the proposed rule.

2. Estimated Number of Affected Entities

The Departments estimate that 4.1 million new employees receive group health insurance coverage through private sector employers and 1.0 million new employees receive group health insurance coverage through public sector employers annually.[23] The 2012 Kaiser Family Foundation and Health Research and Education Trust Employer Health Benefits Annual Survey (the ''2012 Kaiser Survey'') finds that only eight percent of covered workers were subject to waiting periods of four months or more.[24] If eight percent of new employees receiving health care from their employers are subject to a waiting period of four months or more, then 408,000 new employees (5.1 million × 0.08) would be affected by this rule.[25] However, the Departments would note that it is unlikely that the survey defines the term ''waiting period'' in the same manner as these proposed regulations. For example, waiting period may have been defined by reference to an employee's start date, and it seems unlikely that the 2012 Kaiser Survey would have included the clarifications included in these proposed regulations regarding the measurement period for variable-hour employees or the clarification regarding cumulative hours-of-service requirements.

3. Benefits

Before Congress enacted PHS Act section 2708, federal law did not prescribe any limits on waiting periods for group health insurance coverage.

If employees delay health care treatment until the expiration of a prolonged waiting period, detrimental health effects can result, especially for employees and their dependents requiring higher levels of health care, such as older Americans, pregnant women, young children, and those with chronic conditions. This could lead to lower work productivity and missed school days. Low-wage workers also are vulnerable, because they have less income to spend out-of-pocket to cover medical expenses. The Departments anticipate that these proposed regulations can help reduce these effects, although the overall benefit may be limited because—as discussed in greater detail below—a small fraction of employers are expected to offer earlier health insurance coverage as a result of these proposed regulations.

As discussed earlier in this preamble, these proposed regulations would amend the 2004 HIPAA regulations implementing Code sections 9801, ERISA section 701, and PHS Act section 2701 (as originally added by HIPAA) to remove provisions superseded by the prohibition on preexisting conditions under PHS Act section 2704 and the implementing regulations. These amendments would provide a benefit to plans by reducing the burden associated with complying with the several Paperwork Reduction Act information collections that are associated with the superseded regulations. For a discussion of the affected information collections and the estimated cost and burden hour reduction, please see the Paperwork Reduction Act section, below.

4. Transfers Associated with the Rule

The possible transfers associated with this proposed rule would arise if employers begin to pay their portion of health insurance premiums or contributions sooner than they did before the enactment of PHS Act section 2708 and issuance of these proposed regulations. Recipients of the transfers would be covered employees and their dependents who would, if these proposed regulations are finalized, not be subject to excessive waiting periods during which they must forgo health coverage, purchase COBRA continuation coverage, or obtain an individual health insurance policy—all of which are options that could lead to higher out-of-pocket costs for employees to cover their healthcare expenditures. As discussed above, federal law did not limit the duration of waiting periods in the group health plans market before the enactment of PHS Act section 2708.

The Departments do not believe that this rule, on its own, will cause more than a marginal number of employers to offer coverage earlier to their employees because this provision on its own does not require employers to offer coverage and there is significant flexibility afforded to employers in these proposed regulations to maintain or revise their current group health plan eligibility conditions. For example, paragraph (c)(3)(ii) of the proposed regulations provides that if a group health plan or health insurance issuer conditions eligibility on any employee's (part-time or full-time) having completed a number of cumulative hours of service, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the cumulative hours-of-service requirement does not exceed 1,200 hours. This is intended to provide plan sponsors with flexibility to continue the common practice of utilizing a probationary or trial period to determine whether a new employee will be able to handle the duties and challenges of the job, while providing protections against excessive waiting periods for such employees. Under these proposed regulations, the plan's waiting period must begin once the new employee satisfies the plan's cumulative hours-of-service requirement and may not exceed 90 days.

Therefore, an employee who must meet a cumulative hours-of-service requirement of 1,200 hours could be employed for ten months[26] before their health coverage becomes effective and only employers that had a waiting period longer than ten months before the enactment of PHS Act section 2708 and these proposed regulations would necessarily incur a transfer for additional coverage. Because the 2012 Kaiser Survey reports that just eight percent of covered workers are in plans with waiting periods of four months or more and the overall average waiting period is just 2.3 months, the

[22] As stated earlier, the Departments' August 2012 guidance provided that group health plans and health insurance issuers may rely on the compliance guidance through at least the end of 2014. In the Departments' view, these proposed regulations are consistent with, and no more restrictive on employers than, the August 2012 guidance. Therefore, the Departments will consider compliance with these proposed regulations as compliance with PHS Act section 2708 at least through the end of 2014.

[23] This estimate is based upon internal Department of Labor calculations derived from the 2009 Medical Expenditure Panel Survey.

[24] *See e.g.,* Kaiser Family Foundation and Health Research and Education Trust, *Employer Health Benefits 2012 Annual Survey* (2012) available at *http://ehbs.kff.org/pdf/2012/8345.pdf.*

[25] Approximately 331,000 private sector employees and 77,000 state and local public sector employees.

[26] 1,200 hours/40 hours per week = 30 weeks; 30 weeks *7 days/week = 210 days; 210 days eligibility requirement + 90 day wait period = 300 days.

Departments are confident that such long waiting periods are rare.

B. Paperwork Reduction Act

1. Department of Labor and Department of the Treasury

As stated above, Sections 9801 of the Code and 701 of ERISA, and 2701 of the PHS Act as originally added by Health Insurance Portability and Accountability Act of 1996, included requirements pertaining to the application of preexisting conditions exclusions and waiting periods as well as methods of crediting coverage. The 2004 HIPAA regulations (in effect prior to the effective date of these amendments) permit limited exclusions of coverage based on a preexisting condition under certain circumstances.

PHS Act section 2704, added by the Affordable Care Act and incorporated into ERISA and the Code, amends the 2004 HIPAA regulations relating to preexisting conditions to provide that a group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion. PHS Act section 2704 and the interim final regulations implementing that section are generally effective with respect to plan years (in the individual market, policy years) beginning on or after January 1, 2014, but for enrollees who are under 19 years of age, this prohibition became effective for plan years (in the individual market, policy years) beginning on or after September 23, 2010. Therefore, these regulations propose to amend the 2004 HIPAA regulations implementing Code sections 9801, ERISA section 701, and PHS Act section 2701 (as originally added by HIPAA), to remove provisions superseded by the prohibition on preexisting conditions under PHS Act section 2704 and the implementing regulations.

The Departments are proposing to discontinue the following Information Collection Requests (ICRs) that are associated with the superseded regulation: The Notice of Preexisting Condition Exclusion under Group Health Plans, which is approved under OMB Control Number 1210–0102 through January 31, 2016, and Establishing Creditable Coverage under Group Health Plans, which is approved under OMB Control Number 1210–0103 through January 31, 2016.

Additionally, the Departments are proposing to revise Final Regulations for Health Coverage Portability for Group Health Plans and Group Health Insurance Issuers under HIPAA Titles I & IV, which is approved under OMB Control Number 1545–1537 through January 31, 2014, to remove the Health Plans Imposing Pre-existing Condition Notification Requirements, Certification Requirements, and Exclusion Period Notification Information Collections within this ICR because they are associated with the superseded regulation.

Discontinuing and revising these ICRs would result in a total burden reduction of approximately 341,000 hours (5,000 hours attributable to OMB Control Number 1210–0102, 74,000 hours attributable to OMB Control Number 1210–0103, and 262,000 hours attributable to OMB Control Number 1545–1537) and a total cost burden reduction of approximately $32.7 million ($1.1 million attributable to OMB Control Number 1210–0102, $12.4 million attributable to OMB Control Number 1210–0103, and $19.2 million attributable to OMB Control Number 1545–1537).

C. Regulatory Flexibility Act—Department of Labor and Department of Health and Human Services

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) applies to most Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.). Unless an agency certifies that such a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of analysis under the RFA, the Departments propose to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(3) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for welfare benefit plans that cover fewer than 100 participants.[27]

Further, while some large employers may have small plans, in general, small employers maintain most small plans. Thus, the Departments believe that assessing the impact of these proposed regulations on small plans is an appropriate substitute for evaluating the effect on small entities.

The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 et seq.). The Departments therefore request comments on the appropriateness of the size standard used in evaluating the impact of these proposed regulations on small entities.

The Departments carefully considered the likely impact of the rule on small entities in connection with their assessment under Executive Order 12866. The Departments lack data to focus only on the impacts on small business. However, the Departments believe that the proposed rule includes flexibility that would allow small employers to minimize the transfers in health insurance premiums that they would have to pay to employees.

The Departments hereby certify that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Consistent with the policy of the RFA, the Departments encourage the public to submit comments that would allow the Departments to assess the impacts specifically on small plans or suggest alternative rules that accomplish the stated purpose of PHS Act section 2708 and minimize the impact on small entities.

D. Special Analyses—Department of the Treasury

For purposes of the Department of the Treasury, it has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations, and, because these proposed regulations do not impose a collection of information requirement on small entities, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to Code section 7805(f), this notice of proposed rulemaking has been

[27] Under ERISA section 104(a)(2), the Secretary may also provide exemptions or simplified reporting and disclosure requirements for pension plans. Pursuant to the authority of ERISA section 104(a)(3), the Department of Labor has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, that cover fewer than 100 participants and satisfy certain other requirements.

submitted to the Small Business Administration for comment on its impact on small business.

E. Congressional Review Act

These proposed regulations are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and, if finalized, will be transmitted to the Congress and the Comptroller General for review.

F. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, these proposed rules do not include any proposed federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector, of $100 million or more adjusted for inflation ($141 million in 2013).

G. Federalism Statement—Department of Labor and Department of Health and Human Services

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have ''substantial direct effects'' on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the regulation.

In the Departments' view, these proposed regulations have federalism implications, because they have direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among various levels of government. In general, through section 514, ERISA supersedes State laws to the extent that they relate to any covered employee benefit plan, and preserves State laws that regulate insurance, banking, or securities. While ERISA prohibits States from regulating a plan as an insurance or investment company or bank, the preemption provisions of ERISA section 731 and PHS Act section 2724 (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the HIPAA requirements (including those of the Affordable Care Act) are not to be ''construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement'' of a federal standard. The conference report accompanying HIPAA indicates that this is intended to be the ''narrowest'' preemption of State laws. (See House Conf. Rep. No. 104–736, at 205, reprinted in 1996 U.S. Code Cong. & Admin. News 2018.)

States may continue to apply State law requirements except to the extent that such requirements prevent the application of the Affordable Care Act requirements that are the subject of this rulemaking. State insurance laws that are more stringent than the Federal requirements are unlikely to ''prevent the application of'' the Affordable Care Act, and be preempted. Accordingly, States have significant latitude to impose requirements on health insurance issuers that are more restrictive than the Federal law.

Guidance conveying this interpretation was published in the **Federal Register** on April 8, 1997 (62 FR 16904), and December 30, 2004 (69 FR 78720), and these proposed rules would clarify and implement the statute's minimum standards and would not significantly reduce the discretion given the states by the statute.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Departments have engaged in efforts to consult with and work cooperatively with affected State and local officials, including attending conferences of the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis.

Throughout the process of developing these proposed regulations, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Departments have attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every State. By doing so, it is the Departments' view that they have complied with the requirements of Executive Order 13132.

IV. Statutory Authority

The Department of the Treasury regulations are proposed to be adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are proposed to be adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104–191, 110 Stat. 1936; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services regulations are proposed to be adopted, with respect to 45 CFR Part 146, pursuant to the authority contained in sections 2702 through 2705, 2711 through 2723, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg–1 through 300gg–5, 300gg–11 through 300gg–23, 300gg–91, and 300gg–92), and, with respect to 45 CFR Part 147, pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

List of Subjects

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 144

Health care, Health insurance, Reporting and recordkeeping requirements.

45 CFR Parts 146 and 147

Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Signed this 14th day of March, 2013.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Dated: March 13, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: March 14, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Accordingly, 26 CFR part 54 is proposed to be amended as follows:

PART 54—PENSION EXCISE TAXES

■ **Paragraph 1.** The authority citation for Part 54 is amended by adding an entry for § 54.9815–2708 in numerical order to read in part as follows:

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

Section 54.9815–2708 is also issued under 26 U.S.C. 9833.

■ **Par. 2.** Section 54.9801–1 is amended by revising paragraph (b) to read as follows:

§ 54.9801–1 Basis and scope.

* * * * *

(b) *Scope.* A group health plan or health insurance issuer offering group health insurance coverage may provide greater rights to participants and beneficiaries than those set forth in the portability and market reform sections of this part 54. This part 54 sets forth minimum requirements for group health plans and group health insurance issuers offering group health insurance coverage concerning certain consumer protections of the Health Insurance Portability and Accountability Act (HIPAA), including special enrollment periods and the prohibition against discrimination based on a health factor, as amended by the Patient Protection and Affordable Care Act (Affordable Care Act). Other consumer protection provisions, including other protections provided by the Affordable Care Act and the Mental Health Parity and Addiction Equity Act are set forth in this part 54.

* * * * *

■ **Par. 3.** Section 54.9801–2 is amended by revising the definitions of ''*enrollment date*'', ''*late enrollment*'', and ''*waiting period*'', and by adding definitions of ''*first day of coverage*'' and ''*late enrollee*'' in alphabetical order, to read as follows:

§ 54.9801–2 Definitions.

* * * * *

Enrollment date means the first day of coverage or, if there is a waiting period, the first day of the waiting period. If an individual receiving benefits under a group health plan changes benefit packages, or if the plan changes group health insurance issuers, the individual's enrollment date does not change.

* * * * *

First day of coverage means, in the case of an individual covered for benefits under a group health plan, the first day of coverage under the plan and, in the case of an individual covered by health insurance coverage in the individual market, the first day of coverage under the policy or contract.

* * * * *

Late enrollee means an individual whose enrollment in a plan is a late enrollment.

Late enrollment means enrollment of an individual under a group health plan other than the earliest date on which coverage can become effective for the individual under the terms of the plan, or through special enrollment. (For rules relating to special enrollment, see § 54.9801–6.) If an individual ceases to be eligible for coverage under a plan, and then subsequently becomes eligible for coverage under the plan, only the individual's most recent period of eligibility is taken into account in determining whether the individual is a late enrollee under the plan with respect to the most recent period of coverage. Similar rules apply if an individual again becomes eligible for coverage following a suspension of coverage that applied generally under the plan.

* * * * *

Waiting period means *waiting period* within the meaning of § 54.9815–2708(b).

* * * * *

■ **Par. 4.** Section 54.9801–3 is amended by:

■ A. Removing paragraphs (a)(2), (a)(3), (c), (d), (e) and (f).

■ B. Revising the heading to paragraph (a).

■ C. Removing paragraph (a)(1) introductory text, and redesignating paragraphs (a)(1)(i) and (a)(1)(ii) as paragraphs (a)(1) and (a)(2).

■ D. Amending paragraph (a)(2) by revising paragraph (ii) of Examples 1 and 2, by revising Example 3 and Example 4, and by revising paragraph (ii) of Examples 5, 6, 7 and 8.

■ E. Revising paragraph (b).

The revisions read as follows:

§ 54.9801–3 Limitations on preexisting condition exclusion period.

(a) *Preexisting condition exclusion defined*—

* * * * *

(2) * * *

Example 1. * * *

(ii) *Conclusion.* In this *Example 1,* the exclusion of benefits for any prosthesis if the body part was lost before the effective date of coverage is a preexisting condition exclusion because it operates to exclude benefits for a condition based on the fact that the condition was present before the effective date of coverage under the policy. The exclusion of benefits, therefore, is prohibited.

Example 2. * * *

(ii) *Conclusion.* In this *Example 2,* the plan provision excluding cosmetic surgery benefits for individuals injured before enrolling in the plan is a preexisting condition exclusion because it operates to exclude benefits relating to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 3. (i) *Facts.* A group health plan provides coverage for the treatment of diabetes, generally not subject to any requirement to obtain an approval for a treatment plan. However, if an individual was diagnosed with diabetes before the effective date of coverage under the plan, diabetes coverage is subject to a requirement to obtain approval of a treatment plan in advance.

(ii) *Conclusion.* In this *Example 3,* the requirement to obtain advance approval of a treatment plan is a preexisting condition exclusion because it limits benefits for a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 4. (i) *Facts.* A group health plan provides coverage for three infertility treatments. The plan counts against the three-treatment limit benefits provided under prior health coverage.

(ii) *Conclusion.* In this *Example 4,* counting benefits for a specific condition provided under prior health coverage against a treatment limit for that condition is a preexisting condition exclusion because it operates to limit benefits for a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 5. * * *

(ii) *Conclusion.* In this *Example 5,* the requirement to be covered under the plan for 12 months to be eligible for pregnancy benefits is a subterfuge for a preexisting condition exclusion because it is designed to exclude benefits for a condition (pregnancy) that arose before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 6. * * *

(ii) *Conclusion.* In this *Example 6,* the exclusion of coverage for treatment of congenital heart conditions is a preexisting

condition exclusion because it operates to exclude benefits relating to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 7. * * *

(ii) *Conclusion.* In this *Example 7,* the exclusion of coverage for treatment of cleft palate is not a preexisting condition exclusion because the exclusion applies regardless of when the condition arose relative to the effective date of coverage. The plan provision, therefore, is not prohibited. (But see 45 CFR 147.150, which may require coverage of cleft palate as an essential health benefit for health insurance coverage in the individual or small group market).

Example 8. * * *

(ii) *Conclusion.* In this *Example 8,* the exclusion of coverage for treatment of cleft palate for individuals who have not been covered under the plan from the date of birth operates to exclude benefits in relation to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

* * * * *

(b) *General rules. See* § 54.9815–2704T for rules prohibiting the imposition of a preexisting condition exclusion.

■ **Par. 5.** Section 54.9801–4 is amended by removing paragraphs (a)(3) and (c), and revising paragraph (b) to read as follows:

§ 54.9801–4 Rules relating to creditable coverage.

* * * * *

(b) *Counting creditable coverage rules superseded by prohibition on preexisting condition exclusion. See* § 54.9815–2704T for rules prohibiting the imposition of a preexisting condition exclusion.

■ **Par. 6.** Section 54.9801–5 is revised to read as follows:

§ 54.9801–5 Evidence of creditable coverage.

(a) *In general.* The rules for providing certificates of creditable coverage and demonstrating creditable coverage have been superseded by the prohibition on preexisting condition exclusions. *See* § 54.9815–2704T for rules prohibiting the imposition of a preexisting condition exclusion.

(b) *Applicability.* The amendments made under this section apply beginning December 31, 2014.

■ **Par. 7.** Section 54.9801–6 is amended by removing paragraph (a)(3)(i)(E) and revising paragraphs (a)(3)(i)(C), (a)(3)(i)(D), (a)(4)(i) and (d)(2) to read as follows:

§ 54.9801–6 Special enrollment periods.

* * * * *

(a) * * *

(3) * * *

(i) * * *

(C) In the case of coverage offered through an HMO, or other arrangement, in the group market that does not provide benefits to individuals who no longer reside, live, or work in a service area, loss of coverage because an individual no longer resides, lives, or works in the service area (whether or not within the choice of the individual), and no other benefit package is available to the individual; and

(D) A situation in which a plan no longer offers any benefits to the class of similarly situated individuals (as described in § 54.9802–1(d)) that includes the individual.

* * * * *

(4) * * *

(i) A plan or issuer must allow an employee a period of at least 30 days after an event described in paragraph (a)(3) of this section to request enrollment (for the employee or the employee's dependent).

* * * * *

(d) * * *

(2) Special enrollees must be offered all the benefit packages available to similarly situated individuals who enroll when first eligible. For this purpose, any difference in benefits or cost-sharing requirements for different individuals constitutes a different benefit package. In addition, a special enrollee cannot be required to pay more for coverage than a similarly situated individual who enrolls in the same coverage when first eligible.

* * * * *

■ **Par. 8.** Section 54.9802–1 is amended by:

■ A. Removing paragraph (b)(3) and revising paragraphs (b)(1)(i) and (b)(2)(i)(B).

■ B. Revising Example 1, paragraph (i) of Example 2, paragraph (ii) of Example 4, paragraph (ii) of Example 5, and removing Example 8 in paragraph (b)(2)(i)(D).

■ C. Revising Example 2, and paragraph (i) of Example 5, in paragraph (d)(4).

■ D. Revising paragraph (ii) of Example 2 in paragraph (e)(2)(i)(B).

■ E. Revising Example 1 in paragraph (g)(1)(ii).

The revisions read as follows:

§ 54.9802–1 Prohibiting discrimination against participants and beneficiaries based on a health factor.

* * * * *

(b) * * *

(1) * * *

(i) A group health plan may not establish any rule for eligibility (including continued eligibility) of any individual to enroll for benefits under the terms of the plan that discriminates based on any health factor that relates to that individual or a dependent of that individual. This rule is subject to the provisions of paragraph (b)(2) of this section (explaining how this rule applies to benefits), paragraph (d) of this section (containing rules for establishing groups of similarly situated individuals), paragraph (e) of this section (relating to nonconfinement, actively-at-work, and other service requirements), paragraph (f) of this section (relating to wellness programs), and paragraph (g) of this section (permitting favorable treatment of individuals with adverse health factors).

* * * * *

(2) * * *

(i) * * *

(B) However, benefits provided under a plan must be uniformly available to all similarly situated individuals (as described in paragraph (d) of this section). Likewise, any restriction on a benefit or benefits must apply uniformly to all similarly situated individuals and must not be directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries (determined based on all the relevant facts and circumstances). Thus, for example, a plan may limit or exclude benefits in relation to a specific disease or condition, limit or exclude benefits for certain types of treatments or drugs, or limit or exclude benefits based on a determination of whether the benefits are experimental or not medically necessary, but only if the benefit limitation or exclusion applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries. In addition, a plan may require the satisfaction of a deductible, copayment, coinsurance, or other cost-sharing requirement in order to obtain a benefit if the limit or cost-sharing requirement applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries. In the case of a cost-sharing requirement, see also paragraph (b)(2)(ii) of this section, which permits variances in the application of a cost-sharing mechanism made available under a wellness program. (Whether any plan provision or practice with respect to benefits complies with this paragraph (b)(2)(i) does not affect whether the provision or practice is permitted under ERISA, the Affordable Care Act (including the requirements related to essential health

benefits), the Americans with Disabilities Act, or any other law, whether State or Federal.)

* * * * *

(D) * * *

Example 1. (i) *Facts.* A group health plan applies a $10,000 annual limit on a specific covered benefit that is not an essential health benefit to each participant or beneficiary covered under the plan. The limit is not directed at individual participants or beneficiaries.

(ii) *Conclusion.* In this *Example 1,* the limit does not violate this paragraph (b)(2)(i) because coverage of the specific, non-essential health benefit up to $10,000 is available uniformly to each participant and beneficiary under the plan and because the limit is applied uniformly to all participants and beneficiaries and is not directed at individual participants or beneficiaries.

Example 2. (i) *Facts.* A group health plan has a $500 deductible on all benefits for participants covered under the plan. Participant *B* files a claim for the treatment of AIDS. At the next corporate board meeting of the plan sponsor, the claim is discussed. Shortly thereafter, the plan is modified to impose a $2,000 deductible on benefits for the treatment of AIDS, effective before the beginning of the next plan year.

* * * * *

Example 4. * * *

(ii) *Conclusion.* In this *Example 4,* the limit does not violate this paragraph (b)(2)(i) because $2,000 of benefits for the treatment of TMJ are available uniformly to all similarly situated individuals and a plan may limit benefits covered in relation to a specific disease or condition if the limit applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries. (However, applying a lifetime limit on TMJ may violate § 54.9815–2711, if TMJ coverage is an essential health benefit. This example does not address whether the plan provision is permissible under any other applicable law, including PHS Act section 2711 or the Americans with Disabilities Act.)

Example 5. * * *

(ii) *Conclusion.* In this *Example 5,* the lower lifetime limit for participants and beneficiaries with a congenital heart defect violates this paragraph (b)(2)(i) because benefits under the plan are not uniformly available to all similarly situated individuals and the plan's lifetime limit on benefits does not apply uniformly to all similarly situated individuals. Additionally, this plan provision is prohibited under § 54.9815–2711 because it imposes a lifetime limit on essential health benefits.

* * * * *

(d) * * *

(4) * * *

Example 2. (i) *Facts.* Under a group health plan, coverage is made available to employees, their spouses, and their children. However, coverage is made available to a child only if the child is under age 26 (or under age 29 if the child is continuously enrolled full-time in an institution of higher learning (full-time students)). There is no evidence to suggest that these classifications are directed at individual participants or beneficiaries.

(ii) *Conclusion.* In this Example 2, treating spouses and children differently by imposing an age limitation on children, but not on spouses, is permitted under this paragraph (d). Specifically, the distinction between spouses and children is permitted under paragraph (d)(2) of this section and is not prohibited under paragraph (d)(3) of this section because it is not directed at individual participants or beneficiaries. It is also permissible to treat children who are under age 26 (or full-time students under age 29) as a group of similarly situated individuals separate from those who are age 26 or older (or age 29 or older if they are not full-time students) because the classification is permitted under paragraph (d)(2) of this section and is not directed at individual participants or beneficiaries.

* * * * *

Example 5. (i) *Facts.* An employer sponsors a group health plan that provides the same benefit package to all seven employees of the employer. Six of the seven employees have the same job title and responsibilities, but Employee *G* has a different job title and different responsibilities. After *G* files an expensive claim for benefits under the plan, coverage under the plan is modified so that employees with *G's* job title receive a different benefit package that includes a higher deductible than in the benefit package made available to the other six employees.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(B) * * *

Example 2. * * *

(ii) *Conclusion.* In this Example 2, the plan violates this paragraph (e)(2) (and thus also paragraph (b) of this section) because the 90-day continuous service requirement is a rule for eligibility based on whether an individual is actively at work. However, the plan would not violate this paragraph (e)(2) or paragraph (b) of this section if, under the plan, an absence due to any health factor is not considered an absence for purposes of measuring 90 days of continuous service. (In addition, any eligibility provision that is time-based must comply with the requirements of PHS Act section 2708 and its implementing regulations.)

* * * * *

(g) * * *

(1) * * *

(ii) * * *

Example 1. (i) *Facts.* An employer sponsors a group health plan that generally is available to employees, spouses of employees, and dependent children until age 26. However, dependent children who are disabled are eligible for coverage beyond age 26.

(ii) *Conclusion.* In this Example 1, the plan provision allowing coverage for disabled dependent children beyond age 26 satisfies this paragraph (g)(1) (and thus does not violate this section).

* * * * *

■ **Par. 9.** Section 54.9815–2708 is added to read as follows:

§ 54.9815–2708 Prohibition on waiting periods that exceed 90 days.

(a) *General rule.* A group health plan, and a health insurance issuer offering group health insurance coverage, must not apply any waiting period that exceeds 90 days, in accordance with the rules of this section. If, under the terms of a plan, an employee can elect coverage that would begin on a date that is not later than the end of the 90-day waiting period, this paragraph (a) is considered satisfied. Accordingly, a plan or issuer in that case will not be considered to have violated this paragraph (a) solely because employees (or other classes of participants) may take additional time (beyond the end of the 90-day waiting period) to elect coverage.

(b) *Waiting period defined.* For purposes of this part, a waiting period is the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective. If an employee or dependent enrolls as a late enrollee (as defined under § 54.9801–2) or special enrollee (as described in § 54.9801–6), any period before such late or special enrollment is not a waiting period.

(c) *Relation to a plan's eligibility criteria*—(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, being otherwise eligible to enroll under the terms of a group health plan means having met the plan's substantive eligibility conditions (such as, for example, being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms). Moreover, except as provided in paragraphs (c)(2) and (c)(3) of this section, nothing in this section requires a plan sponsor to offer coverage to any particular employee or class of employees (including, for example, part-time employees). Instead, this section prohibits requiring otherwise eligible participants and beneficiaries to wait more than 90 days before coverage is effective. (While a substantive eligibility condition that denies coverage to employees may be permissible under this section, a failure by an applicable large employer (as defined in section 4980H) to offer coverage to a full-time employee might, for example, nonetheless give rise to an assessable payment under section 4980H and its implementing regulations.)

(2) *Eligibility conditions based solely on the lapse of time.* Eligibility conditions that are based solely on the

lapse of a time period are permissible for no more than 90 days.

(3) *Other conditions for eligibility.* Other conditions for eligibility under the terms of a group health plan are generally permissible under PHS Act section 2708, unless the condition is designed to avoid compliance with the 90-day waiting period limitation, determined in accordance with the rules of this paragraph (c)(3).

(i) *Application to variable-hour employees in cases in which a specified number of hours of service per period is a plan eligibility condition.* If a group health plan conditions eligibility on an employee regularly having a specified number of hours of service per period (or working full-time), and it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours per period (or work full-time), the plan may take a reasonable period of time, not to exceed 12 months and beginning on any date between the employee's start day and the first day of the first calendar month following the employee's start date, to determine whether the employee meets the plan's eligibility condition. Except in cases in which a waiting period that exceeds 90 days is imposed in addition to a measurement period, the time period for determining whether such an employee meets the plan's eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date, plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month.

(ii) *Cumulative service requirements.* If a group health plan or health insurance issuer conditions eligibility on an employee's having completed a number of cumulative hours of service, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the cumulative hours-of-service requirement does not exceed 1,200 hours.

(d) *Counting days.* Under this section, all calendar days are counted beginning on the enrollment date (as defined in § 54.9801–2), including weekends and holidays. If, in the case of a plan or issuer imposing a 90-day waiting period, the 91st day is a weekend or holiday, the plan or issuer may choose to permit coverage to become effective earlier than the 91st day, for administrative convenience. Similarly, plans and issuers that do not want to start coverage in the middle of a month (or pay period) may choose to permit coverage to become effective earlier than the 91st day, for administrative convenience. For example, a plan may impose a waiting period of 60 days plus a fraction of a month (or pay period) until the first day of the next month (or pay period). However, a plan or issuer that extends the effective date of coverage beyond the 91st day fails to comply with the 90-day waiting period limitation.

(e) *Examples.* The rules of this section are illustrated by the following examples:

Example 1. (i) *Facts.* A group health plan provides that full-time employees are eligible for coverage under the plan. Employee *A* begins employment as a full-time employee on January 19.

(ii) *Conclusion.* In this *Example 1,* any waiting period for *A* would begin on January 19 and may not exceed 90 days. Coverage under the plan must become effective no later than April 19 (assuming February lasts 28 days).

Example 2. (i) *Facts.* A group health plan provides that only employees with job title *M* are eligible for coverage under the plan. Employee *B* begins employment in job title *L* on January 30.

(ii) *Conclusion.* In this *Example 2, B* is not eligible for coverage under the plan, and the period while *B* is working in job title *L* and therefore not in an eligible class of employees is not part of a waiting period under this section.

Example 3. (i) *Facts.* Same facts as *Example 2,* except that *B* transfers to a new position with job title *M* on April 11.

(ii) *Conclusion.* In this *Example 3, B* becomes eligible for coverage on April 11, but for the waiting period. Any waiting period for *B* begins on April 11 and may not exceed 90 days. Coverage under the plan must become effective no later than July 10.

Example 4. (i) *Facts.* A group health plan provides that only employees who have completed specified training and achieved specified certifications are eligible for coverage under the plan. Employee *C* is hired on May 3 and meets the plan's eligibility criteria on September 22.

(ii) *Conclusion.* In this *Example 4, C* becomes eligible for coverage on September 22, but for the waiting period. Any waiting period for *C* would begin on September 22 and may not exceed 90 days. Coverage under the plan must become effective no later than December 21.

Example 5. (i) *Facts.* A group health plan provides that employees are eligible for coverage after one year of service.

(ii) *Conclusion.* In this *Example 5,* the plan's eligibility condition is based solely on the lapse of time and, therefore, is impermissible under paragraph (c)(2) of this section because it exceeds 90 days.

Example 6. (i) *Facts.* Employer *W*'s group health plan provides for coverage to begin on the first day of the first payroll period on or after the date an employee is hired and completes the applicable enrollment forms. Enrollment forms are distributed on an employee's start date and may be completed within 90 days. Employee *D* is hired and starts on October 31, which is the first day of a pay period. *D* completes the enrollment forms and submits them on the 90th day after *D*'s start date. Coverage is made effective 7 days later, which is the first day of the next pay period.

(ii) *Conclusion.* In this *Example 6,* under the terms of *W*'s plan, coverage may become effective as early as October 31, depending on when *D* completes the applicable enrollment forms. Under the terms of the plan, when coverage becomes effective is dependent solely on the length of time taken by *D* to complete the enrollment materials. Therefore, under the terms of the plan, *D* may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, and the plan complies with this section.

Example 7. (i) *Facts.* Under Employer *Y*'s group health plan, only employees who are full-time (defined under the plan as regularly averaging 30 hours of service per week) are eligible for coverage. Employee *E* begins employment for Employer *Y* on November 26 of Year 1. *E*'s hours are reasonably expected to vary, with an opportunity to work between 20 and 45 hours per week, depending on shift availability and *E*'s availability. Therefore, it cannot be determined at *E*'s start date that *E* is reasonably expected to work full-time. Under the terms of the plan, variable-hour employees, such as *E,* are eligible to enroll in the plan if they are determined to be a full-time employee after a measurement period of 12 months that begins on the employee's start date. Coverage is made effective no later than the first day of the first calendar month after the applicable enrollment forms are received. *E*'s 12-month measurement period ends November 25 of Year 2. *E* is determined to be a full-time employee and is notified of *E*'s plan eligibility. If *E* then elects coverage, *E*'s first day of coverage will be January 1 of Year 3.

(ii) *Conclusion.* In this *Example 7,* the measurement period is permissible because it is not considered to be designed to avoid compliance with the 90-day waiting period limitation. The plan may use a reasonable period of time to determine whether a variable-hour employee is a full-time employee, provided the period of time is no longer than 12 months and begins on a date between the employee's start date and the first day of the next calendar month, provided coverage is made effective no later than 13 months from *E*'s start date (plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month) and provided that, in addition to the measurement period, no more than 90 days elapse prior to the employee's eligibility for coverage.

Example 8. (i) *Facts.* Employee *F* begins working 25 hours per week for Employer *Z* on January 6 and is considered a part-time employee for purposes of *Z*'s group health plan. *Z* sponsors a group health plan that provides coverage to part-time employees after they have completed a cumulative 1,200 hours of service. *F* satisfies the plan's

cumulative hours of service condition on December 15.

(ii) *Conclusion.* In this *Example 8,* the cumulative hours of service condition with respect to part-time employees is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, coverage for *F* under the plan must begin no later than the 91st day after *F* completes 1,200 hours. (If the plan's cumulative hours-of-service requirement was more than 1,200 hours, the requirement would be considered to be designed to avoid compliance with the 90-day waiting period limitation.)

(f) *Special rule for health insurance issuers.* To the extent coverage under a group health plan is insured by a health insurance issuer, the issuer is permitted to rely on the eligibility information reported to it by the employer (or other plan sponsor) and will not be considered to violate the requirements of this section with respect to its administration of any waiting period, if both of the following conditions are satisfied:

(1) The issuer requires the plan sponsor to make a representation regarding the terms of any eligibility conditions or waiting periods imposed by the plan sponsor before an individual is eligible to become covered under the terms of the employer's plan (and requires the plan sponsor to update this representation with any changes); and

(2) The issuer has no specific knowledge of the imposition of a waiting period that would exceed the permitted 90-day period.

(g) *No effect on other laws.* Compliance with this section is not determinative of compliance with any other provision of State or Federal law (including ERISA, the Code, or other provisions of the Patient Protection and Affordable Care Act). *See e.g.,* § 54.9802–1, which prohibits discrimination in eligibility for coverage based on a health factor, and section 4980H, which generally requires applicable large employers to offer coverage to full-time employees and their dependents or make an assessable payment.

(h) *Applicability date*—(1) *In general.* The provisions of this section apply for plan years beginning on or after January 1, 2014. *See* § 54.9815–1251T providing that the prohibition on waiting periods exceeding 90 days applies to all group health plans and health insurance issuers, including grandfathered health plans.

(2) *Application to individuals in a waiting period prior to the applicability date*—(i) With respect to individuals who are in a waiting period for coverage before the applicability date of this section, beginning on the first day the section applies, the waiting period can no longer apply to the individual if it would exceed 90 days with respect to the individual.

(ii) This paragraph (h)(2) is illustrated by the following example:

Example. (i) *Facts.* A group health plan is a calendar year plan. Prior to January 1, 2014, the plan provides that full-time employees are eligible for coverage after a 6-month waiting period. Employee *A* begins work as a full-time employee on October 1, 2013.

(ii) *Conclusion.* In this *Example 1,* the first day of A's waiting period is October 1, 2013 because that is the first day *A* is otherwise eligible to enroll under the plan's substantive eligibility provisions, but for the waiting period. Beginning January 1, 2014, the plan may not apply a waiting period that exceeds 90 days. Accordingly, *A* must be given the opportunity to elect coverage that begins no later than January 1, 2014 (which is 93 days after *A*'s start date) because otherwise, on January 1, 2014, the plan would be applying a waiting period that exceeds 90 days. The plan is not required to make coverage effective before January 1, 2014 under the rules of this section.

Par. 10. Section 54.9815–2719T is amended by adding a sentence to the end of the introductory text of paragraph (d) and revising paragraph (d)(1)(i) to read as follows:

§ 54.9815–2719T Internal claims and appeals and external review processes.

* * * * *

(d) * * * A Multi State Plan or MSP, as defined by 45 CFR 800.20, must provide an effective Federal external review process in accordance with this paragraph (d).

(1) * * *

(i) *In general.* Subject to the suspension provision in paragraph (d)(1)(ii) of this section and except to the extent provided otherwise by the Secretary in guidance, the Federal external review process established pursuant to this paragraph (d) applies, at a minimum, to any adverse benefit determination or final adverse benefit determination (as defined in paragraphs (a)(2)(i) and (a)(2)(v) of this section), except that a denial, reduction, termination, or a failure to provide payment for a benefit based on a determination that a participant or beneficiary fails to meet the requirements for eligibility under the terms of a group health plan is not eligible for the Federal external review process under this paragraph (d).

* * * * *

Par. 11. Section 54.9831–1 is amended by removing paragraph (b)(2)(i), and redesignating paragraphs (b)(2)(ii) through (b)(2)(viii) as (b)(2)(i) through (b)(2)(vii).

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Chapter XXV

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR part 2590 as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 12. The authority citation for Part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L.104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

■ 13. Section 2590.701–1 is amended by revising paragraph (b) to read as follows:

§ 2590.701–1 Basis and scope.

* * * * *

■ (b) *Scope.* A group health plan or health insurance issuer offering group health insurance coverage may provide greater rights to participants and beneficiaries than those set forth in this Subpart B. This Subpart B sets forth minimum requirements for group health plans and group health insurance issuers offering group health insurance coverage concerning certain consumer protections of the Health Insurance Portability and Accountability Act (HIPAA), including special enrollment periods and the prohibition against discrimination based on a health factor, as amended by the Patient Protection and Affordable Care Act (Affordable Care Act). Other consumer protection provisions, including other protections provided by the Affordable Care Act and the Mental Health Parity and Addiction Equity Act are set forth in Subpart C of this part.

■ 14. Section 2590.701–2 is amended by revising the definitions of ''*enrollment date*'', ''*late enrollment*'', and ''*waiting period*'', and by adding definitions of ''*first day of coverage*'' and ''*late enrollee*'' in alphabetical order, to read as follows:

§ 2590.701–2 Definitions.

* * * * *

Enrollment date means the first day of coverage or, if there is a waiting period, the first day of the waiting period. If an individual receiving benefits under a

group health plan changes benefit packages, or if the plan changes group health insurance issuers, the individual's enrollment date does not change.

* * * * *

First day of coverage means, in the case of an individual covered for benefits under a group health plan, the first day of coverage under the plan and, in the case of an individual covered by health insurance coverage in the individual market, the first day of coverage under the policy or contract.

* * * * *

Late enrollee means an individual whose enrollment in a plan is a late enrollment.

Late enrollment means enrollment of an individual under a group health plan other than on the earliest date on which coverage can become effective for the individual under the terms of the plan; or through special enrollment. (For rules relating to special enrollment, see § 2590.701–6.) If an individual ceases to be eligible for coverage under a plan, and then subsequently becomes eligible for coverage under the plan, only the individual's most recent period of eligibility is taken into account in determining whether the individual is a late enrollee under the plan with respect to the most recent period of coverage. Similar rules apply if an individual again becomes eligible for coverage following a suspension of coverage that applied generally under the plan.

* * * * *

Waiting period means *waiting period* within the meaning of § 2590.715–2708(b).

■ 15. Section 2590.701–3 is amended by:

■ A. Removing paragraphs (a)(2), (a)(3), (c), (d), (e), and (f).

■ B. Revising the heading to paragraph (a).

■ C. Removing paragraph (a)(1) introductory text, and redesignating paragraphs (a)(1)(i) and (a)(1)(ii) as paragraphs (a)(1) and (a)(2).

■ D. Amending paragraph (a)(2) by revising paragraph (ii) of Examples 1 and 2, by revising Example 3 and Example 4, by revising paragraph (ii) of Examples 5, 6, 7 and 8.

■ E. Revising paragraph (b).

The revisions read as follows:

§ 2590.701–3 Limitations on preexisting condition exclusion period.

(a) *Preexisting condition exclusion defined*—

* * * * *

(2) * * *

Example 1. * * *

(ii) *Conclusion.* In this *Example 1,* the exclusion of benefits for any prosthesis if the body part was lost before the effective date of coverage is a preexisting condition exclusion because it operates to exclude benefits for a condition based on the fact that the condition was present before the effective date of coverage under the policy. The exclusion of benefits, therefore, is prohibited.

Example 2. * * *

(ii) *Conclusion.* In this *Example 2,* the plan provision excluding cosmetic surgery benefits for individuals injured before enrolling in the plan is a preexisting condition exclusion because it operates to exclude benefits relating to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 3. (i) *Facts.* A group health plan provides coverage for the treatment of diabetes, generally not subject to any requirement to obtain an approval for a treatment plan. However, if an individual was diagnosed with diabetes before the effective date of coverage under the plan, diabetes coverage is subject to a requirement to obtain approval of a treatment plan in advance.

(ii) *Conclusion.* In this *Example 3,* the requirement to obtain advance approval of a treatment plan is a preexisting condition exclusion because it limits benefits for a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 4. (i) *Facts.* A group health plan provides coverage for three infertility treatments. The plan counts against the three-treatment limit benefits provided under prior health coverage.

(ii) *Conclusion.* In this *Example 4,* counting benefits for a specific condition provided under prior health coverage against a treatment limit for that condition is a preexisting condition exclusion because it operates to limit benefits for a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 5. * * *

(ii) *Conclusion.* In this *Example 5,* the requirement to be covered under the plan for 12 months to be eligible for pregnancy benefits is a subterfuge for a preexisting condition exclusion because it is designed to exclude benefits for a condition (pregnancy) that arose before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 6. * * *

(ii) *Conclusion.* In this *Example 6,* the exclusion of coverage for treatment of congenital heart conditions is a preexisting condition exclusion because it operates to exclude benefits relating to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 7. * * *

(ii) *Conclusion.* In this *Example 7,* the exclusion of coverage for treatment of cleft palate is not a preexisting condition exclusion because the exclusion applies regardless of when the condition arose relative to the effective date of coverage. The plan provision, therefore, is not prohibited. (But see 45 CFR 147.150, which may require coverage of cleft palate as an essential health benefit for health insurance coverage in the individual or small group market).

Example 8. * * *

(ii) *Conclusion.* In this *Example 8,* the exclusion of coverage for treatment of cleft palate for individuals who have not been covered under the plan from the date of birth operates to exclude benefits in relation to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

* * * * *

(b) *General rules. See* § 2590.715–2704 for rules prohibiting the imposition of a preexisting condition exclusion.

■ 16. Section 2590.701–4 is amended by removing paragraphs (a)(3) and (c), and revising paragraph (b) to read as follows:

§ 2590.701–4 Rules relating to creditable coverage.

* * * * *

(b) *Counting creditable coverage rules superseded by prohibition on preexisting condition exclusion. See* § 2590.715–2704 for rules prohibiting the imposition of a preexisting condition exclusion.

■ 17. Section 2590.701–5 is revised to read as follows:

§ 2590.701–5 Evidence of creditable coverage.

(a) *In general.* The rules for providing certificates of creditable coverage and demonstrating creditable coverage have been superseded by the prohibition on preexisting condition exclusions. *See* § 2590.715–2704 for rules prohibiting the imposition of a preexisting condition exclusion.

(b) *Applicability.* The amendments made under this section apply beginning December 31, 2014.

■ 18. Section 2590.701–6 is amended by removing paragraph (a)(3)(i)(E) and revising paragraphs (a)(3)(i)(C), (a)(3)(i)(D), (a)(4)(i), and (d)(2) to read as follows:

§ 2590.701–6 Special enrollment periods.

* * * * *

(a) * * *

(3) * * *

(i) * * *

(C) In the case of coverage offered through an HMO, or other arrangement, in the group market that does not provide benefits to individuals who no longer reside, live, or work in a service area, loss of coverage because an individual no longer resides, lives, or works in the service area (whether or not within the choice of the individual), and no other benefit package is available to the individual; and

(D) A situation in which a plan no longer offers any benefits to the class of similarly situated individuals (as described in § 2590.702(d)) that includes the individual.

* * * * *

(4) * * *

(i) A plan or issuer must allow an employee a period of at least 30 days after an event described in paragraph (a)(3) of this section to request enrollment (for the employee or the employee's dependent).

* * * * *

(d) * * *

(2) Special enrollees must be offered all the benefit packages available to similarly situated individuals who enroll when first eligible. For this purpose, any difference in benefits or cost-sharing requirements for different individuals constitutes a different benefit package. In addition, a special enrollee cannot be required to pay more for coverage than a similarly situated individual who enrolls in the same coverage when first eligible.

* * * * *

■ 19. Section 2590.701–7 is revised to read as follows:

§ 2590.701–7 HMO affiliation period as an alternative to a preexisting condition exclusion.

The rules for HMO affiliation periods have been superseded by the prohibition on preexisting condition exclusions. *See* § 2590.715–2704 for rules prohibiting the imposition of a preexisting condition exclusion.

■ 20. Section 2590.702 is amended by:

■ A. Removing paragraph (b)(3) and revising paragraphs (b)(1)(i) and (b)(2)(i)(B).

■ B. Revising Example 1, paragraph (i) of Example 2, paragraph (ii) of Example 4, paragraph (ii) of Example 5, and removing Example 8, in paragraph (b)(2)(i)(D).

■ C. Revising Example 2, and paragraph (i) of Example 5, in paragraph (d)(4).

■ D. Revising paragraph (ii) of Example 2 in paragraph (e)(2)(i)(B).

■ E. Revising Example 1 in paragraph (g)(1)(ii).

The revisions read as follows:

§ 2590.702 Prohibiting discrimination against participants and beneficiaries based on a health factor.

* * * * *

(b) * * *

(1) * * *

(i) A group health plan, and a health insurance issuer offering health insurance coverage in connection with a group health plan, may not establish any rule for eligibility (including continued eligibility) of any individual to enroll for benefits under the terms of the plan or group health insurance coverage that discriminates based on any health factor that relates to that individual or a dependent of that individual. This rule is subject to the provisions of paragraph (b)(2) of this section (explaining how this rule applies to benefits), paragraph (d) of this section (containing rules for establishing groups of similarly situated individuals), paragraph (e) of this section (relating to nonconfinement, actively-at-work, and other service requirements), paragraph (f) of this section (relating to wellness programs), and paragraph (g) of this section (permitting favorable treatment of individuals with adverse health factors).

* * * * *

(2) * * *

(i) * * *

(B) However, benefits provided under a plan must be uniformly available to all similarly situated individuals (as described in paragraph (d) of this section). Likewise, any restriction on a benefit or benefits must apply uniformly to all similarly situated individuals and must not be directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries (determined based on all the relevant facts and circumstances). Thus, for example, a plan may limit or exclude benefits in relation to a specific disease or condition, limit or exclude benefits for certain types of treatments or drugs, or limit or exclude benefits based on a determination of whether the benefits are experimental or not medically necessary, but only if the benefit limitation or exclusion applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries. In addition, a plan or issuer may require the satisfaction of a deductible, copayment, coinsurance, or other cost-sharing requirement in order to obtain a benefit if the limit or cost-sharing requirement applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries. In the case of a cost-sharing requirement, see also paragraph (b)(2)(ii) of this section, which permits variances in the application of a cost-sharing mechanism made available under a wellness program. (Whether any plan provision or practice with respect to benefits complies with this paragraph (b)(2)(i) does not affect whether the provision or practice is permitted under ERISA, the Affordable Care Act (including the requirements related to essential health benefits), the Americans with Disabilities Act, or any other law, whether State or Federal.)

* * * * *

(D) * * *

Example 1. (i) *Facts.* A group health plan applies a $10,000 annual limit on a specific covered benefit that is not an essential health benefit to each participant or beneficiary covered under the plan. The limit is not directed at individual participants or beneficiaries.

(ii) *Conclusion.* In this *Example 1,* the limit does not violate this paragraph (b)(2)(i) because coverage of the specific, non-essential health benefit up to $10,000 is available uniformly to each participant and beneficiary under the plan and because the limit is applied uniformly to all participants and beneficiaries and is not directed at individual participants or beneficiaries.

Example 2. (i) *Facts.* A group health plan has a $500 deductible on all benefits for participants covered under the plan. Participant *B* files a claim for the treatment of AIDS. At the next corporate board meeting of the plan sponsor, the claim is discussed. Shortly thereafter, the plan is modified to impose a $2,000 deductible on benefits for the treatment of AIDS, effective before the beginning of the next plan year.

* * * * *

Example 4. * * *

(ii) *Conclusion.* In this *Example 4,* the limit does not violate this paragraph (b)(2)(i) because $2,000 of benefits for the treatment of TMJ are available uniformly to all similarly situated individuals and a plan may limit benefits covered in relation to a specific disease or condition if the limit applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries. (However, applying a lifetime limit on TMJ may violate § 2590.715–2711, if TMJ coverage is an essential health benefit. This example does not address whether the plan provision is permissible under any other applicable law, including PHS Act section 2711 or the Americans with Disabilities Act.)

Example 5. * * *

(ii) *Conclusion.* In this *Example 5,* the lower lifetime limit for participants and beneficiaries with a congenital heart defect violates this paragraph (b)(2)(i) because benefits under the plan are not uniformly available to all similarly situated individuals and the plan's lifetime limit on benefits does not apply uniformly to all similarly situated individuals. Additionally, this plan provision is prohibited under § 2590.715–2711 because it imposes a lifetime limit on essential health benefits.

* * * * *

(d) * * *

(4) * * *

Example 2. (i) *Facts.* Under a group health plan, coverage is made available to employees, their spouses, and their children. However, coverage is made available to a child only if the child is under age 26 (or under age 29 if the child is continuously

enrolled full-time in an institution of higher learning (full-time students)). There is no evidence to suggest that these classifications are directed at individual participants or beneficiaries.

(ii) *Conclusion.* In this Example 2, treating spouses and children differently by imposing an age limitation on children, but not on spouses, is permitted under this paragraph (d). Specifically, the distinction between spouses and children is permitted under paragraph (d)(2) of this section and is not prohibited under paragraph (d)(3) of this section because it is not directed at individual participants or beneficiaries. It is also permissible to treat children who are under age 26 (or full-time students under age 29) as a group of similarly situated individuals separate from those who are age 26 or older (or age 29 or older if they are not full-time students) because the classification is permitted under paragraph (d)(2) of this section and is not directed at individual participants or beneficiaries.

* * * * *

Example 5. (i) *Facts.* An employer sponsors a group health plan that provides the same benefit package to all seven employees of the employer. Six of the seven employees have the same job title and responsibilities, but Employee *G* has a different job title and different responsibilities. After *G* files an expensive claim for benefits under the plan, coverage under the plan is modified so that employees with *G*'s job title receive a different benefit package that includes a higher deductible than in the benefit package made available to the other six employees.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(B) * * *

Example 2. * * *

(ii) *Conclusion.* In this Example 2, the plan violates this paragraph (e)(2) (and thus also paragraph (b) of this section) because the 90-day continuous service requirement is a rule for eligibility based on whether an individual is actively at work. However, the plan would not violate this paragraph (e)(2) or paragraph (b) of this section if, under the plan, an absence due to any health factor is not considered an absence for purposes of measuring 90 days of continuous service. (In addition, any eligibility provision that is time-based must comply with the requirements of PHS Act section 2708 and its implementing regulations.)

* * * * *

(g) * * *

(1) * * *

(ii) * * *

Example 1. (i) *Facts.* An employer sponsors a group health plan that generally is available to employees, spouses of employees, and dependent children until age 26. However, dependent children who are disabled are eligible for coverage beyond age 26.

(ii) *Conclusion.* In this Example 1, the plan provision allowing coverage for disabled dependent children beyond age 26 satisfies this paragraph (g)(1) (and thus does not violate this section).

* * * * *

21. Section 2590.715–2708 is added to read as follows:

§ 2590.715–2708 Prohibition on waiting periods that exceed 90 days.

(a) *General rule.* A group health plan, and a health insurance issuer offering group health insurance coverage, must not apply any waiting period that exceeds 90 days, in accordance with the rules of this section. If, under the terms of a plan, an employee can elect coverage that would begin on a date that is not later than the end of the 90-day waiting period, this paragraph (a) is considered satisfied. Accordingly, a plan or issuer in that case will not be considered to have violated this paragraph (a) solely because employees (or other classes of participants) may take additional time (beyond the end of the 90-day waiting period) to elect coverage.

(b) *Waiting period defined.* For purposes of this part, a waiting period is the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective. If an employee or dependent enrolls as a late enrollee (as defined under § 2590.701–2) or special enrollee (as described in § 2590.701–6), any period before such late or special enrollment is not a waiting period.

(c) *Relation to a plan's eligibility criteria*—(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, being otherwise eligible to enroll under the terms of a group health plan means having met the plan's substantive eligibility conditions (such as, for example, being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms). Moreover, except as provided in paragraphs (c)(2) and (c)(3) of this section, nothing in this section requires a plan sponsor to offer coverage to any particular employee or class of employees (including, for example, part-time employees). Instead, this section prohibits requiring otherwise eligible participants and beneficiaries to wait more than 90 days before coverage is effective. (While a substantive eligibility condition that denies coverage to employees may be permissible under this section, a failure by an applicable large employer (as defined in section 4980H of the Code) to offer coverage to a full-time employee might, for example, nonetheless give rise to an assessable payment under Code section 4980H and its implementing regulations.)

(2) *Eligibility conditions based solely on the lapse of time.* Eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days.

(3) *Other conditions for eligibility.* Other conditions for eligibility under the terms of a group health plan are generally permissible under PHS Act section 2708, unless the condition is designed to avoid compliance with the 90-day waiting period limitation, determined in accordance with the rules of this paragraph (c)(3).

(i) *Application to variable-hour employees in cases in which a specified number of hours of service per period is a plan eligibility condition.* If a group health plan conditions eligibility on an employee regularly having a specified number of hours of service per period (or working full-time), and it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours per period (or work full-time), the plan may take a reasonable period of time, not to exceed 12 months and beginning on any date between the employee's start day and the first day of the first calendar month following the employee's start date, to determine whether the employee meets the plan's eligibility condition. Except in cases in which a waiting period that exceeds 90 days is imposed in addition to a measurement period, the time period for determining whether such an employee meets the plan's eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date, plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month.

(ii) *Cumulative service requirements.* If a group health plan or health insurance issuer conditions eligibility on an employee's having completed a number of cumulative hours of service, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the cumulative hours-of-service requirement does not exceed 1,200 hours.

(d) *Counting days.* Under this section, all calendar days are counted beginning on the enrollment date (as defined in § 2590.701–2), including weekends and holidays. If, in the case of a plan or issuer imposing a 90-day waiting period, the 91st day is a weekend or holiday, the plan or issuer may choose to permit coverage to become effective earlier than the 91st day, for

administrative convenience. Similarly, plans and issuers that do not want to start coverage in the middle of a month (or pay period) may choose to permit coverage to become effective earlier than the 91st day, for administrative convenience. For example, a plan may impose a waiting period of 60 days plus a fraction of a month (or pay period) until the first day of the next month (or pay period). However, a plan or issuer that extends the effective date of coverage beyond the 91st day fails to comply with the 90-day waiting period limitation.

(e) *Examples.* The rules of this section are illustrated by the following examples:

Example 1. (i) *Facts.* A group health plan provides that full-time employees are eligible for coverage under the plan. Employee *A* begins employment as a full-time employee on January 19.

(ii) *Conclusion.* In this *Example 1,* any waiting period for *A* would begin on January 19 and may not exceed 90 days. Coverage under the plan must become effective no later than April 19 (assuming February lasts 28 days).

Example 2. (i) *Facts.* A group health plan provides that only employees with job title *M* are eligible for coverage under the plan. Employee *B* begins employment in job title *L* on January 30.

(ii) *Conclusion.* In this *Example 2, B* is not eligible for coverage under the plan, and the period while *B* is working in job title *L* and therefore not in an eligible class of employees is not part of a waiting period under this section.

Example 3. (i) *Facts.* Same facts as *Example 2,* except that *B* transfers to a new position with job title *M* on April 11.

(ii) *Conclusion.* In this *Example 3, B* becomes eligible for coverage on April 11, but for the waiting period. Any waiting period for *B* begins on April 11 and may not exceed 90 days. Coverage under the plan must become effective no later than July 10.

Example 4. (i) *Facts.* A group health plan provides that only employees who have completed specified training and achieved specified certifications are eligible for coverage under the plan. Employee *C* is hired on May 3 and meets the plan's eligibility criteria on September 22.

(ii) *Conclusion.* In this *Example 4, C* becomes eligible for coverage on September 22, but for the waiting period. Any waiting period for *C* would begin on September 22 and may not exceed 90 days. Coverage under the plan must become effective no later than December 21.

Example 5. (i) *Facts.* A group health plan provides that employees are eligible for coverage after one year of service.

(ii) *Conclusion.* In this *Example 5,* the plan's eligibility condition is based solely on the lapse of time and, therefore, is impermissible under paragraph (c)(2) of this section because it exceeds 90 days.

Example 6. (i) *Facts.* Employer *W*'s group health plan provides for coverage to begin on the first day of the first payroll period on or after the date an employee is hired and completes the applicable enrollment forms. Enrollment forms are distributed on an employee's start date and may be completed within 90 days. Employee *D* is hired and starts on October 31, which is the first day of a pay period. *D* completes the enrollment forms and submits them on the 90th day after *D*'s start date. Coverage is made effective 7 days later, which is the first day of the next pay period.

(ii) *Conclusion.* In this *Example 6,* under the terms of *W*'s plan, coverage may become effective as early as October 31, depending on when *D* completes the applicable enrollment forms. Under the terms of the plan, when coverage becomes effective is dependent solely on the length of time taken by *D* to complete the enrollment materials. Therefore, under the terms of the plan, *D* may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, and the plan complies with this section.

Example 7. (i) *Facts.* Under Employer *Y*'s group health plan, only employees who are full-time (defined under the plan as regularly averaging 30 hours of service per week) are eligible for coverage. Employee *E* begins employment for Employer *Y* on November 26 of Year 1. *E*'s hours are reasonably expected to vary, with an opportunity to work between 20 and 45 hours per week, depending on shift availability and *E*'s availability. Therefore, it cannot be determined at *E*'s start date that *E* is reasonably expected to work full-time. Under the terms of the plan, variable-hour employees, such as *E,* are eligible to enroll in the plan if they are determined to be a full-time employee after a measurement period of 12 months that begins on the employee's start date. Coverage is made effective no later than the first day of the first calendar month after the applicable enrollment forms are received. *E*'s 12-month measurement period ends November 25 of Year 2. *E* is determined to be a full-time employee and is notified of *E*'s plan eligibility. If *E* then elects coverage, *E*'s first day of coverage will be January 1 of Year 3.

(ii) *Conclusion.* In this *Example 7,* the measurement period is permissible because it is not considered to be designed to avoid compliance with the 90-day waiting period limitation. The plan may use a reasonable period of time to determine whether a variable-hour employee is a full-time employee, provided the period of time is no longer than 12 months and begins on a date between the employee's start date and the first day of the next calendar month, provided coverage is made effective no later than 13 months from *E*'s start date (plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month) and provided that, in addition to the measurement period, no more than 90 days elapse prior to the employee's eligibility for coverage.

Example 8. (i) *Facts.* Employee *F* begins working 25 hours per week for Employer *Z* on January 6 and is considered a part-time employee for purposes of *Z*'s group health plan. *Z* sponsors a group health plan that provides coverage to part-time employees after they have completed a cumulative 1,200 hours of service. *F* satisfies the plan's cumulative hours of service condition on December 15.

(ii) *Conclusion.* In this *Example 8,* the cumulative hours of service condition with respect to part-time employees is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, coverage for *F* under the plan must begin no later than the 91st day after *F* completes 1,200 hours. (If the plan's cumulative hours-of-service requirement was more than 1,200 hours, the requirement would be considered to be designed to avoid compliance with the 90-day waiting period limitation.)

(f) *Special rule for health insurance issuers.* To the extent coverage under a group health plan is insured by a health insurance issuer, the issuer is permitted to rely on the eligibility information reported to it by the employer (or other plan sponsor) and will not be considered to violate the requirements of this section with respect to its administration of any waiting period, if both of the following conditions are satisfied:

(1) The issuer requires the plan sponsor to make a representation regarding the terms of any eligibility conditions or waiting periods imposed by the plan sponsor before an individual is eligible to become covered under the terms of the employer's plan (and requires the plan sponsor to update this representation with any changes), and

(2) The issuer has no specific knowledge of the imposition of a waiting period that would exceed the permitted 90-day period.

(g) *No effect on other laws.* Compliance with this section is not determinative of compliance with any other provision of State or Federal law (including ERISA, the Code, or other provisions of the Patient Protection and Affordable Care Act). *See e.g.,* § 2590.702, which prohibits discrimination in eligibility for coverage based on a health factor and Code section 4980H, which generally requires applicable large employers to offer coverage to full-time employees and their dependents or make an assessable payment.

(h) *Applicability date*—(1) *In general.* The provisions of this section apply for plan years beginning on or after January 1, 2014. *See* § 2590.715–1251 providing that the prohibition on waiting periods exceeding 90 days applies to all group health plans and health insurance issuers, including grandfathered health plans.

(2) *Application to individuals in a waiting period prior to the applicability date*—(i) With respect to individuals

who are in a waiting period for coverage before the applicability date of this section, beginning on the first day the section applies, the waiting period can no longer apply to the individual if it would exceed 90 days with respect to the individual.

(ii) This paragraph (h)(2) is illustrated by the following example:

Example. (i) *Facts.* A group health plan is a calendar year plan. Prior to January 1, 2014, the plan provides that full-time employees are eligible for coverage after a 6-month waiting period. Employee *A* begins work as a full-time employee on October 1, 2013.

(ii) *Conclusion.* In this *Example 1,* the first day of A's waiting period is October 1, 2013 because that is the first day *A* is otherwise eligible to enroll under the plan's substantive eligibility provisions, but for the waiting period. Beginning January 1, 2014, the plan may not apply a waiting period that exceeds 90 days. Accordingly, *A* must be given the opportunity to elect coverage that begins no later than January 1, 2014 (which is 93 days after *A*'s start date) because otherwise, on January 1, 2014, the plan would be applying a waiting period that exceeds 90 days. The plan is not required to make coverage effective before January 1, 2014 under the rules of this section.

■ 22. Section 2590.715–2719 is amended by adding a sentence to the end of the introductory text of paragraph (d) and revising paragraph (d)(1)(i) to read as follows:

§ 2590.715–2719 Internal claims and appeals and external review processes.

* * * * *

(d) * * * A Multi State Plan or MSP, as defined by 45 CFR 800.20, must provide an effective Federal external review process in accordance with this paragraph (d).

(1) * * *

(i) *In general.* Subject to the suspension provision in paragraph (d)(1)(ii) of this section and except to the extent provided otherwise by the Secretary in guidance, the Federal external review process established pursuant to this paragraph (d) applies, at a minimum, to any adverse benefit determination or final adverse benefit determination (as defined in paragraphs (a)(2)(i) and (a)(2)(v) of this section), except that a denial, reduction, termination, or a failure to provide payment for a benefit based on a determination that a participant or beneficiary fails to meet the requirements for eligibility under the terms of a group health plan is not eligible for the Federal external review process under this paragraph (d).

* * * * *

■ 23. Section 2590.731 is amended by revising paragraph (c)(2) to read as follows:

§ 2590.731 Preemption; State flexibility; construction.

* * * * *

(c) * * *

(2) *Exceptions.* Only in relation to health insurance coverage offered by a health insurance issuer, the provisions of this part do not supersede any provision of State law to the extent that such provision requires special enrollment periods in addition to those required under section 701(f) of the Act.

* * * * *

■ 24. Section 2590.732 is amended by removing paragraph (b)(2)(i), and redesignating paragraphs (b)(2)(ii) through (b)(2)(ix) as (b)(2)(i) through (b)(2)(viii).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Subtitle A

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR parts 144, 146, and 147 as set forth below:

PART 144—REQUIREMENTS RELATING TO HEALTH INSURANCE COVERAGE

■ 25. The authority citation for part 144 continues to read as follows:

Authority: Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92).

■ 26. Section 144.103 is amended by revising the definitions of ''*enrollment date*'', ''*late enrollment*'', and ''*waiting period*'', and by adding definitions of ''*first day of coverage*'' and ''*late enrollee*'' in alphabetical order, to read as follows:

§ 144.103 Definitions.

* * * * *

Enrollment date means the first day of coverage or, if there is a waiting period, the first day of the waiting period. If an individual receiving benefits under a group health plan changes benefit packages, or if the plan changes group health insurance issuers, the individual's enrollment date does not change.

* * * * *

First day of coverage means, in the case of an individual covered for benefits under a group health plan, the first day of coverage under the plan and, in the case of an individual covered by health insurance coverage in the individual market, the first day of coverage under the policy or contract.

* * * * *

Late enrollee means an individual whose enrollment in a plan is a late enrollment.

Late enrollment means enrollment of an individual under a group health plan other than on the earliest date on which coverage can become effective for the individual under the terms of the plan; or other than through special or limited open enrollment. (For rules relating to special enrollment and limited open enrollment, *see* § 146.117 and § 147.104.) If an individual ceases to be eligible for coverage under a plan, and then subsequently becomes eligible for coverage under the plan, only the individual's most recent period of eligibility is taken into account in determining whether the individual is a late enrollee under the plan with respect to the most recent period of coverage. Similar rules apply if an individual again becomes eligible for coverage following a suspension of coverage that applied generally under the plan.

* * * * *

Waiting period has the meaning given the term in 45 CFR 147.116(b).

PART 146—REQUIREMENTS FOR THE GROUP HEALTH INSURANCE MARKET

■ 27. The authority citation for part 146 continues to read as follows:

Authority: Secs. 2702 through 2705, 2711 through 2723, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg–1 through 300gg–5, 300gg–11 through 300gg–23, 300gg–91, and 300gg–92).

■ 28. Section 146.101 is amended by revising paragraph (b)(1) to read as follows:

§ 146.101 Basis and scope.

* * * * *

(b) * * *

(1) *Subpart B.* Subpart B of this part sets forth minimum requirements for group health plans and health insurance issuers offering group health insurance coverage under the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Patient Protection and Affordable Care Act (Affordable Care Act), including special enrollment periods, prohibiting discrimination against participants and beneficiaries based on a health factor, and additional requirements prohibiting discrimination against participants and beneficiaries based on genetic information.

* * * * *

■ 29. Section 146.111 is amended by:

■ A. Removing paragraphs (a)(2), (a)(3), (c), (d), (e), and (f).

■ B. Revising the heading to paragraph (a).

■ C. Removing paragraph (a)(1) introductory text, and redesignating paragraphs (a)(1)(i) and (a)(1)(ii) as paragraphs (a)(1) and (a)(2).
■ D. Amending paragraph (a)(2) by revising paragraph (ii) of Examples 1 and 2, by revising Example 3 and Example 4, and by revising paragraph (ii) of Examples 5, 6, 7, and 8.
■ E. Revising paragraph (b).

The revisions read as follows:

§ 146.111 Prohibition of preexisting condition exclusion period.

(a) *Preexisting condition exclusion defined—*

* * * * *

(2) * * *

Example 1. * * *

(ii) *Conclusion.* In this *Example 1,* the exclusion of benefits for any prosthesis if the body part was lost before the effective date of coverage is a preexisting condition exclusion because it operates to exclude benefits for a condition based on the fact that the condition was present before the effective date of coverage under the policy. The exclusion of benefits, therefore, is prohibited.

Example 2. * * *

(ii) *Conclusion.* In this *Example 2,* the plan provision excluding cosmetic surgery benefits for individuals injured before enrolling in the plan is a preexisting condition exclusion because it operates to exclude benefits relating to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 3. (i) *Facts.* A group health plan provides coverage for the treatment of diabetes, generally not subject to any requirement to obtain an approval for a treatment plan. However, if an individual was diagnosed with diabetes before the effective date of coverage under the plan, diabetes coverage is subject to a requirement to obtain approval of a treatment plan in advance.

(ii) *Conclusion.* In this *Example 3,* the requirement to obtain advance approval of a treatment plan is a preexisting condition exclusion because it limits benefits for a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 4. (i) *Facts.* A group health plan provides coverage for three infertility treatments. The plan counts against the three-treatment limit benefits provided under prior health coverage.

(ii) *Conclusion.* In this *Example 4,* counting benefits for a specific condition provided under prior health coverage against a treatment limit for that condition is a preexisting condition exclusion because it operates to limit benefits for a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 5. * * *

(ii) *Conclusion.* In this *Example 5,* the requirement to be covered under the plan for 12 months to be eligible for pregnancy benefits is a subterfuge for a preexisting condition exclusion because it is designed to exclude benefits for a condition (pregnancy) that arose before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 6. * * *

(ii) *Conclusion.* In this *Example 6,* the exclusion of coverage for treatment of congenital heart conditions is a preexisting condition exclusion because it operates to exclude benefits relating to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

Example 7. * * *

(ii) *Conclusion.* In this *Example 7,* the exclusion of coverage for treatment of cleft palate is not a preexisting condition exclusion because the exclusion applies regardless of when the condition arose relative to the effective date of coverage. The plan provision, therefore, is not prohibited. (But see 45 CFR 147.150, which may require coverage of cleft palate as an essential health benefit for health insurance coverage in the individual or small group market).

Example 8. * * *

(ii) *Conclusion.* In this *Example 8,* the exclusion of coverage for treatment of cleft palate for individuals who have not been covered under the plan from the date of birth operates to exclude benefits in relation to a condition based on the fact that the condition was present before the effective date of coverage. The plan provision, therefore, is prohibited.

* * * * *

(b) *General rules. See* § 147.108 for rules prohibiting the imposition of a preexisting condition exclusion.

■ 30. Section 146.113 is amended by removing paragraphs (a)(3) and (c), and revising paragraph (b) to read as follows:

§ 146.113 Rules relating to creditable coverage.

* * * * *

(b) *Counting creditable coverage rules superseded by prohibition on preexisting condition exclusion. See* § 147.108 of this subchapter for rules prohibiting the imposition of a preexisting condition exclusion.

■ 31. Section 146.115 is revised to read as follows:

§ 146.115 Certification and disclosure of previous coverage.

(a) *In general.* The rules for providing certificates of creditable coverage and demonstrating creditable coverage have been superseded by the prohibition on preexisting condition exclusions. *See* § 147.108 of this subchapter for rules prohibiting the imposition of a preexisting condition exclusion.

(b) *Applicability.* The amendments made under this section apply beginning December 31, 2014.

■ 32. Section 146.117 is amended by removing paragraph (a)(3)(i)(E) and revising paragraph (a)(3)(i)(C), (a)(3)(i)(D), (a)(4)(i), and (d)(2) to read as follows:

§ 146.117 Special enrollment periods.

* * * * *

(a) * * *

(3) * * *

(i) * * *

(C) In the case of coverage offered through an HMO, or other arrangement, in the group market that does not provide benefits to individuals who no longer reside, live, or work in a service area, loss of coverage because an individual no longer resides, lives, or works in the service area (whether or not within the choice of the individual), and no other benefit package is available to the individual; and

(D) A situation in which a plan no longer offers any benefits to the class of similarly situated individuals (as described in § 146.121(d)) that includes the individual.

* * * * *

(4) * * *

(i) A plan or issuer must allow an employee a period of at least 30 days after an event described in paragraph (a)(3) of this section to request enrollment (for the employee or the employee's dependent).

* * * * *

(d) * * *

(2) Special enrollees must be offered all the benefit packages available to similarly situated individuals who enroll when first eligible. For this purpose, any difference in benefits or cost-sharing requirements for different individuals constitutes a different benefit package. In addition, a special enrollee cannot be required to pay more for coverage than a similarly situated individual who enrolls in the same coverage when first eligible.

* * * * *

■ 33. Section 146.119 is revised to read as follows:

§ 146.119 HMO affiliation period as an alternative to a preexisting condition exclusion.

The rules for HMO affiliation periods have been superseded by the prohibition on preexisting condition exclusions. *See* § 147.108 of this subchapter for rules prohibiting the imposition of a preexisting condition exclusion.

■ 34. Section 146.121 is amended by:
■ A. Removing paragraph (b)(3) and revising paragraphs (b)(1)(i) and (b)(2)(i)(B).
■ B. Revising Example 1, paragraph (i) of Example 2, paragraph (ii) of Example 4, and paragraph (ii) of Example 5, and removing Example 8 in paragraph (b)(2)(i)(D).

■ C. Revising Example 2, and paragraph (i) of Example 5, in paragraph (d)(4).
■ D. Revising paragraph (ii) of Example 2 in paragraph (e)(2)(i)(B).
■ E. Revising Example 1 in paragraph (g)(1)(ii).

The revisions read as follows:

§ 146.121 Prohibiting discrimination against participants and beneficiaries based on a health factor.

* * * * *

(b) * * *

(1) * * *

(i) A group health plan, and a health insurance issuer offering health insurance coverage in connection with a group health plan, may not establish any rule for eligibility (including continued eligibility) of any individual to enroll for benefits under the terms of the plan or group health insurance coverage that discriminates based on any health factor that relates to that individual or a dependent of that individual. This rule is subject to the provisions of paragraph (b)(2) of this section (explaining how this rule applies to benefits), paragraph (d) of this section (containing rules for establishing groups of similarly situated individuals), paragraph (e) of this section (relating to nonconfinement, actively-at-work, and other service requirements), paragraph (f) of this section (relating to wellness programs), and paragraph (g) of this section (permitting favorable treatment of individuals with adverse health factors).

* * * * *

(2) * * *

(i) * * *

(B) However, benefits provided under a plan must be uniformly available to all similarly situated individuals (as described in paragraph (d) of this section). Likewise, any restriction on a benefit or benefits must apply uniformly to all similarly situated individuals and must not be directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries (determined based on all the relevant facts and circumstances). Thus, for example, a plan may limit or exclude benefits in relation to a specific disease or condition, limit or exclude benefits for certain types of treatments or drugs, or limit or exclude benefits based on a determination of whether the benefits are experimental or not medically necessary, but only if the benefit limitation or exclusion applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries. In addition, a plan or issuer may require the satisfaction of a deductible, copayment, coinsurance, or other cost-sharing requirement in order to obtain a benefit if the limit or cost-sharing requirement applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries. In the case of a cost-sharing requirement, see also paragraph (b)(2)(ii) of this section, which permits variances in the application of a cost-sharing mechanism made available under a wellness program. (Whether any plan provision or practice with respect to benefits complies with this paragraph (b)(2)(i) does not affect whether the provision or practice is permitted under ERISA, the Affordable Care Act (including the requirements related to essential health benefits), the Americans with Disabilities Act, or any other law, whether State or Federal.)

* * * * *

(D) * * *

Example 1. (i) *Facts.* A group health plan applies a $10,000 annual limit on a specific covered benefit that is not an essential health benefit to each participant or beneficiary covered under the plan. The limit is not directed at individual participants or beneficiaries.

(ii) *Conclusion.* In this *Example 1,* the limit does not violate this paragraph (b)(2)(i) because coverage of the specific, non-essential health benefit up to $10,000 is available uniformly to each participant and beneficiary under the plan and because the limit is applied uniformly to all participants and beneficiaries and is not directed at individual participants or beneficiaries.

Example 2. (i) *Facts.* A group health plan has a $500 deductible on all benefits for participants covered under the plan. Participant *B* files a claim for the treatment of AIDS. At the next corporate board meeting of the plan sponsor, the claim is discussed. Shortly thereafter, the plan is modified to impose a $2,000 deductible on benefits for the treatment of AIDS, effective before the beginning of the next plan year.

* * * * *

Example 4. * * *

(ii) *Conclusion.* In this *Example 4,* the limit does not violate this paragraph (b)(2)(i) because $2,000 of benefits for the treatment of TMJ are available uniformly to all similarly situated individuals and a plan may limit benefits covered in relation to a specific disease or condition if the limit applies uniformly to all similarly situated individuals and is not directed at individual participants or beneficiaries. (However, applying a lifetime limit on TMJ may violate § 147.126, if TMJ coverage is an essential health benefit. This example does not address whether the plan provision is permissible under any other applicable law, including PHS Act section 2711 or the Americans with Disabilities Act.)

Example 5. * * *

(ii) *Conclusion.* In this *Example 5,* the lower lifetime limit for participants and beneficiaries with a congenital heart defect violates this paragraph (b)(2)(i) because benefits under the plan are not uniformly available to all similarly situated individuals and the plan's lifetime limit on benefits does not apply uniformly to all similarly situated individuals. Additionally, this plan provision is prohibited under § 147.126 because it imposes a lifetime limit on essential health benefits.

* * * * *

(d) * * *

(4) * * *

Example 2. (i) *Facts.* Under a group health plan, coverage is made available to employees, their spouses, and their children. However, coverage is made available to a child only if the child is under age 26 (or under age 29 if the child is continuously enrolled full-time in an institution of higher learning (full-time students)). There is no evidence to suggest that these classifications are directed at individual participants or beneficiaries.

(ii) *Conclusion.* In this *Example 2,* treating spouses and children differently by imposing an age limitation on children, but not on spouses, is permitted under this paragraph (d). Specifically, the distinction between spouses and children is permitted under paragraph (d)(2) of this section and is not prohibited under paragraph (d)(3) of this section because it is not directed at individual participants or beneficiaries. It is also permissible to treat children who are under age 26 (or full-time students under age 29) as a group of similarly situated individuals separate from those who are age 26 or older (or age 29 or older if they are not full-time students) because the classification is permitted under paragraph (d)(2) of this section and is not directed at individual participants or beneficiaries.

* * * * *

Example 5. (i) *Facts.* An employer sponsors a group health plan that provides the same benefit package to all seven employees of the employer. Six of the seven employees have the same job title and responsibilities, but Employee *G* has a different job title and different responsibilities. After *G* files an expensive claim for benefits under the plan, coverage under the plan is modified so that employees with *G's* job title receive a different benefit package that includes a higher deductible than in the benefit package made available to the other six employees.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(B) * * *

Example 2. * * *

(ii) *Conclusion.* In this *Example 2,* the plan violates this paragraph (e)(2) (and thus also paragraph (b) of this section) because the 90-day continuous service requirement is a rule for eligibility based on whether an individual is actively at work. However, the plan would not violate this paragraph (e)(2) or paragraph (b) of this section if, under the plan, an absence due to any health factor is not

considered an absence for purposes of measuring 90 days of continuous service. (In addition, any eligibility provision that is time-based must comply with the requirements of PHS Act section 2708 and its implementing regulations.)

* * * * *

(g) * * *

(1) * * *

(ii) * * *

Example 1. (*i*) *Facts.* An employer sponsors a group health plan that generally is available to employees, spouses of employees, and dependent children until age 26. However, dependent children who are disabled are eligible for coverage beyond age 26.

(ii) *Conclusion.* In this *Example 1,* the plan provision allowing coverage for disabled dependent children beyond age 26 satisfies this paragraph (g)(1) (and thus does not violate this section).

* * * * *

■ 35. Section 146.143 is amended by revising paragraph (c)(2) to read as follows:

§ 146.143 Preemption; State flexibility; construction.

* * * * *

(c) * * *

(2) *Exceptions.* Only in relation to health insurance coverage offered by a health insurance issuer, the provisions of this part do not supersede any provision of State law to the extent that such provision requires special enrollment periods in addition to those required under section 2702 of the Act.

* * * * *

■ 36. Amend § 146.145 by revising paragraph (b) to read as follows:

§ 146.145 Special rules relating to group health plans.

* * * * *

(b) *General exception for certain small group health plans.* The requirements of this part, other than § 146.130 and the provisions with respect to genetic nondiscrimination (found in § 146.121(b), § 146.121(c), § 146.121(e), § 146.122(b), § 146.122(c), § 146.122(d), and § 146.122(e)) do not apply to any group health plan (and group health insurance coverage) for any plan year, if on the first day of the plan year, the plan has fewer than two participants who are current employees.

* * * * *

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

■ 37. The authority citation for part 147 continues to read as follows:

Authority: Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

■ 38. Section 147.116 is added to read as follows:

§ 147.116 Prohibition on waiting periods that exceed 90 days.

(a) *General rule.* A group health plan, and a health insurance issuer offering group health insurance coverage, must not apply any waiting period that exceeds 90 days, in accordance with the rules of this section. If, under the terms of a plan, an employee can elect coverage that would begin on a date that is not later than the end of the 90-day waiting period, this paragraph (a) is considered satisfied. Accordingly, a plan or issuer in that case will not be considered to have violated this paragraph (a) solely because employees (or other classes of participants) may take additional time (beyond the end of the 90-day waiting period) to elect coverage.

(b) *Waiting period defined.* For purposes of this part, a waiting period is the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective. If an employee or dependent enrolls as a late enrollee (as defined under § 144.103 of this subchapter) or special enrollee (as described in § 146.117 of this subchapter), any period before such late or special enrollment is not a waiting period.

(c) *Relation to a plan's eligibility criteria*—(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, being otherwise eligible to enroll under the terms of a group health plan means having met the plan's substantive eligibility conditions (such as, for example, being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms). Moreover, except as provided in paragraphs (c)(2) and (c)(3) of this section, nothing in this section requires a plan sponsor to offer coverage to any particular employee or class of employees (including, for example, part-time employees). Instead, this section prohibits requiring otherwise eligible participants and beneficiaries to wait more than 90 days before coverage is effective. (While a substantive eligibility condition that denies coverage to employees may be permissible under this section, a failure by an applicable large employer (as defined in section 4980H of the Code) to offer coverage to a full-time employee might, for example, nonetheless give rise to an assessable payment under section 4980H and its implementing regulations.)

(2) *Eligibility conditions based solely on the lapse of time.* Eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days.

(3) *Other conditions for eligibility.* Other conditions for eligibility under the terms of a group health plan are generally permissible under PHS Act section 2708, unless the condition is designed to avoid compliance with the 90-day waiting period limitation, determined in accordance with the rules of this paragraph (c)(3).

(i) *Application to variable-hour employees in cases in which a specified number of hours of service per period is a plan eligibility condition.* If a group health plan conditions eligibility on an employee regularly having a specified number of hours of service per period (or working full-time), and it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours per period (or work full-time), the plan may take a reasonable period of time, not to exceed 12 months and beginning on any date between the employee's start day and the first day of the first calendar month following the employee's start date, to determine whether the employee meets the plan's eligibility condition. Except in cases in which a waiting period that exceeds 90 days is imposed in addition to a measurement period, the time period for determining whether such an employee meets the plan's eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later than 13 months from the employee's start date, plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month.

(ii) *Cumulative service requirements.* If a group health plan or health insurance issuer conditions eligibility on an employee's having completed a number of cumulative hours of service, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the cumulative hours-of-service requirement does not exceed 1,200 hours.

(d) *Counting days.* Under this section, all calendar days are counted beginning on the enrollment date (as defined in § 144.103 of this subchapter), including weekends and holidays. If, in the case of a plan or issuer imposing a 90-day waiting period, the 91st day is a weekend or holiday, the plan or issuer may choose to permit coverage to become effective earlier than the 91st

day, for administrative convenience. Similarly, plans and issuers that do not want to start coverage in the middle of a month (or pay period) may choose to permit coverage to become effective earlier than the 91st day, for administrative convenience. For example, a plan may impose a waiting period of 60 days plus a fraction of a month (or pay period) until the first day of the next month (or pay period). However, a plan or issuer that extends the effective date of coverage beyond the 91st day fails to comply with the 90-day waiting period limitation.

(e) *Examples.* The rules of this section are illustrated by the following examples:

Example 1. (i) *Facts.* A group health plan provides that full-time employees are eligible for coverage under the plan. Employee *A* begins employment as a full-time employee on January 19.

(ii) *Conclusion.* In this *Example 1,* any waiting period for *A* would begin on January 19 and may not exceed 90 days. Coverage under the plan must become effective no later than April 19 (assuming February lasts 28 days).

Example 2. (i) *Facts.* A group health plan provides that only employees with job title *M* are eligible for coverage under the plan. Employee *B* begins employment in job title *L* on January 30.

(ii) *Conclusion.* In this *Example 2, B* is not eligible for coverage under the plan, and the period while *B* is working in job title *L* and therefore not in an eligible class of employees is not part of a waiting period under this section.

Example 3. (i) *Facts.* Same facts as *Example 2,* except that *B* transfers to a new position with job title *M* on April 11.

(ii) *Conclusion.* In this *Example 3, B* becomes eligible for coverage on April 11, but for the waiting period. Any waiting period for *B* begins on April 11 and may not exceed 90 days. Coverage under the plan must become effective no later than July 10.

Example 4. (i) *Facts.* A group health plan provides that only employees who have completed specified training and achieved specified certifications are eligible for coverage under the plan. Employee *C* is hired on May 3 and meets the plan's eligibility criteria on September 22.

(ii) *Conclusion.* In this *Example 4, C* becomes eligible for coverage on September 22, but for the waiting period. Any waiting period for *C* would begin on September 22 and may not exceed 90 days. Coverage under the plan must become effective no later than December 21.

Example 5. (i) *Facts.* A group health plan provides that employees are eligible for coverage after one year of service.

(ii) *Conclusion.* In this *Example 5,* the plan's eligibility condition is based solely on the lapse of time and, therefore, is impermissible under paragraph (c)(2) of this section because it exceeds 90 days.

Example 6. (i) *Facts.* Employer *W*'s group health plan provides for coverage to begin on the first day of the first payroll period on or after the date an employee is hired and completes the applicable enrollment forms. Enrollment forms are distributed on an employee's start date and may be completed within 90 days. Employee *D* is hired and starts on October 31, which is the first day of a pay period. *D* completes the enrollment forms and submits them on the 90th day after *D*'s start date. Coverage is made effective 7 days later, which is the first day of the next pay period.

(ii) *Conclusion.* In this *Example 6,* under the terms of *W*'s plan, coverage may become effective as early as October 31, depending on when *D* completes the applicable enrollment forms. Under the terms of the plan, when coverage becomes effective is dependent solely on the length of time taken by *D* to complete the enrollment materials. Therefore, under the terms of the plan, *D* may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, and the plan complies with this section.

Example 7. (i) *Facts.* Under Employer *Y*'s group health plan, only employees who are full-time (defined under the plan as regularly averaging 30 hours of service per week) are eligible for coverage. Employee *E* begins employment for Employer *Y* on November 26 of Year 1. *E*'s hours are reasonably expected to vary, with an opportunity to work between 20 and 45 hours per week, depending on shift availability and *E*'s availability. Therefore, it cannot be determined at *E*'s start date that *E* is reasonably expected to work full-time. Under the terms of the plan, variable-hour employees, such as *E,* are eligible to enroll in the plan if they are determined to be a full-time employee after a measurement period of 12 months that begins on the employee's start date. Coverage is made effective no later than the first day of the first calendar month after the applicable enrollment forms are received. *E*'s 12-month measurement period ends November 25 of Year 2. *E* is determined to be a full-time employee and is notified of *E*'s plan eligibility. If *E* then elects coverage, *E*'s first day of coverage will be January 1 of Year 3.

(ii) *Conclusion.* In this *Example 7,* the measurement period is permissible because it is not considered to be designed to avoid compliance with the 90-day waiting period limitation. The plan may use a reasonable period of time to determine whether a variable-hour employee is a full-time employee, provided the period of time is no longer than 12 months and begins on a date between the employee's start date and the first day of the next calendar month, provided coverage is made effective no later than 13 months from *E*'s start date (plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month) and provided that, in addition to the measurement period, no more than 90 days elapse prior to the employee's eligibility for coverage.

Example 8. (i) *Facts.* Employee *F* begins working 25 hours per week for Employer *Z* on January 6 and is considered a part-time employee for purposes of *Z*'s group health plan. *Z* sponsors a group health plan that provides coverage to part-time employees after they have completed a cumulative 1,200 hours of service. *F* satisfies the plan's cumulative hours of service condition on December 15.

(ii) *Conclusion.* In this *Example 8,* the cumulative hours of service condition with respect to part-time employees is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, coverage for *F* under the plan must begin no later than the 91st day after *F* completes 1,200 hours. (If the plan's cumulative hours-of-service requirement was more than 1,200 hours, the requirement would be considered to be designed to avoid compliance with the 90-day waiting period limitation.)

(f) *Special rule for health insurance issuers.* To the extent coverage under a group health plan is insured by a health insurance issuer, the issuer is permitted to rely on the eligibility information reported to it by the employer (or other plan sponsor) and will not be considered to violate the requirements of this section with respect to its administration of any waiting period, if both of the following conditions are satisfied:

(1) The issuer requires the plan sponsor to make a representation regarding the terms of any eligibility conditions or waiting periods imposed by the plan sponsor before an individual is eligible to become covered under the terms of the employer's plan (and requires the plan sponsor to update this representation with any changes), and

(2) The issuer has no specific knowledge of the imposition of a waiting period that would exceed the permitted 90-day period.

(g) *No effect on other laws.* Compliance with this section is not determinative of compliance with any other provision of State or Federal law (including ERISA, the Code, or other provisions of the Affordable Care Act). *See e.g.,* § 146.121 of this subchapter, which prohibits discrimination in eligibility for coverage based on a health factor and Code section 4980H, which generally requires applicable large employers to offer coverage to full-time employees and their dependents or make an assessable payment.

(h) *Applicability date*—(1) *In general.* The provisions of this section apply for plan years beginning on or after January 1, 2014. *See* § 147.140 providing that the prohibition on waiting periods exceeding 90 days applies to all group health plans and health insurance issuers, including grandfathered health plans.

(2) *Application to individuals in a waiting period prior to the applicability date*—(i) With respect to individuals who are in a waiting period for coverage

before the applicability date of this section, beginning on the first day the section applies, the waiting period can no longer apply to the individual if it would exceed 90 days with respect to the individual.

(ii) This paragraph (h)(2) is illustrated by the following example:

Example. (i) *Facts.* A group health plan is a calendar year plan. Prior to January 1, 2014, the plan provides that full-time employees are eligible for coverage after a 6-month waiting period. Employee *A* begins work as a full-time employee on October 1, 2013.

(ii) *Conclusion.* In this *Example 1,* the first day of A's waiting period is October 1, 2013 because that is the first day *A* is otherwise eligible to enroll under the plan's substantive eligibility provisions, but for the waiting period. Beginning January 1, 2014, the plan may not apply a waiting period that exceeds 90 days. Accordingly, *A* must be given the opportunity to elect coverage that begins no later than January 1, 2014 (which is 93 days after *A's* start date) because otherwise, on January 1, 2014, the plan would be applying a waiting period that exceeds 90 days. The plan is not required to make coverage effective before January 1, 2014 under the rules of this section.

■ 39. Section 147.136 is amended by adding a sentence to the end of the introductory text of paragraph (d) and revising paragraph (d)(1)(i) to read as follows:

§ 147.136 Internal claims and appeals and external review processes.

* * * * *

(d) * * * A Multi State Plan or MSP, as defined by 45 CFR 800.20, must provide an effective Federal external review process in accordance with this paragraph (d).

(1) * * *

(i) *In general.* Subject to the suspension provision in paragraph (d)(1)(ii) of this section and except to the extent provided otherwise by the Secretary in guidance, the Federal external review process established pursuant to this paragraph (d) applies, at a minimum, to any adverse benefit determination or final adverse benefit determination (as defined in paragraphs (a)(2)(i) and (a)(2)(v) of this section), except that a denial, reduction, termination, or a failure to provide payment for a benefit based on a determination that a participant or beneficiary fails to meet the requirements for eligibility under the terms of a group health plan is not eligible for the Federal external review process under this paragraph (d).

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120815345–3223–01]

RIN 0648–BC41

Snapper-Grouper Fishery off the Southern Atlantic States; Snapper-Grouper Management Measures

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 a regulatory amendment (Regulatory Amendment 13) to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared by the South Atlantic Fishery Management Council (Council). If implemented, this rule would revise the annual catch limits (ACLs) (including sector ACLs) for 37 species in the snapper-grouper fishery management unit (FMU). The intent of this rule is to ensure that the ACLs are based on the best scientific information available, and to prevent unnecessary negative socio-economic impacts to participants in the snapper-grouper fishery and fishing community that could occur if the ACLs are not revised, in accordance with the provisions set forth in the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Written comments must be received on or before April 22, 2013.

ADDRESSES: You may submit comments on this document, identified by ''NOAA–NMFS–2012–0245'', by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0245,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Nikhil Mehta, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: 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 by NMFS. 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.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. 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, or Adobe PDF file formats only.

Electronic copies of documents supporting this proposed rule including an environmental assessment, initial regulatory flexibility analysis (IRFA), regulatory impact review, and fishery impact statement may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sf/SASnapperGrouperHomepage.htm.*

FOR FURTHER INFORMATION CONTACT: Nikhil Mehta, telephone: 727–824–5305, or email: *Nikhil.Mehta@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic is managed under the FMP and includes the 37 snapper-grouper species addressed in Regulatory Amendment 13 and this proposed rule. These 37 snapper-grouper species do not have stock assessments; their acceptable biological catch estimates (ABCs) are greater than zero; and their ABCs were specified using a formula established in the Comprehensive ACL Amendment. Species in the FMU with stock assessments and species with an ABC equal to zero are not addressed in Regulatory Amendment 13. However, they will be considered in future amendments. The FMP was prepared by the Council and implemented through regulations at 50 CFR parts 622 under the authority of the Magnuson-Stevens Act.

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing of federally managed fish stocks, to the extent practicable. This mandate is intended to ensure that fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems. National Standard 2 of the Magnuson-Stevens Act states that the conservation and management measures of fishery management plans and any regulations promulgated to implement any such plan shall be based upon the best scientific information available.

To address this mandate of the Magnuson-Stevens Act, NMFS published the final rule to implement the Comprehensive ACL Amendment on March 16, 2012 (77 FR 15916). That final rule established ACLs (including sector-specific ACL allocations) and accountability measures (AMs) for select species in the snapper-grouper FMU. Additionally, the Comprehensive ACL Amendment established ABCs and annual catch targets (ACTs) for these select species in the snapper-grouper FMU. These ABCs and ACTs are not codified in the regulatory text. Recreational catch estimates in the Comprehensive ACL Amendment were determined by using data generated by the Marine Recreational Fisheries Statistics Survey (MRFSS), which was the best scientific information available at that time.

The MRFSS is made up of an integrated system of surveys, each targeted toward particular segments of the fishing community (one for for-hire vessels, one for anglers pursuing highly migratory species, and one for all other anglers). It usually takes a couple of months to compile information from both surveys, perform quality control, and tabulate the results from each 2-month wave of data. As a result, in most places, total estimates of catch and effort are produced on an annual basis. These annual estimates are then used by NMFS and the Council to make informed decisions about the health and sustainability of the fishery and how many fish can be harvested the following year.

Since the implementation of the Comprehensive ACL Amendment on April 16, 2012, there have been substantial improvements in the data collection and catch estimation methodologies that are used to generate the data for the computation of ABCs and recreational and commercial ACLs and ACTs. NMFS no longer uses the MRFSS and now estimates landings using the Marine Recreational Information Program (MRIP).

The MRIP collects data on a more frequent basis and provides more accurate recreational catch estimates by accounting for potential biases such as possible differences in catch rates at high-activity and low-activity fishing sites, as well as variation in fishing effort throughout the day. As described in Regulatory Amendment 13, the NMFS Office of Science and Technology released MRIP data from 2004–2011. MRFSS data from 2004–2011 were compared with MRIP data (2004–2011) and ratio estimators were generated. These ratio estimators were used to recalibrate MRFSS data from 1986–2003 to MRIP data (from 1986–2003). These calculations provided a complete MRIP data set from 1986–2011. To determine the ABCs for these species in the Comprehensive ACL Amendment, the Council's SSC used data from 1999–2008 for 36 out of the 37 species (1986–2008 for blueline tilefish). The same years of MRIP data were used to determine revised ABC values for the 37 species in Regulatory Amendment 13. The revised ABC values also include updated commercial and for-hire landings data. Using those revised ABC values, the same procedures used in the Comprehensive ACL Amendment for calculating ACL and ACT values were also used in Regulatory Amendment 13.

The revisions are necessary because if the ABC, ACL, and ACT values are not updated with the new MRIP estimates, ACLs would be set using MRFSS data while the landings being used to track the ACLs would be estimated using MRIP data. This would result in a disconnect in how ACLs are calculated versus how they are monitored. The changes in data impact the allocations to the commercial and recreational sectors because the formula used to establish the allocations remains unchanged from what was implemented previously in the Comprehensive ACL Amendment.

Using MRIP values to estimate recreational landings, and using updated headboat and commercial landings, ensures that the ABCs, ACLs, and ACTs are based on the best scientific information available in accordance with National Standard 2 of the Magnuson-Stevens Act.

Management Measures Contained in This Proposed Rule

This proposed rule would revise ACLs for the following species and species complexes: deep-water complex species (yellowedge grouper, blueline tilefish, silk snapper, misty grouper, sand tilefish, queen snapper, black snapper, and blackfin snapper); shallow-water groupers (red hind, rock hind, yellowmouth grouper, yellowfin grouper, coney, and graysby); snappers (gray snapper, lane snapper, cubera snapper, dog snapper, and mahogany snapper), jacks (almaco jack, banded rudderfish, and lesser amberjack), grunts (white grunt, sailor's choice, tomtate, and margate); porgies (jolthead porgy, knobbed porgy, saucereye porgy, scup, and whitebone porgy); Atlantic spadefish; blue runner; bar jack; gray triggerfish; scamp; and hogfish. The ACLs are used to monitor landings throughout a fishing season. The potential disconnect between how the ACLs are calculated and how they are monitored is important because the ACLs trigger the AMs that were established in the Comprehensive ACL Amendment.

The AMs for the commercial sector for the species and species complexes in this proposed rule specify that if the commercial ACL for a species or species complex is reached or projected to be reached during a fishing year, the sector will close for the remainder of that fishing year for that species or species complex. If a complex is closed, sale and purchase of any species in that complex is prohibited. If a species, or a single member of a species complex, is designated as overfished and the commercial ACL is exceeded, then during the following fishing year the commercial sector ACL would be reduced by the amount of the commercial ACL overage in the prior fishing year.

For the recreational sector, the AMs for the species and species complexes are as follows: if the recreational ACL is exceeded for a species or species complex in a fishing year, then during the next fishing year the NMFS Regional Administrator monitors the recreational landings for a persistence in increased landings, and using the best scientific information available, reduces the length of the recreational fishing season as necessary to ensure the recreational landings do not exceed the recreational ACL.

This proposed rule would ensure that the methodology used to calculate the ACLs is consistent with the methodology used to monitor landings and determine when it is necessary to trigger the established AMs.

Additional Measures Contained in Regulatory Amendment 13

In addition to the ACL revisions in this proposed rule, Regulatory Amendment 13 would revise the ABCs, and ACTs for the 37 un-assessed species in the snapper-grouper FMU, using the improved data methods as previously described.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator for Fisheries, NOAA, (AA) has determined that this proposed rule is consistent with Regulatory Amendment 13, the FMP, 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 Chief Counsel for Regulation of the Department of Commerce certified

to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if implemented, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows:

The purpose of this rule and Regulatory Amendment 13 is to revise the ABCs, ACLs (including sector ACLs) and ACTs implemented by the Comprehensive ACL Amendment with improved data. The revisions are necessary because if the ABCs, ACLs (including sector ACLs), and ACTs are not updated using the new data, there could be a disconnect between the ACLs and the landings used to determine if ACLs are met and AMs are triggered. The Magnuson-Stevens Act provides the statutory basis for the proposed action.

No duplicative, overlapping, or conflicting Federal rules have been identified.

The rule would apply directly to licensed commercial fishermen in the Finfish Fishing Industry (NAICS 114111) that harvest six stock complexes and six individual stocks of the South Atlantic snapper-grouper fishery. An estimated 890 to 944 small businesses in the Finfish Fishing Industry may be affected.

This proposed rule would not establish any new reporting or record-keeping requirements. If the measures contained in this proposed rule are implemented, they are expected to increase the lengths of commercial fishing seasons for the deep-water and porgies stock complexes and collectively increase annual landings by 33,821 lb (15,341 kg) and $78,259. These proposed measures are also expected to decrease the lengths of commercial fishing seasons for the jacks complex, blue runner and gray triggerfish, and collectively decrease annual landings by 46,527 lb (21,104 kg) and $74,520. The collective net change to small businesses in the Finfish Fishing Industry would be a loss of annual landings of 12,706 lb (5,763 kg), but a gain of $3,739 because the deep-water and porgies stock complexes are more valued species. With an estimated 890 to 944 small businesses potentially affected, the average annual gain per small business would be $3.96 to $4.20.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: March 15, 2013.

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 § 622.49, the first sentence of paragraphs (b)(8)(i)(A), (b)(8)(ii), (b)(9)(i)(A), (b)(9)(ii), (b)(10)(i)(A), (b)(10)(ii), (b)(12)(i)(A), (b)(12)(ii), (b)(13)(i)(A), (b)(13)(ii), (b)(16)(i)(A), (b)(16)(ii), (b)(17)(i)(A), (b)(17)(ii), (b)(19)(i)(A), (b)(19)(ii), (b)(20)(i)(A), (b)(20)(ii), (b)(21)(i)(A), (b)(21)(ii), (b)(23)(i)(A), (b)(23)(ii), (b)(24)(i)(A), and (b)(24)(ii) are revised, to read as follows:

§ 622.49 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(b) * * *

(8) * * *

(i) * * *

(A) If commercial landings for the deep-water complex, as estimated by the SRD, reach or are projected to reach the commercial ACL of 376,469 lb (170,763 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If recreational landings for the deep-water complex, as estimated by the SRD, exceed the recreational ACL of 334,556 lb (151,752 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

(9) * * *

(i) * * *

(A) If commercial landings for scamp, as estimated by the SRD, reach or are projected to reach the commercial ACL of 333,100 lb (151,092 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If recreational landings for scamp, as estimated by the SRD, exceed the recreational ACL of 176,688 lb (80,144 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

(10) * * *

(i) * * *

(A) If commercial landings for other SASWG, as estimated by the SRD, reach or are projected to reach the commercial ACL of 49,776 lb (22,578 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If recreational landings for other SASWG, as estimated by the SRD, exceed the recreational ACL of 46,656 lb (21,163 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

* * * * *

(12) * * *

(i) * * *

(A) If commercial landings for lesser amberjack, almaco jack, and banded rudderfish, combined, as estimated by the SRD, reach or are projected to reach their combined commercial ACL of 189,422 lb (85,920 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If recreational landings for the complex (lesser amberjack, almaco jack, and banded rudderfish), combined, as estimated by the SRD, exceed the recreational ACL of 267,799 lb (121,472 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if

necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

(13) * * *

(i) * * *

(A) If commercial landings for bar jack, as estimated by the SRD, reach or are projected to reach the commercial ACL of 5,265 lb (2,388 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If recreational landings for bar jack, as estimated by the SRD, exceed the recreational ACL of 19,515 lb (8,852 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

* * * * *

(16) * * *

(i) * * *

(A) If commercial landings combined for this other snappers complex, as estimated by the SRD, reach or are projected to reach the combined complex commercial ACL of 215,662 lb (97,823 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If the combined recreational landings for this snappers complex, as estimated by the SRD, exceed the recreational ACL of 728,577 lb (330,477 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL for this complex in the following fishing year. * * *

(17) * * *

(i) * * *

(A) If commercial landings for gray triggerfish, as estimated by the SRD, reach or are projected to reach the commercial ACL of 272,880 lb (123,776 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If recreational landings for gray triggerfish, as estimated by the SRD, exceed the recreational ACL of 353,638 lb (160,407 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

* * * * *

(19) * * *

(i) * * *

(A) If commercial landings for blue runner, as estimated by the SRD, reach or are projected to reach the commercial ACL of 177,506 lb (80,515 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If recreational landings for blue runner, as estimated by the SRD, exceed the recreational ACL of 948,223 lb (430,107 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

* * * * *

(20) * * *

(i) * * *

(A) If commercial landings for Atlantic spadefish, as estimated by the SRD, reach or are projected to reach the commercial ACL of 35,108 lb (15,925 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

* * * * *

(ii) * * * If recreational landings for Atlantic spadefish, as estimated by the SRD, exceed the recreational ACL of 154,352 lb (70,013 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

(21) * * *

(i) * * *

(A) If commercial landings for hogfish, as estimated by the SRD, reach or are projected to reach the commercial ACL of 49,469 lb (22,439 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. * * *

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(ii) * * * If recreational landings for hogfish, as estimated by the SRD, exceed the recreational ACL of 85,355 lb (38,716 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

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(23) * * *

(i) * * *

(A) If commercial landings for jolthead porgy, knobbed porgy, whitebone porgy, scup, and saucereye porgy, combined, as estimated by the SRD, reach or are projected to reach the commercial complex ACL of 36,348 lb (16,487 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. * * *

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(ii) * * * If recreational landings for jolthead porgy, knobbed porgy, whitebone porgy, scup, and saucereye porgy, combined, as estimated by the SRD, exceed the recreational ACL of 106,914 lb (48,495 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season for this complex by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

(24) * * *

(i) * * *

(A) If commercial landings for white grunt, sailor's choice, tomtate, and

margate, combined, as estimated by the SRD, reach or are projected to reach the commercial complex ACL of 218,539 lb (99,128 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for this complex for the remainder of the fishing year. * * *

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(ii) * * * If recreational landings for white grunt, sailor's choice, tomtate, and margate, as estimated by the SRD, exceed the recreational ACL of 588,113 lb (266,764 kg), round weight, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings and, if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the following recreational fishing season for this complex by the amount necessary to ensure recreational landings do not exceed the recreational ACL in the following fishing year. * * *

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[FR Doc. 2013–06417 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 130215145–3145–01]

RIN 0648–BD01

Control Date for Qualifying Landings History in the Western Gulf of Alaska Trawl Groundfish Fisheries

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

ACTION: Advance notice of proposed rulemaking (ANPR); control date.

SUMMARY: At the request of the North Pacific Fishery Management Council (Council), this notice announces a control date of March 1, 2013, that may be used as a reference for future management actions applicable to, but not limited to, qualifying landings and permit history for an allocation-based management or catch share program in the Western Gulf of Alaska (GOA) trawl groundfish fisheries. This notice is intended to discourage speculative entry into the fisheries while the Council considers whether and how allocations of fishing privileges should be developed under a future management program. The Council selected the control date based on previous fishing activity in the Western GOA groundfish fisheries, in which the majority of the fishery has concluded by March 1 each year. This notice is publishing close to the control date of March 1, 2013, and so will not either prompt speculation in advance of its publication, or disadvantage any fishers regarding their fishing activity after the control date, but before publication. This notice is also intended to promote awareness of possible rulemaking and provide notice to the public that any accumulation of landings history in the Western GOA trawl groundfish fisheries occurring after the control date may not be credited for purposes of making any allocation under a future management program.

DATES: March 1, 2013, shall be known as the control date for the Western GOA trawl groundfish fisheries and may be used as a reference for allocations in a future management program that is consistent with the Council's objectives and applicable Federal laws.

FOR FURTHER INFORMATION CONTACT: Rachel Baker: 907–586–7228 or *rachel.baker@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fisheries in the U.S. exclusive economic zone (EEZ) of the GOA under the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). The Council prepared, and NMFS approved, the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801 *et seq.* Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600 and 679.

This advance notice of proposed rulemaking would apply to owners and operators of catcher vessels and catcher/processors participating in Federal fisheries prosecuted with trawl gear in the Western Reporting Area of the GOA. The Western Reporting Area, defined at § 679.2 and shown in Figure 3 to 50 CFR part 679, includes the Western Regulatory Area (Statistical Area 610).

The Council and NMFS annually establish biological thresholds and annual total allowable catch limits for groundfish species to sustainably manage the groundfish fisheries in the GOA. To achieve these objectives, NMFS requires vessel operators participating in GOA groundfish fisheries to comply with various restrictions, such as fishery closures, to maintain catch within specified total allowable catch limits. The GOA groundfish fishery restrictions also include prohibited species catch (PSC) limits for species that are generally required to be discarded when harvested. When harvest of a PSC species reaches the specified PSC limit for that fishery, NMFS closes directed fishing for the target groundfish species, even if the total allowable catch limit for that species has not been harvested.

The Council and NMFS have long sought to control the amount of fishing in the North Pacific Ocean to ensure that fisheries are conservatively managed and do not exceed established biological thresholds. One of the measures used by the Council and NMFS is the license limitation program (LLP), which limits access to the groundfish, crab, and scallop fisheries in the Bering Sea and Aleutian Islands and the GOA. The LLP is intended to limit entry into federally managed fisheries. For groundfish, the LLP requires that persons hold and assign a license to each vessel that is used to fish in federally managed fisheries, with some limited exemptions. The preamble to the final rule implementing the groundfish LLP provides a more detailed explanation of the rationale for specific provisions in the LLP (October 1, 1998; 63 FR 52642).

Over the past few years, the Council has recommended amendments to the FMP to reduce the use of PSC in the GOA fisheries. Under Amendment 93 to the FMP, the Council recommended, and NMFS approved, Chinook PSC limits in the GOA pollock (*Theragra chalcogramma*) trawl fisheries (77 FR 42629, July 20, 2012). In June 2012, the Council recommended an FMP amendment to reduce Pacific halibut (*Hippoglossus stenolepis*) PSC limits for the trawl and longline fisheries in the Central GOA and Western GOA. This series of actions reflects the Council's commitment to reduce PSC in the GOA fisheries. Participants in these fisheries have raised concerns that the current limited access management system creates a substantial disincentive for participants to take actions to reduce PSC usage, particularly if those actions could reduce target catch rates. Additionally, any participants who choose not to take actions to reduce PSC usage stand to gain additional target catch by continuing to harvest groundfish at a higher catch rate, at the expense of any vessels engaged in PSC avoidance. In February 2013, the Council unanimously adopted a purpose and need statement, and goals and objectives, to support the development of a management system that would remove this disincentive to reduce PSC usage in Western GOA trawl groundfish fisheries.

The Council intends to develop a management program that would replace the current limited access

management program with allocations of allowable harvest (catch shares) to individuals, cooperatives, or other entities. The goal of the program is to improve stock conservation by creating vessel-level and/or cooperative-level incentives to control and reduce PSC, and to create accountability measures for participants when utilizing target, secondary, and PSC species. The Council also intends for the program to improve operational efficiencies, reduce incentives to fish during unsafe conditions, and support the continued participation of coastal communities that are dependent on the fisheries. The Council intends to develop an analysis of alternatives for a catch share management program that meets its goals and objectives. In developing the alternatives for analysis, the Council will consider how other fishery management programs have considered and applied MSA catch share provisions to meet similar goals and objectives.

The Council announced a control date of March 1, 2013, to reduce the incentive for, and dampen the effect of, speculative entry into the Western GOA trawl groundfish fisheries in anticipation of the future management program. The Council intended to establish a control date as soon as possible after its February 2013 decision to initiate development of a new management program for the Western GOA groundfish trawl fisheries. The Council selected the control date because it anticipated that the majority of the 2013 Western GOA trawl groundfish fishery would be concluded by March 1, 2013. The Council stated that it may not credit any catch history in those fisheries after the control date for purposes of making allocations under a future management program. The control date may be used as a reference for future management measures in determining how to credit landings and permit history acquired before or after this date for purposes of establishing an allocation-based management program. The establishment of a control date, however, does not obligate the Council to use this control date or take any action or prevent the Council from selecting another control date or imposing limits on permits acquired prior to the control date. Accordingly, this notification is intended to promote awareness that the Council may develop a catch share management program to achieve its objectives for the Western GOA trawl fisheries; to provide notice to the public that any current or future accumulation of fishing privilege interests in the Western GOA trawl fisheries may be affected, restricted, or even nullified; and to discourage speculative participation and behavior in the fisheries while the Council considers whether and how fishing privileges should be assigned or allocated in the future. Any measures the Council considers may require changes to the FMP. Such measures may be adopted in a future amendment to the FMP, which would include opportunity for further public participation and comment.

NMFS encourages public participation in the Council's development of the Western GOA trawl groundfish fisheries catch share management program. Please consult the Council's Web site at *http://www.alaskafisheries.noaa.gov/npfmc/* for information on public participation in the Council's decision-making process.

This notification and control date do not impose any legal obligations, requirements, or expectation.

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

Dated: March 18, 2013.

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.

[FR Doc. 2013–06542 Filed 3–20–13; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. 120806311–3213–01]

RIN 0648–BC25

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Crab Rationalization Program

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues a proposed rule that would implement Amendment 42 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). If approved, these regulations would revise the annual economic data reports (EDRs) currently required of participants in the Crab Rationalization Program (CR Program) fisheries. The EDRs include cost, revenue, ownership, and employment data that the North Pacific Fishery Management Council (Council) and NMFS use to study the economic impacts of the CR Program on harvesters, processors, and affected communities. This proposed action is necessary to eliminate redundant reporting requirements, standardize reporting across participants, and reduce participants' costs associated with the data collection. This action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the FMP, and other applicable laws.

DATES: Comments must be received no later than April 22, 2013.

ADDRESSES: You may submit comments, identified by FDMS Docket Number NOAA–NMFS–2012–0111, by any one of the following methods.

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking Portal Web site at *http://www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2012–0111 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 that line.
- *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.
- *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to 907–586–7557.
- *Hand delivery to the Federal Building:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

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 *http://www.regulations.gov* without change. All personal identifying

information (e.g., name, address, telephone number) 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 portable document file (PDF) formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS at the above address and by email to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

Electronic copies of Amendment 42, the Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA), and the categorical exclusion prepared for this action—as well as the Environmental Impact Statement (EIS) prepared for the CR Program—may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov.* The environmental impacts of the CR Program were analyzed in the Bering Sea/Aleutian Islands Crab Fisheries Final EIS. Due to the nature of this action, it is not predicted to have additional impacts beyond those identified in the EIS. Therefore, NMFS determined that this proposed action was categorically excluded from the need to prepare an environmental assessment under the National Environmental Policy Act.

FOR FURTHER INFORMATION CONTACT: Karen Palmigiano, 907–586–7228 or *karen.palmigiano@noaa.gov.*

SUPPLEMENTARY INFORMATION: The king and Tanner crab fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands (BSAI) are managed under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Act as amended by the Consolidated Appropriations Act of 2004 (Pub. L. 108–199, section 801). The Secretary of Commerce approved Amendments 18 and 19 to the FMP on November 19, 2004. NMFS published final regulations implementing the Crab Rationalization Program (CR Program) in 2005 (70 FR 10174, March 2, 2005). Regulations implementing the FMP, including the CR Program, are located at 50 CFR part 680.

Background

The CR Program is a limited-access system that allocates crab managed under the FMP among harvesters, processors, and coastal communities. Each year, the quota share (QS) issued to a person yields an amount of individual fishing quota (IFQ), which is a permit providing an exclusive harvesting privilege for a specific amount of raw crab pounds, in a specific crab fishery, in a given season. The size of each annual IFQ allocation is based on the amount of QS held by a person in relation to the total QS pool in a crab fishery. For example, a person holding QS equaling 1 percent of the QS pool in a crab fishery would receive IFQ to harvest 1 percent of the annual total allowable catch (TAC) in that crab fishery.

As part of the CR Program, the Council recommended and NMFS implemented a comprehensive economic data collection program. The CR Program requires participants to complete an annual economic data report (EDR) based on harvesting and processing activities for that fishing season. The Council and NMFS use the EDR to assess the success of the CR Program and develop amendments to the FMP necessary to mitigate any unintended consequences of the CR Program. An annual EDR is currently required for four categories of participants in the CR Program fisheries: catcher vessels, catcher/processors, shoreside processors, and stationary floating crab processors.

The information collected in the EDR is intended to provide comprehensive data to assist the Council and analysts in understanding the costs and benefits of the CR Program on harvesters' and processors' crab operations. Specifically, the Council and analysts use the data to examine changes in usage of the crab, excess harvesting and processing capacity, economic returns, variable costs and revenues, economic efficiency, and the stability of harvesters, processors and coastal communities. Data submission is mandatory (see regulations at § 680.6(a)). The EDR Program is administered by NMFS through contracts with the Pacific States Marine Fisheries Commission (PSMFC). NMFS collects fees from CR Program participants to recover the costs of administering the EDR (see regulations at § 680.44 for cost recovery fee collection under the CR Program). Section 304(d)(2) of the Magnuson-Stevens Act requires that NMFS collect fees necessary to recover the actual costs directly related to data collection of limited access privilege programs, such as the CR Program.

Need for Action

Since the beginning of the CR Program, EDRs containing cost, revenue, ownership, and employment data have been collected by NMFS annually from the harvesting and processing sectors. This comprehensive approach to collecting data was implemented because the data collection programs in place at the time the CR Program began did not collect employment, cost, and sales information necessary to adequately examine how processing plants and vessels were being affected by the implementation of the CR Program. Collection of these data could help the Council understand the economic performance of crab fishermen, determine how this performance has changed after rationalization, and assess what aspects of these changes are specifically attributable to crab rationalization.

Beginning in 2007, NMFS, the Council, the PSMFC, and industry participants initiated a multi-year review of the quality of data collected through the EDRs. Overall, this review process concluded that roughly one-third of the data collected through the annual EDRs are of high quality, one-third have quality limitations that could limit their utility and these concerns would require analysts to adjust their analytical methods and interpretations to accommodate these concerns, and one-third of the data were deemed not reliable for use in analysis. Additional detail on the EDR data quality review process is provided in Appendix C of the RIR/IRFA and is not repeated here.

In 2010, the Council initiated an analysis to modify the EDR based on the results of its data quality review process and public comment received during the Council's 5-year review of the CR Program. As part of this analysis, the Council considered input from a Center for Independent Experts review of the data collection program that was completed in October 2011 (see Section 2.4.3 of the RIR/IRFA for additional detail). In February 2012, the Council recommended Amendment 42 to the FMP to modify the EDR. This proposed rule would implement the Council's recommended changes to the EDR under Amendment 42. The proposed modifications to the current EDRs are presented in the RIR/IRFA for this action (see Section 2.2. of the RIR/IRFA) and summarized below.

Following the Council's recommendation of Amendment 42, additional industry outreach and Council review of the proposed EDR

revisions was carried out to ensure that the revisions were compatible with industry recordkeeping procedures and consistent with the intent of the Council recommendations. In October 2012, the Council reviewed the three proposed EDR forms developed for this action and the draft Paperwork Reduction Act submission. The Council expressed its support that NMFS go forward with this proposed rule.

The first concern identified by the Council with the current EDRs is inaccurate and inconsistently reported data. For example, the current processor EDRs require the reporting of labor information for each crab fishery, including average processing positions, which is intended to provide analysts with information concerning the normal processing staff for a processor. However, the Council and NMFS determined the reported average processing positions do not provide an accurate estimate of the number of staff used, as staff may be reassigned to non-crab tasks with changing plant needs. In some cases, a plant may switch from one production line to two lines, with large changes in the number of staff. Since instructions provide no reporting directions for these circumstances, reporting may be inconsistent across processors. Therefore, the Council suggested removing this data-reporting requirement, as inaccurately or inconsistently reported data limits its usefulness in analysis.

In addition to data quality limitations, several elements of the data collected under the CR Program are currently collected under other data collection programs. For example, the requirement for catcher vessels to report their fishing activity, including fish ticket numbers, days fishing, and days transiting and offloading, by crab fishery are also collected by the State of Alaska. The Council and NMFS agree these elements are useful for examining operational efficiencies; however, each of these elements is individually available through other data collection sources. Further information on the uses and possible shortcomings of each data element can be found in Section 2.5 and Appendix C of the RIR/IRFA.

In some cases, data collected through the EDR does not duplicate data collected under other collection programs, and so the EDR data provides the Council and NMFS with additional information. However, in the majority of cases, the data collected in the EDRs are already collected under other programs. As a result, submitters must submit the same data more than once, and analysts are required to analyze two separate sets of data for the same variables.

Finally, the cost to industry, both directly through data submission and indirectly through cost recovery funding of program administration, exceeds the estimates of administering and complying with the EDR that NMFS provided in the initial analysis of the CR Program (see **ADDRESSES**). NMFS' administrative costs associated with the current EDRs result from the production and distribution of data collection forms, processing of completed forms, data entry, data verification, and data management. These costs are then passed onto CR Program participants annually through the cost recovery fee system.

Since the EDR Program's inception, NMFS' associated administrative costs and fees have decreased. NOAA continues to work with the Council and PSFMC to streamline the data collection and reduce reporting errors. NMFS expects these continuing efforts and the revisions to the EDR proposed in this action to decrease costs further.

For several reasons, the cost of reporting associated with the current crab EDRs is more than what NMFS originally estimated when the EDR program was developed. First, vessel owners and processors are required to consult both annual fishing (i.e., days fishing, days traveling, and days processing) and financial (i.e., landings by share type, sales by species, and fuel costs) records, which often do not follow the same format. Initial estimates of time required to accurately complete an EDR was 7.5 hours per vessel. In 2012, during public testimony, the Council was advised that for the current EDR the actual time required to complete the forms was approximately 45 to 50 hours. The modifications proposed by this rule would reduce duplicative reporting, as well as the time and costs required to complete an EDR.

NMFS proposes changes to the annual crab EDRs that would result in the removal or modification of several reporting requirements. One major change would be the combination of the shoreside processor and floating processor EDR forms. There is currently a form for shoreside processor data submission and another for floating processor data submission. The forms are essentially the same, and the Council believed no information would be lost if the forms were combined into one form. As a result, there would be three separate EDR forms, rather than the current four.

The information below summarizes the changes that are proposed to each of the three EDR forms. Each table displays the information that NMFS would continue to collect from each submitter (catcher vessels, processors, and catcher/processors). For a more comprehensive description of what information has been removed or modified from the current forms and the reasons for the modifications and deletions, please see Section 2.5 Analysis of Alternatives in the RIR/IRFA.

Annual Catcher Vessel Crab EDR

TABLE 1—PROPOSED CATCHER VESSEL CRAB EDR

[The table below lists all elements that will be collected in the proposed catcher vessel EDR]

Deliveries and revenues	Landings by share type (pounds) by crab fishery.
	Landings by share type (revenue) by crab fishery.
	Market-Value and Negotiated-Price transfers of quota by share type (pounds) by crab fishery.
	Market-Value and Negotiated-Price transfers of quota by share type (cost) by crab fishery.
Crew Labor Costs	Payments to crew by crab fishery.
	Payments to captain by crab fishery.
	Health Insurance and Retirement Benefits—available for captain and crew.
Vessel Operating Expenses	Food and Provisions—total cost by crab fishery.
	Bait purchased—total cost by crab fishery.
	Fuel consumed—gallons by crab fishery.
	Fuel cost, annual—gallons and cost aggregated for all fisheries.
	Labor cost—all activities aggregated across all activities.
	Tendering.

Much of the data requested on the current annual catcher vessel Crab EDR is available through other sources (e.g., eLandings data collected by NMFS contains information on the specific quota accounts debited during a landing). Further, the quality of some data currently collected is poor and results in limited usefulness of the data for analyses (e.g., estimates of bait used are known to be inaccurate and unreliable). The Council recommended scaling back the data collection in the EDR, including eliminating the data collected in some categories so that only data that could be accurately and reliably collected would be required (See Table 1).

The proposed catcher vessel EDR would substantially decrease the amount of data collected in comparison to the current EDR. The proposed EDR would eliminate the reporting of fishing days, transiting days, and shipyard days as these can all be obtained from other data sets. It would omit any collection of information about overall vessel activities, such as days at sea and gross revenues. The EDR would continue to collect tendering and information associated with labor costs because those data are not available through other sources and were determined to be reliable in the RIR/IRFA prepared for this proposed action (Table 1).

The proposed catcher vessel EDR would continue the collection of revenue data, including landings by share type by crab fishery (pounds and revenue), and market-value or negotiated-price transfers of IFQ and community development quota (CDQ) received for harvest on the vessel during the calendar year, by fishery and harvest quota permit type (pounds and revenue). Data on payments to captains and crew would still be collected by fishery. Crew license and Commercial Fisheries Entry Commission (CFEC) permit numbers would also continue to be collected to facilitate analysis of demographic distribution of crew benefits. The proposed EDR would also require the reporting of vessel costs such as bait, food, and provisions purchased by crab fishery. This is slightly different from the current forms, which require submitters to include the quantity of these items used versus what is purchased. This new data on the quantity of items purchased would provide some understanding of expenditures and would be more easily reported by submitters than the quantity of items used.

Annual Shoreside Processor/Stationary Floating Processor Crab EDR

TABLE 2—PROPOSED ANNUAL SHORESIDE PROCESSOR/STATIONARY FLOATING PROCESSOR CRAB EDR

[The table below lists all elements that will be collected in the combined proposed processor EDR]

	Sales to affiliates/non-affiliates by species (product/process) by crab fishery.
	Sales to affiliates/non-affiliates by species (box size and finished pounds) by crab fishery (use box size categories).
	Sales to affiliates/non-affiliates by species (revenues) by crab fishery.
	Custom processing by product/process by crab fishery (include pounds raw and pounds of product).
	Custom processing revenues by crab fishery.
Labor	Man-hours by crab fishery.
	Total processing labor payments by crab fishery.
	Crab processing employees by residence by crab fishery.
Custom Processing Services Purchased.	Reporting requirement—all companies contracting custom processing must report.
	Raw pounds by crab fishery.
	Product and processes by crab fishery.
	Finished pounds by crab fishery.
	Processing fee by crab fishery.
Crab Purchases	Raw crab purchases by fishery (IFQ type) by crab fishery.
	Raw crab purchases by fishery (pounds) by crab fishery.
	Raw crab purchases by fishery (gross payments) by crab fishery.
Crab Processing Costs	Market-Value and Negotiated-Price transfers of IPQ by (pounds and monetary cost) crab fishery.
General Plant Costs	Foreman, managers, other employees and salaries aggregated across all fisheries.

The proposed Annual Shoreside Processor/Stationary Floating Processor Crab EDR (Processor EDR) would combine the Annual Shoreside Processor Crab EDR and the Annual Stationary Floating Processor Crab EDR into a processor EDR and would eliminate several elements from the current data collections. Most of the deleted elements represent production data, which are similar to data found within the State of Alaska's Commercial Operators Annual Report (COAR). Crab processors must submit the COAR annually and report processing and plant costs in it. The production data that is not available through other sources could be estimated by NMFS based on landings data. Therefore, the proposed exclusion of these data from the processor EDR would not affect the analysis of EDR data and may decrease the submitter's time burden required to fill in the form. See Table 2 for a description of the elements that would be retained and those that would be modified in the proposed processor EDR.

Revenue data collected under the proposed processor EDR would remain essentially the same. These data allow analysts to distinguish crab sales to affiliated entities from sales to unaffiliated entities, which is not currently available through other data sources. However, the proposed processor EDR would not require sales data by crab size or grade. Currently, those elements appear to be inconsistently reported and do not appear to correlate with price differences to date. Packing box sizes would continue to be reported by categories. Revenues from custom processing (an arrangement under which a person processes crab on behalf of another) would be added, as that data is currently unavailable from other sources and may provide insights into the costs of processing and markets for custom services in the fisheries. Unlike the current processor EDRs, the proposed processor EDR provides for the reporting of processed output and revenue received for custom processing of CR crab performed for other crab buyers or registered crab receivers (RCR) for each CR fishery in which custom processing was provided.

Reporting of labor data (i.e., man-hours, total processing labor payments, and crab processing employees by residence) would not change from the

status quo. Custom processing services purchased would be reported with some differences from the status quo (i.e., excluding crab size and grade and box size). Crab purchases by share type would still be collected. This data is not available from other data sources.

Annual Catcher/Processor Crab EDR

TABLE 3—PROPOSED ANNUAL CATCHER PROCESSOR CRAB EDR

[The table below lists all elements that would be collected in the proposed catcher/processor EDR.]

Deliveries and revenues—for operations as a catcher vessel.	Landings by share type (pounds) by crab fishery.
	Landings by share type (revenues) by crab fishery.
Revenues	Sales to affiliates/non-affiliates by species (product/process) by crab fishery.
	Sales to affiliates/non-affiliates by species (box size and finished pounds) by crab fishery (use box size categories).
	Sales to affiliates/non-affiliates by species (revenues) by crab fishery—FOB Alaska.
	Custom processing by species/product/process by crab fishery (include pounds raw and pounds of product).
	Custom processing services provided by crab fishery.
IFQ	Market-Value and Negotiated-Price transfers of quota by share type (pounds) by crab fishery.
	Market-Value and Negotiated-Price transfers of quota by share type (cost) by crab fishery.
Crew	Payments to captain by crab fishery.
	Payments to harvest crew by crab fishery (aggregated across harvesting and processing crew).
	Crew license number/CFEC permit number aggregated across all crab fisheries.
Custom Processing Services Purchased.	Custom processing services purchased (raw pounds) by crab fishery.
	Custom processing services purchased (product and process) by crab fishery.
	Custom processing services purchased (finished pounds) by crab fishery.
	Custom processing services purchased (processing fee) by crab fishery.
Crab purchases	Raw crab purchases by fishery (IFQ type) by crab fishery.
	Raw crab purchases by fishery (pounds) by crab fishery.
	Raw crab purchases by fishery (gross payments) by crab fishery.
Crab Costs	Bait used (species/pounds by fishery) purchases by crab fishery.
	Bait used (species/cost by fishery) purchases by crab fishery.
	Fuel used—gallons by crab fishery (gallons only).
	Food and provisions (cost) purchases by crab fishery.
	Other crew expenses purchases by crab fishery.
	Market-Value and Negotiated-Price transfers of IPQ by (pounds and monetary cost) crab fishery.
Vessel Costs	Foremen, managers, other employees and salaries aggregated across all fisheries.
	Fuel—gallons and cost aggregated for all fisheries.

Catcher/processors participate in both harvesting and processing. Therefore, the proposed catcher/processor EDR includes elements for the collection of harvesting and processing information.

Much like the proposed Annual Catcher Vessel Crab EDR, the proposed catcher/processor EDR would eliminate the reporting of fishing data (i.e. days in the fishery, days fishing, days traveling, and days processing), as well as production information (i.e. raw crab processed, crab size and grade, and finished pounds) (Table 3). Analysts would have access to this information through other sources. A new section would be added for deliveries and revenues by share type when operating as a catcher vessel. Most catcher/processors are unlikely to operate exclusively as a catcher vessel, but in instances when a catcher/processor operates as a catcher vessel, these data could be important to understanding total catcher vessel revenues in the fishery.

Several elements would remain, including sales by species by packing box size to affiliated entities and unaffiliated entities, custom processing revenue and production, payments to captains and crews, crew license, CFEC permit numbers and residence information, custom processing services purchased, and crab purchases by share type. All this information provides data that is not found in other data collections and is useful to analysts when assessing the CR Program (see Table 3).

Most crab fishing and vessel costs would be omitted. Bait purchases and food and provision purchases would continue to be reported by fishery. Gear purchases (i.e. pots) would not be collected, because pot registration information together with pot pull information, which are collected through other programs, provide analysts with some insights into changes in pot usage. Fuel use would be estimated for each fishery, as well as annual fuel costs. Processing data (i.e., broker fees, repackaging costs, storage costs, and processing and packing materials) would be eliminated. In most cases, these data are not available on a fishery-by-fishery basis and, therefore, are limited in their usefulness.

Vessel cost data (e.g., insurance premiums, repairs and maintenance, and investments) would be eliminated as much of the current data suffer from data quality limitations. Fishing and processing activities along with product revenues can be estimated with existing data from other sources, such as the eLandings System or the State's COAR report.

Other Regulatory Changes

This action proposes to remove the historical EDR requirements from regulations at § 680.6 because they are obsolete. The historical EDR regulations at § 680.6(a) for catcher vessels, § 680.6(c) for catcher/processors, § 680.6(e) for stationary floating crab processors, and § 680.6(g) for shoreside processors describe detailed requirements on historical data submission that are no longer necessary because the application deadline has expired and those forms have already been submitted. The historical EDR was required to be submitted by owners and leaseholders that harvested or processed crab in the BSAI CR program fisheries during 1998, 2001, and 2004. Historical EDRs were required to be submitted for the catcher vessel sector by July 11, 2005, and by June 30, 2005, for catcher/processors, stationary floating crab

processors, and shoreside processors. The historical EDRs were required to be submitted only once, and the requirement was concluded upon completion of the validation audits of those EDRs in early 2007. NMFS no longer requires participants in BSAI crab fisheries during the calendar years 1998, 2001, or 2004 to complete any further reports under the § 680.6 EDR requirements.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined this proposed rule is consistent with Amendment 42, the FMP, 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.

Regulatory Impact Review (RIR)

An RIR was prepared to assess all cost and benefits of available regulatory alternatives. The RIR considers all quantitative and qualitative measures. Copies of the combined RIR/IRFA are available from NMFS (see **ADDRESSES**). The Council recommended Amendment 42 based on the benefits it will provide to the Nation, which will be derived from the updating and revision of the current EDRs. Specific aspects of the economic analysis are discussed below.

Initial Regulatory Flexibility Analysis (IRFA)

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. Copies of the RIR/IRFA prepared for this proposed rule are available from NMFS (see **ADDRESSES**). The RIR/IRFA prepared for this proposed rule incorporates by reference an extensive RIR/FRFA prepared for Amendments 18 and 19 to the FMP that detail the impacts of the CR Program on small entities.

The IRFA for this proposed action describes the action, why this action is being proposed, the objectives and legal basis for the proposed rule, the type and number of small entities to which the proposed rule would apply, and the projected reporting, recordkeeping, and other compliance requirements of the proposed rule. It also identifies any overlapping, duplicative, or conflicting Federal rules and describes any significant alternatives to the proposed rule that would accomplish the stated objectives of the Magnuson-Stevens Act and other applicable statues and that would minimize any significant adverse economic impact of the proposed rule on small entities. The description of the proposed action, its purpose, and its legal basis are described in the preamble and are not repeated here.

After considerable review of the EDR Program, the Council suggested amending the EDR process so that the data collected is accurate, informative to the Council, not redundant with existing reporting requirements, and can be reported and administered at a reasonable cost. Specifically, the Council wants to limit the EDR to the collection of data that have been demonstrated, through the development of the EDR metadata, and other reviews of the data, to be accurate. The Council determined that data collection should be structured and specific elements identified, to minimize costs while maintaining accuracy and providing the greatest information value to the management decision making process.

The EDR is required to be submitted by 74 catcher vessel owners. Based on the definition of a small entity (see section 3.1.1 of the RIR/IRFA for the full definition and discussion of what a ''small entity'' is), only one vessel owner would be considered a small entity. Instead, because crabs are relatively high value, the majority of harvesters join cooperatives, which allows them to pool their quota.

Three catcher/processor owners would be required to submit catcher/processor data reporting forms under the proposed action. None of the catcher/processors are considered small entities. Nineteen shore-based or floating processors would be required to submit their EDR data. Of these nineteen, four are small entities that are controlled by community development corporations or non-profit entities, and five are estimated to be small entities because they employ fewer than 500 individuals.

This proposed action would require all catcher vessel and catcher/processor operators to report categories of information: ex vessel revenues; market lease revenues; crew compensation; bait, food, and provision purchases; and fuel use by crab fishery. Catcher vessel and catcher/processor operators would also be required to report annual fuel and labor costs aggregated across all fisheries and identify whether the vessel operated as a tender. Processors and catcher/processors would be required to report crab purchases, custom processing services provided and purchased, crab sales revenue, and processing labor costs.

The reporting requirement under the proposed action is substantially less than required under the current regulations. If adopted, the proposed changes would reduce the record keeping and reporting requirements substantially from the status quo, resulting in reduced administrative expenses for both small and large entities.

Description of Significant Alternatives Considered

The Council considered a series of alternatives and different options as it evaluated the potential to revise the annual crab EDRs, including the ''no action'' alternative. The RIR contains brief summaries of these alternatives. Three alternatives were defined for each of the three sectors: catcher vessels, catcher/processors, and shoreside processors and stationary floating crab processors. All alternatives collect annual reports of activity for the preceding year even though the variables are different for each sector. Three alternatives for the catcher vessel sector were considered: Alternative 1, status quo/no action; Alternative 2, which would reduce the variables collected under the status quo, including the collection of landings and revenues by share type; lease costs; crew information such as crew shares, payments, contracts, settlement sheets; purchases such as pots, fuel, vessel investments, repair, and maintenance; annual costs for insurance and fuel; and the vessel's annual gross revenues and payments; and Alternative 3, which includes further reduction of data collection from Alternative 2, including limits on data collection to deliveries, revenues, crew data, fuel use, and annual costs. Ultimately, the Council recommended Alternative 3 with slight modifications to exclude the collection of crew contracts and settlement sheets, but includes the collection of crew license or permit numbers, bait purchases by crab fishery, as well as food and provision purchases by crab fishery (See Table 1 for a full list of data to be collected in the proposed catcher vessel EDR.).

Three alternatives for the catcher/processor sector were also considered: Alternative 1, status quo/no action; Alternative 2, a reduction of variables collected under the status quo, including the collection of landings and revenues from the vessel; custom processing; purchase data such as fuel use; vessel costs; annual gross revenues; and payments to labor; general annual data; leasing and crew information, and Alternative 3, which is a further reduction of data collected from

Alternative 2, which limits data collected to leases, gallons of fuel used, IPQ lease costs, sales using box size categories, and custom processing (raw crab and pounds of product). The Council chose Alternative 3 with slight modifications to exclude the collection of crew contracts and settlement sheets, but include the collection of crew license or permit numbers, bait purchases by crab fishery, and food and provision purchases by crab fishery (See Table 2 for a full list of data to be collected in the proposed catcher/processor EDR).

Three alternatives for the combined shoreside processor and stationary floating crab processor were considered. The Council chose to combine data collection for these two types of processors, because the data collection variables are similar. The alternatives considered were: Alternative 1, status quo/no action; Alternative 2, a reduction of variables collected under the status quo, including data collection of first and last day of processing; revenues by fishery; revenues and quantities of custom processed crab products; labor man-hours by crab fishery; costs of IPQ leases, salaries, and general plant costs; and processing information; and Alternative 3, a further reduction of data collection from Alternative 2, which limits data collection to combine data collected for crab fisheries in the aggregate for labor, IPQ lease payments, and revenue and box size information, but also requires revenues to be reported using a standard pricing for Alaska, and custom processing contracts to be reported by each company. The Council chose Alternative 3 with slight modifications to require reporting requirements on a fishery-by-fishery basis for processing man-hours, total processing labor payments, and number of employees by residence (See Table 3 for a full list of data to be collected in the proposed processor EDR).

Additional Alternatives Considered

The Council considered two additional alternatives but both were rejected. First, the Council considered eliminating the EDR program in its entirety. The Council elected not to advance this alternative. Instead, through this proposed action, the Council intends to improve the quality of the data collected and eliminate redundancies with other collections.

The Council also considered eliminating the use of blind formatting, which requires that data adhere to a blind formatting requirement and that data are maintained by a third party data manager. For the crab EDRs, the third party is the PSMFC. It was the opinion of the Council, and was supported by public testimony, that the potential risk associated with the disclosure of data was greater than the perceived benefits of removing the blind formatting requirement. Therefore, PSMFC will continue to abide by all statutory and regulatory data confidentiality requirements and will only release the data to NMFS, Council staff, and any other authorized users in a blind format.

Collection-of-Information Requirements

This proposed rule contains collection-of-information requirements subject to review and approval by OMB under the PRA. These requirements have been submitted to OMB for approval under the original OMB Control Number 0648–0518. Public reporting burden is estimated to average 10 hours for Annual Catcher Vessel Crab EDR; 10 hours for Annual Catcher/processor Crab EDR; 10 Annual stationary floating crab processor and shoreside crab processor EDR (replacing formerly two separate EDRs); and 8 hours for Verification of Data. Combination of the shoreside processor and stationary floating processor crab EDRs would be effective with approval of this rule. Public reporting burden includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden statement; ways to enhance 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 on these or any other aspects of the collection of information, to NMFS (see **ADDRESSES**) and by email to *OIRA_Submission@omb.eop.gov* or fax to 202–395–7285.

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

List of Subjects in 50 CFR Part 680

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: March 14, 2013.

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 680 is proposed to be amended as follows:

PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 680 continues to read as follows:

Authority: 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

■ 2. Section 680.6 is revised to read as follows:

§ 680.6 Crab economic data report (EDR).

(a) *Requirements.* (1) Any owner or leaseholder of a vessel or processing plant, or a holder of a registered crab receiver permit that harvested, processed, or custom processed, CR crab during a calendar year must submit a complete Economic Data Report (EDR) by following the instructions on the applicable EDR form.

(2) A completed EDR or EDR certification pages must be submitted to the DCA for each calendar year on or before 1700 hours, A.l.t., July 31 of the following year.

(3) Annual EDR forms for catcher vessels, catcher/processors, shoreside crab processors, and stationary floating crab processors are available on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov* or the Pacific States Marine Fisheries Commission (PSMFC) Alaska Crab Rational Program Web site at *www.psmfc.org/alaska_crab/,* or by contacting NMFS at 1–800–304–4846.

(b) *EDR certification pages.* The owner or leaseholder must submit the EDR certification pages either:

(1) *As part of the entire EDR.* The owner or leaseholder must submit the completed EDR certification pages as part of the entire EDR and must attest to the accuracy and completion of the EDR by signing and dating the certification pages; or

(2) *As a separate document.* The owner or leaseholder must submit the completed EDR certification pages only, and must attest that they meet the conditions exempting them from submitting the EDR, by signing and dating the certification pages.

(c) *Annual catcher vessel crab EDR*—Any owner or leaseholder of a catcher vessel that landed CR crab in the previous calendar year must submit to the DCA, electronically or at the address provided on the form, a completed catcher vessel EDR for annual data for the previous calendar year.

(d) *Annual catcher/processor crab EDR*—Any owner or leaseholder of a catcher/processor that harvested or processed CR crab in the previous calendar year must submit to the DCA, electronically or at the address provided on the form, a completed catcher/processor EDR for annual data for the previous calendar year.

(e) *Annual stationary floating crab processor (SFCP) and shoreside crab processor EDR*—Any owner or leaseholder of an SFCP or shoreside crab processor that processed CR crab, including custom processing of CR crab performed for other crab buyers, in the previous calendar year must submit to the DCA, electronically or at the address provided on the form, a completed processor EDR for annual data for the previous calendar year.

(f) *Verification of data.* (1) The DCA shall conduct verification of information with the owner or leaseholder.

(2) The owner or leaseholder must respond to inquiries by the DCA within 20 days of the date of issuance of the inquiry.

(3) The owner or leaseholder must provide copies of additional data to facilitate verification by the DCA. The DCA auditor may review and request copies of additional data provided by the owner or leaseholder, including but not limited to previously audited or reviewed financial statements, worksheets, tax returns, invoices, receipts, and other original documents substantiating the data.

(g) *DCA authorization.* The DCA is authorized to request voluntary submission of economic data specified in this section from persons who are not required to submit an EDR under this section.

Tables 2, 3c, 4, 5, and 6 [Removed]

■ 3. Remove Tables 2, 3c, 4, 5, and 6 to part 680.

[FR Doc. 2013–06413 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 78, No. 55
Thursday, March 21, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Section 538 Guaranteed Rural Rental Housing Program 2013 Industry Forums—Open Teleconference and/or Web Conference Meetings

AGENCY: Rural Housing Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces a series of teleconference and/or web conference meetings regarding the U.S. Department of Agriculture (USDA) Section 538 Guaranteed Rural Rental Housing Program, which are scheduled to occur during the months of March, July, and November of 2013. This notice also outlines suggested discussion topics for the meetings and is intended to notify the general public of their opportunity to participate in the teleconference and/or web conference meetings.

DATES: The dates and times for the teleconference and/or web conference meetings will be announced via email to parties registered as described below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to register for the calls and obtain the call-in number, access code, web link and other information for any of the public teleconferences and/or web conferences may contact Monica Cole, Financial and Loan Analyst, Multi-Family Housing Guaranteed Loan Division, Rural Development, U.S. Department of Agriculture, telephone: (202) 720–1251, fax: (202) 205–5066, or email: *monica.cole@wdc.usda.gov.* Those who request registration less than 15 calendar days prior to the date of a teleconference and/or web conference meetings may not receive notice of that teleconference and/or web conference meeting, but will receive notice of future teleconference and/or web conference meetings. The Agency expects to accommodate each participant's preferred form of participation by telephone or via web link. However, if it appears that existing capabilities may prevent the Agency from accommodating all requests for one form of participation, each participant will be notified and encouraged to consider an alternative form of participation. Individuals who plan to participate and need language translation assistance should inform Monica Cole within 10 business days in advance of the meeting date.

SUPPLEMENTARY INFORMATION: The objectives of this series of teleconferences are as follows:

- Enhance the effectiveness of the Section 538 Guaranteed Rural Rental Housing Program.
- Update industry participants and Rural Housing Service (RHS) staff on developments involving the Section 538 program.
- Enhance RHS' awareness of the market and other forces that impact the Section 538 Guaranteed Rural Rental Housing Program.

Topics to be discussed could include, but will not be limited to, the following:

- Updates on USDA's Section 538 Guaranteed Rural Rental Housing Program activities.
- Perspectives on the current state of debt financing and its impact on the Section 538 program.
- Enhancing the use of Section 538 financing with the transfer and/or preservation of Section 515 developments.
- The impact of Low Income Housing Tax Credits program changes on Section 538 financing.

USDA prohibits discrimination against its customers, employees, and applicants for employment on the bases of race, color, national origin, age, disability, sex, gender identity, religion, reprisal and where applicable, political beliefs, marital status, familial or parental status, sexual orientation, or all or part of an individual's income is derived from any public assistance program or protected genetic information in employment or any program activity conducted or funded by the Department. (Not all prohibited bases apply to all programs and/or employment activities.) Individuals who are deaf, hard of hearing or have speech disabilities and you wish to file either an EEO or program complaint, please contact USDA through the Federal Relay Service at (800) 877–8339 or (800) 845–6136 (in Spanish). Persons with disabilities, who wish to file a program complaint, please see information below on how to contact us by mail directly or by email. Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD). If you wish to file a Civil Rights program complaint of discrimination, complete the USDA Program Complaint Form, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html,* or at any USDA office, or call (866) 632–9992 to request a form. You may also write a letter containing all of the information requested on the form. Send your completed complaint form or letter to us by mail at to USDA, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410, by fax (202) 690–7442 or email at *program.intake@usda.gov.* ''USDA is an equal opportunity provider, employer, and lender.''

Dated: March 11, 2013.

Tammye Treviño,

Administrator, Rural Housing Service.

[FR Doc. 2013–06453 Filed 3–20–13; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Office of the Secretary

[Docket No. 130123064–3064–01]

Public Availability of Department of Commerce FY2012 Service Contract Inventory

AGENCY: Office of the Secretary, Department of Commerce.

ACTION: Notice of public availability of FY 2012 Service Contract Inventories.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the Department of Commerce is publishing this notice to advise the public of the availability of the Fiscal Year (FY) 2012 Service Contract Inventory and a report that analyzes the Department's FY 2011 Service Contract Inventory. The service contract inventory provides information on service contract actions over $25,000

made in FY 2012. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance memo on service contract inventories issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP).

ADDRESSES: The Department of Commerce has posted its FY 2012 inventory and summary on the Office of Acquisition Management homepage at the following link *http://www.osec.doc.gov/oam/*. OFPP's guidance memo on service contract inventories is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.*

FOR FURTHER INFORMATION CONTACT: Questions regarding the service contract inventory should be directed to Virna Winters, Director for Acquisitions Policy and Oversight Division at 202–482–4248 or *vwinters@doc.gov.*

Ellen Herbst,

Senior Adviser to the Deputy Secretary performing the non-exclusive duties of the Chief Financial Officer and Assistant Secretary for Administration.

[FR Doc. 2013–06524 Filed 3–20–13; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–22–2013]

Foreign-Trade Zone 262—Southaven (Desoto County), Mississippi; Notification of Proposed Production Activity; Milwaukee Electric Tool Corporation (Power and Hand Tools); Olive Branch, Greenwood, and Jackson, Mississippi

Northern Mississippi FTZ, Inc., grantee of FTZ 262, submitted a notification of proposed production activity on behalf of Milwaukee Electric Tool Corporation (METC), located in Olive Branch, Greenwood, and Jackson, Mississippi. The notification conforming to the requirements of the regulations of the Board (15 CFR 400.22) was received on February 28, 2013.

A separate application for subzone status at the METC facilities was submitted and will be evaluated under Sections 400.12 and 400.31 of the Board's regulations. The facilities are used for the production and kitting of power and hand tools and related accessories. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt METC from customs duty payments on the foreign status components used in export production. On its domestic sales, METC would be able to choose the duty rates during customs entry procedures that apply to power and hand tools (duty rate ranges from free to 12.5%) for the foreign status inputs noted below. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

The components and materials sourced from abroad include oil and grease, articles of plastic (tubing, hoses, fittings, fasteners, stoppers, lids), articles of rubber (caps, tubes, hoses, gaskets, seals, guards, boots, covers), articles of leather, felt seals, paper and paperboard labels/seals/gaskets/boxes/containers, printed materials, textile carrying cases, sweatshirts, jackets, gloves and hand warmers of textile materials, articles of fiberglass, fasteners, springs, wire, pins, spacers, guides, copper wire/tubing/fasteners, shovels, axes, pruners, shears, saws and related parts, hand tools, metal brackets/stoppers/sign plates, pumps and related parts, heat guns, filters, machines, presses and related tools, bearings and related parts, parts of transmissions, flywheels, gear boxes, electric motors and generators, batteries, lamps, radios and related equipment, electrical components, printed circuit boards/assemblies, controllers, cameras, coaxial cable, insulated fittings, wheel assemblies, rangefinders, levels, calculating/measuring instruments and related parts, micrometers, gauges, calipers, tape measures, thermometers, pyrometers, barometers and related parts, multi-meters, fork meters, laser levels, test benches, displays, and LED lights (duty rate ranges from free to 28.2%). Inputs included in certain textile categories (classified within HTSUS Subheadings 4202.92, 6101.20, 6101.30, 6201.93, 6201.99, 6202.93, 6202.99, 6216.00, 6217.10 and 6307.90) will be admitted to the proposed subzone under privileged foreign status (19 CFR 146.41) or domestic (duty paid) status (19 CFR 146.43).

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 April 30, 2013.

A copy of the notification 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 Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: March 15, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–06554 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–801]

Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2010–2011

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

SUMMARY: The Department of Commerce (''the Department'') published the *Preliminary Results* of the eighth administrative review and aligned new shipper reviews on certain frozen fish fillets from the Socialist Republic of Vietnam (''Vietnam'') on September 12, 2012.[1] We gave interested parties an opportunity to comment on the *Preliminary Results.* Based upon our analysis of the comments and information received, we made changes to the margin calculations for these final results. The final dumping margins are listed below in the ''Final Results of the Administrative Reviews'' section of this notice. The period of review (''POR'') is August 1, 2010, through July 31, 2011.

DATES: *Effective Date:* March 21, 2013.

FOR FURTHER INFORMATION CONTACT: Paul Walker (Anvifish), Susan Pulongbarit (Vinh Hoan), Alex Montoro (An Phu and Godaco) or Seth Isenberg (Docifish), AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution

[1] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Eighth Antidumping Duty Administrative Review and Ninth New Shipper Reviews, Partial Rescission of Review, and Intent to Revoke Order in Part,* 77 FR 56180 (September 12, 2012) (''*Preliminary Results*'').

Avenue NW., Washington, DC 20230; telephone 202–482–0413, 202–482–4031, 202–482–0238, or 202–482–0588, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published the *Preliminary Results* on September 12, 2012.[2] Between November 20, 2012 and December 4, 2012 interested parties submitted surrogate value data for consideration in the final results. On December 12, 2012, the Department released verification reports for its verification of Vinh Hoan Corporation (''Vinh Hoan'').[3] On December 13, 2012, the Department extended the final results to March 13, 2013.[4] Between December 21, 2012 and January 17, 2013, interested parties submitted case and rebuttal briefs. On February 21, 2013 the Department held both public and closed hearings.

Scope of the Order

The merchandise subject to the order is frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus.* The products are currently classifiable under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheadings 1604.19.4000, 1604.19.5000, 0305.59.4000, 0304.29.6033 (Frozen Fish Fillets of the species *Pangasius* including basa and tra). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order remains dispositive.[5]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in these reviews are addressed in the Issues and Decision Memorandum. A list of the issues which parties raised is attached to this notice as Appendix I. The Issues and Decision Memorandum is a public document and is on file in the Central Records Unit (''CRU''), Room 7046 of the main Department of Commerce building, as well as electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the CRU. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov/ia/.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Final Partial Rescission

In the *Preliminary Results,* the Department preliminarily rescinded the administrative review with respect to seven companies: (1) Bien Dong Seafood Company Ltd.; (2) International Development & Investment Corporation; (3) Cuu Long Fish Joint Stock Company; (4) Thien Ma Seafood Co., Ltd.; (5) East Sea Seafoods Limited Liability Company;[6] (6) Cantho Import-Export Seafood Joint Stock Company; and (7) Thuan An Production Trading & Services Co., Ltd. (collectively, the ''No Shipment Companies''). These companies reported that they had no shipments of subject merchandise to the United States during the POR, and our examination of shipment data from U.S. Customs and Border Protection (''CBP'') confirmed that there were no entries of subject merchandise made by these companies during the POR.[7] Subsequent to the *Preliminary Results,* the Department did not receive any comments or information indicating that the No Shipment Companies made sales of subject merchandise to the United States during the POR. Therefore, pursuant to 19 CFR 351.213(d)(3), we are rescinding the administrative review with respect to the No Shipment Companies.

In addition, we preliminarily rescinded the administrative review with respect to An Phu Seafood Corporation (''An Phu''), Docifish Corporation (''Docifish''), and Godaco Seafood Joint Stock Company (''Godaco'') (collectively, the ''New Shipper Respondents'') because they notified the Department that they made no entries during the POR other than the entries under review in the aligned new shipper reviews. The Department's examination of shipment data from CBP confirmed that there were no other entries of subject merchandise made by these companies during the POR, and no information to the contrary has been submitted since the *Preliminary Results.* Therefore, we are rescinding the administrative review with respect to the New Shipper Respondents.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we have made certain revisions to the margin calculations for Anvifish Joint Stock Corporation (''Anvifish'') and Vinh Hoan.[8] For the reasons explained in the Issues and Decision Memorandum at Comment I, we have now selected Indonesia as the primary surrogate country. We have also made other changes to the margin calculations of Anvifish and Vinh Hoan.[9] Finally, the surrogate values memorandum contains the further explanation of our changes to the surrogate values.[10]

[2] *Id.*

[3] *See* Memorandum to the File, from Susan Pulongbarit, through Scot T. Fullerton, ''Verification of the Sales and Factors of Production Response of Vinh Hoan Corporation in the 2010–2011 Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,'' dated December 14, 2012; *see also* Memorandum to the File, from Susan Pulongbarit and Kabir Archuletta, through Scot T. Fullerton, ''Verification of the CEP Sales Response of Vinh Hoan Corporation in the 8th Antidumping Duty Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,'' dated December 14, 2012.

[4] *See* Memorandum to Gary Taverman, Senior Advisor, through James Doyle, Office Director, from Paul Walker, Case Analyst, ''Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Extension of Deadline for Final Results of the Eighth Antidumping Duty Administrative Review and Aligned New Shipper Reviews,'' dated December 13, 2012.

[5] *See* ''Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Issues and Decision Memorandum for the Final Results of the Eighth Administrative Review and Aligned New Shipper Reviews,'' dated concurrently with this notice (''Issues and Decision Memorandum'') and incorporated herein by reference, for a complete description of the Scope of the Order.

[6] Includes the trade name East Sea Seafoods LLC.

[7] *See Preliminary Results,* 77 FR at 56181.

[8] Vinh Hoan includes Vinh Hoan Corporation and its affiliates Van Duc Food Export Joint Company (''Van Duc'') and Van Duc Tien Giang (''VDTG'').

[9] *See* accompanying Issues and Decision Memorandum at Comments VIII and XVII and the company-specific analysis memoranda, dated concurrently with this notice.

[10] *See* Memorandum to the File, through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Case Analyst, ''Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Surrogate Values for the Final Results,'' dated concurrently with this notice.

Notice of Intent To Revoke the Order, in Part

A. Vinh Hoan

In the *Preliminary Results,* we preliminarily determined that Vinh Hoan qualifies for revocation from the antidumping duty order on certain frozen fish fillets from Vietnam, and invited parties to comment.

Pursuant to section 751(d) of the Tariff Act of 1930, as amended (''the Act''), the Department ''may revoke, in whole or in part'' an antidumping duty order upon completion of a review under section 751(a) of the Act. In determining whether to revoke an antidumping duty order in part, the Department considers (a) whether the company in question has sold subject merchandise at not less than normal value for a period of at least three consecutive years, (b) whether the company has agreed in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Department concludes that the company, subsequent to revocation, sold the subject merchandise at less than normal value, and (c) whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.[11]

For these final results, Vinh Hoan has not been assigned a zero or *de minimis* margin.[12] As a consequence, the Department finds that Vinh Hoan has not met the criteria listed in 19 CFR 351.222(b)(2)(i) and is, therefore, not eligible for revocation.

B. QVD Food Company Ltd. (''QVD'')

In the *Preliminary Results,* we noted that QVD sold subject merchandise at less than normal value in the prior administrative review and that this was one of the factors which disqualified them from revocation.[13] In fact, the Department's policy is that a company which requests revocation must be selected as a mandatory respondent in order for the Department to consider the revocation request.[14] As QVD was not selected as a mandatory respondent,[15] it is not eligible for revocation.

Separate Rates

In our *Preliminary Results,* we determined that the following companies, in addition to Anvifish, Vinh Hoan, and the New Shipper Respondents, met the criteria for separate rate status: (1) An Giang Agriculture and Food Import-Export Joint Stock Company; (2) Asia Commerce Fisheries Joint Stock Company; (3) Binh An Seafood Joint Stock Company; (4) Cadovimex II Seafood Import-Export and Processing Joint Stock Company; (5) Hiep Thanh Seafood Joint Stock Company; (6) Hung Vuong Corporation; (7) Nam Viet Corporation; (8) NTSF Seafoods Joint Stock Company; (9) QVD; (10) Saigon Mekong Fishery Co., Ltd.; (11) Southern Fisheries Industries Company Ltd.; and (12) Vinh Quang Fisheries Corporation (collectively, the ''Separate Rate Respondents'').[16] We have not received any information since the issuance of the *Preliminary Results* that provides a basis for reconsideration of these determinations. Therefore, the Department continues to find that the Separate Rate Respondents meet the criteria for a separate rate.

Rate for Non-Selected Companies

We selected Anvifish and Vinh Hoan as mandatory respondents in this administrative review.[17] The statute and the Department's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, the Department's practice in cases involving limited selection based on exporters accounting for the largest volumes of trade has been to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or *de minimis* margins or any margins based entirely on facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero rates, *de minimis* rates, or rates based entirely on facts available, we may use ''any reasonable method'' for assigning the rate to non-selected respondents. In the *Preliminary Results,* because we did not calculate margins for Anvifish and Vinh Hoan, and in accordance with *Bearings,*[18] we assigned zero percent margins to the Separate Rate Companies. However, in the final results, we have calculated rates above *de minimis* for Anvifish and Vinh Hoan.

Therefore, consistent with section 735(c)(5)(A) of the Act and the Department's practice, we have assigned the average rate calculated for Anvifish and Vinh Hoan to the Separate Rate Respondents. Because the rates calculated for Anvifish and Vinh Hoan have changed since the *Preliminary Results,* the margin assigned to the Separate Rate Respondents has also changed accordingly.

Vietnam-Wide Rate and Vietnam-Wide Entity

In the *Preliminary Results,* we determined that three companies failed to demonstrate their eligibility for a separate rate.[19] Therefore, we preliminarily assigned the entity a rate of 2.11 USD/kg, the current rate applied to the Vietnam-wide entity. We have not received any information since issuance of the *Preliminary Results* that provides a basis for reconsidering this determination, and will therefore continue to apply the entity rate of 2.11 USD/kg to these three companies.

[11] *See* 19 CFR 351.222(b)(2)(i)(A)–(C).

[12] *See* Memorandum to the File, from Susan Pulongbarit, through Scot T. Fullerton, ''Eighth Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results Analysis Memorandum for Vinh Hoan Corporation,'' dated March 13, 2013, at 1.

[13] *See Preliminary Results,* 77 FR at 56187.

[14] *See, e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, In Part, of the Fifth Administrative Review,* 76 FR 12054 (March 4, 2011) unchanged in *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 76 FR 56158 (September 12, 2011).

[15] *See Preliminary Results,* 77 FR at 56180.

[16] *See id.* at 56182.

[17] *Id.* at 56180.

[18] *Id.* at 56182 (citing *Ball Bearings and Parts Thereof From France, Germany, and Italy: Preliminary Results of Antidumping Duty Administrative Reviews and Rescission of Antidumping Duty Administrative Reviews in Part,* 77 FR 33159 (June 5, 2012) (''*Bearings*'')).

[19] *Id.* at 56183.

Final Results of the Administrative Reviews

The weighted-average dumping margins for the administrative review are as follows:

Exporter	Weighted-average margin (dollars/kilogram) [20]
Vinh Hoan Corporation [21]	0.19
Anvifish Joint Stock Company [22]	1.34
An Giang Agriculture and Food Import-Export Joint Stock Company	0.77
Asia Commerce Fisheries Joint Stock Company	0.77
Binh An Seafood Joint Stock Company	0.77
Cadovimex II Seafood Import-Export and Processing Joint Stock Company	0.77
Hiep Thanh Seafood Joint Stock Company	0.77
Hung Vuong Corporation	0.77
Nam Viet Corporation	0.77
NTSF Seafoods Joint Stock Company	0.77
QVD Food Company Ltd [23]	0.77
Saigon Mekong Fishery Co., Ltd	0.77
Southern Fisheries Industries Company Ltd	0.77
Vinh Quang Fisheries Corporation	0.77
Vietnam-Wide Rate [24]	2.11

The weighted-average dumping margins for the new shipper reviews are as follows:

Manufacturer	Exporter	Weighted-average margin (dollars/kilogram)
An Phu Seafood Corporation	An Phu Seafood Corporation	1.37
Docifish Corporation	Docifish Corporation	3.87
An Phat Import-Export Seafood Co. Ltd	Godaco Seafood Joint Stock Company	1.81

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this administrative review.

For assessment purposes, we calculated importer (or customer)-specific assessment rates for merchandise subject to this review. We will continue to direct CBP to assess importer-specific assessment rates based on the resulting per-unit (*i.e.,* per-kilogram) rates by the weight in kilograms of each entry of the subject merchandise during the POR. Specifically, we calculated importer-specific duty assessment rates on a per-unit rate basis by dividing the total dumping margins (calculated as the difference between normal value and export price, or constructed export price) for each importer by the total sales quantity of subject merchandise sold to that importer during the POR. If an importer (or customer)-specific assessment rate is *de minimis* (*i.e.,* less than 0.50 percent), the Department will instruct CBP to assess that importer (or customer's) entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication

[20] In the third administrative review of this order, the Department determined that it would calculate per-unit assessment and cash deposit rates for all future reviews. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission,* 73 FR 15479 (March 24, 2008).

[21] This rate is applicable to the Vinh Hoan Group which includes Vinh Hoan, Van Duc, and VDTG. In the sixth review of this order, the Department found Vinh Hoan, Van Duc, and VDTG to be a single entity and, because there have been no changes to this determination since that administrative review, we continue to find these companies to be part of a single entity. Therefore, we will assign this rate to the companies in the single entity. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Sixth New Shipper Review,* 75 FR 56061 (September 15, 2010).

[22] Includes the trade name Anvifish Co., Ltd.

[23] This rate is also applicable to QVD Dong Thap Food Co., Ltd and Thuan Hung Co., Ltd. (''THUFICO''). In the second review of this order, the Department found QVD, QVD Dong Thap Food Co., Ltd. and THUFICO to be a single entity and, because there have been no changes to this determination since that administrative review, we continue to find these companies to be part of a single entity. Therefore, we will assign this rate to the companies in the single entity. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of Antidumping Duty Administrative Review,* 71 FR 53387 (September 11, 2006).

[24] The Vietnam-wide rate includes the following companies which are under review, but which did not submit a separate rate application or certification: Nam Viet Company Limited; East Sea Seafoods Joint Venture Co., Ltd.; and Vinh Hoan Company, Ltd.

date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be the rate established in the final results of review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed Vietnamese and non-Vietnamese exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all Vietnamese exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the Vietnam-wide rate of 2.11 USD/kg; and (4) for all non-Vietnamese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Vietnamese exporters that supplied that non-Vietnamese exporter. The deposit requirements, when imposed, shall remain in effect until further notice.

The following cash deposit requirements will be effective upon publication of the final results of these new shipper reviews for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For subject merchandise produced and exported by An Phu, Docifish and Godaco, the cash deposit rate will be the rate established in the final results of these new shipper reviews; (2) for subject merchandise exported by An Phu, Docifish and Godaco, but not manufactured by An Phu, Docifish and Godaco, respectively, the cash deposit rate will continue to be the Vietnam-wide rate, *i.e.,* $2.11/kg; and (3) for subject merchandise manufactured by An Phu, Docifish and Godaco, but exported by any other party, the cash deposit rate will also be the Vietnam-wide rate. The cash deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing these administrative reviews and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: March 13, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix I—Issues and Decision Memorandum

Comment I: Selection of the Surrogate Country
- A. Economic Comparability
- B. Significant Producer of Comparable Merchandise
- C. Data Considerations—Whole Live Fish

Comment II: Surrogate Financial Ratios
Comment III: Labor
Comment IV: Sawdust
Comment V: Rice Husk
Comment VI: Zeroing
Comment VII: By-Products
- A. Fish Waste, Fish Belly, and Fish Skin
- B. Fish Oil and Fish Meal
- C. Frozen Broken Meat
- D. Fresh Broken Meat

Company-Specific Issues

Comment VIII: Application of AFA to Vinh Hoan
Comment IX: Vinh Hoan's Gross Weight vs. Net Weight
Comment X: Vinh Hoan's Revocation
Comment XI: Vinh Hoan's Whole Fish Consumption
Comment XII: Vinh Hoan's Imputed Expenses for Constructed Export Price
Comment XIII: Vinh Hoan's Market Economy Purchases
Comment XIV: Vinh Hoan's Verification Report Clarifications
Comment XV: Vinh Hoan's Programming Changes
Comment XVI: GODACO's & DOCIFISH's Revised Databases
Comment XVII: An Phu's Tape and Strap Calculation

[FR Doc. 2013–06550 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Western Pacific Community Development Program Process

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before May 20, 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 Jarad Makaiau (808) 944–2108 or *Jarad.Makaiau@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection.

The Federal regulations at 50 CFR part 665 authorize the Regional Administrator of the National Marine Fisheries Service (NMFS), Pacific Island Region to provide eligible western Pacific communities with access to fisheries that they have traditionally depended upon, but may not have the capabilities to support continued and substantial participation, possibly due to economic, regulatory, or other barriers. To be eligible to participate in the western Pacific community development program, a community must meet the criteria set forth in 50 CFR part 665.20, and submit a community development plan that describes the purposes and goals of the plan, the justification for proposed fishing activities, and the degree of involvement by the indigenous community members, including contact information.

This collection of information provides NMFS and the Western Pacific Fishery Management Council with data to determine whether a community that submits a community development plan meets the regulatory requirements for participation in the program, and whether the activities proposed under the plan are consistent with the intent of the program, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws. The information is also important for evaluating potential impacts of the proposed community development plan activities on fish stocks, endangered species, marine mammals, and other components of the affected environment for the purposes of compliance with the National Environmental Policy Act, the Endangered Species Act and other applicable laws.

II. Method of Collection

The collection of information of a community development plan involves no forms, and respondents have a choice of submitting information by electronic transmission or by mail.

III. Data

OMB Control Number: 0648–0612.
Form Number: None.
Type of Review: Regular submission (extension of a currently approved collection).
Affected Public: Business or other for profit organizations, and individuals or households.
Estimated Number of Respondents: 5.
Estimated Time per Response: 6 hours.
Estimated Total Annual Burden Hours: 30.
Estimated Total Annual Cost to Public: $50 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 15, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–06466 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC576

Endangered Species; File No. 17787

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that the NMFS Southeast Fisheries Center (SEFSC); 75 Virginia Beach Drive, Miami, FL 33149 [Responsible Party: Bonnie Ponwith, Ph.D.], has applied in due form for a permit to take smalltooth sawfish (*Pristis pectinata*) for purposes of scientific research.

DATES: Written, telefaxed, or email comments must be received on or before April 22, 2013.

ADDRESSES: The application and related documents are available for review by selecting Records Open for Public Comment from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 17787 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division:

- By email to *NMFS.Pr1Comments@noaa.gov* (include the File No. in the subject line of the email);
- By facsimile to (301) 713–0376; or
- At the address listed above.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Colette Cairns or Malcolm Mohead, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The applicant proposes to gather life history information on smalltooth sawfish. The purpose of the research is to investigate the movements and habitat use of smalltooth sawfish in Florida waters, primarily in the region of the Florida coast from Naples to Key West, encompassing the Ten Thousand Islands. Up to 100 neonate and 40 juvenile and adult sawfish would be captured annually by longline, gillnet, seine net, and recreational angling gear. All captured sawfish are measured, tagged, sampled, and released. Tagging methods would include dart tags, passive integrated transponder tags, and external satellite tags (e.g., Smart Position Only Transmitting tags, Pop-Up Archival Transmitting tags) and internal acoustic tags. Tissue and blood samples would also be taken. Dead sawfish acquired through strandings or from law enforcement confiscations would be sampled for scientific purposes. The permit is requested for a duration of 5 years.

Dated: March 18, 2013.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–06467 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC568

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Receipt of an application for a new scientific research permit (16506) and notice of withdrawal of a scientific research permit application (16128).

SUMMARY: Notice is hereby given that NMFS has received a scientific research permit application request relating to salmonids listed under the Endangered Species Act (ESA). The proposed research permit is intended to increase knowledge of the species and to help guide management and conservation efforts. The application and related documents may be viewed online at: *https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm.* These documents are also available upon written request or by appointment by contacting NMFS by phone (707) 575–6097 or fax (707) 578–3435.

DATES: Written comments on the permit application must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific standard time on April 22, 2013.

ADDRESSES: Written comments on either application should be submitted to the Protected Resources Division, NMFS, 777 Sonoma Avenue, Room 325, Santa Rosa, CA 95404. Comments may also be submitted via fax to (707) 578–3435 or by email to *FRNpermits.SR@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Jeffrey Jahn, Santa Rosa, CA (ph.: 707–575–6097, email.: *Jeffrey.Jahn@noaa.gov*).

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

This notice is relevant to federally threatened Central California Coast steelhead (*Oncorhynchus mykiss*), endangered Central California Coast coho salmon (*O. kisutch*), threatened California Coastal Chinook salmon (*O. tshawytscha*), threatened Southern Oregon/Northern California coho salmon (*O. kisutch*), and threatened Northern California steelhead (*O. mykiss*).

Authority

Scientific research permits are issued in accordance with section 10(a)(1)(A) of the ESA of 1973 (16 U.S.C. 1531–1543) and regulations governing listed fish and wildlife permits(50 CFR parts 222–226). NMFS issues permits based on findings that such permits: (1) Are applied for in good faith; (2) if granted and exercised, would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. The authority to take listed species is subject to conditions set forth in the permits.

Anyone requesting a hearing on the application listed in this notice should set out the specific reasons why a hearing on the application would be appropriate (see **ADDRESSES**). Such hearings are held at the discretion of the Assistant Administrator for Fisheries, NMFS.

Application Received

Permit 16506

Michael Podlech (Aquatic Ecologist) is requesting a 5-year scientific research permit to take juvenile, smolt and adult Central California Coast (CCC) steelhead and juvenile, smolt and adult CCC coho salmon, (ESA-listed salmonids) associated with two research studies within Sonoma and San Mateo counties in California. In the studies described below, the researcher does not expect to kill any listed fish but a small number may die as an unintended result of the research activities.

These projects are part of an ongoing effort to monitor population status and trends of ESA-listed salmonids within Squaw Creek (Sonoma County) and Pescadero Creek (San Mateo County). The objectives are to: (1) Monitor salmonid smolt outmigration, (2) determine summer juvenile rearing, (3) assess whether previous NMFS CCC coho salmon broodstock releases have resulted in wild progeny, and (4) gather population data to inform ongoing watershed restoration and salmonid recovery efforts in Pescadero Creek. In these projects, ESA-listed salmonids will be captured (electrofishing and fyke-net), anesthetized, handled (identified, measured, weighed), a subset of these captured fish will be fin-clipped (marked), tissue sampled (fin-clip), scale sampled, and released. All data and information will be shared with county, state, and federal entities for use in conservation and restoration planning efforts related to ESA-listed salmonids.

Study 1 is a CCC steelhead population monitoring study in Squaw Creek, this watershed has been developed for geothermal power production by the Calpine Corporation, but is otherwise pristine. The Squaw Creek Aquatic Monitoring Program (SCAMP), initiated in 1984 to track the population dynamics in this Sonoma County watershed. A Smith and Root backpack electrofisher will be used annually from August 15-September 15 for two to three days of sampling. Electroshocked juvenile CCC steelhead will be handled minimally and released back into the habitat they were captured.

Study 2 will monitor the CCC steelhead and CCC coho salmon population trends in Pescadero Creek, San Mateo County. A fyke net trap will be placed in the main channel of Pescadero Creek within a reach extending from the upper limit of tidal influence upstream for approximately 0.5 mile. The trap will be set to fish from March 1 through June 15 on a four days a week schedule. Adult and smolt salmonids will be captured (fyke net), anesthetized, and handled. A subset of these captured fish will be fin-clipped (marked), tissue sampled (fin-clip), and scale sampled.

Permit 16128 Application Withdrawn

NMFS has received notice from the United State Geological Survey (USGS) California Cooperative Fish Research Unit at Humboldt State University to withdraw its application for a permit for take of ESA-listed species associated with scientific research. Notice was published on April 19, 2011 (76 FR 21857) that USGS applied for a scientific research permit under section 10(a)(1)(A) of the ESA. The permit requested take of adult, smolt, and juvenile threatened Southern Oregon/Northern California Coast (SONCC) coho salmon; adult, smolt, and juvenile threatened California Coastal (CC) Chinook salmon; and adult, smolt, and juvenile threatened Northern California (NC) steelhead. Associated with three routine fish distribution and monitoring research projects. During the permit process the applicant decided to collaborate with the California Department of Fish and Wildlife (Department), and include these three projects in 4(d) research applications annually renewed by the Department for research and monitoring in the Redwood Creek watershed. The applicant will be gradually turning over these long term projects to the Department to carry on the research and monitoring after the applicant's retirement. The applicant requested this withdrawal via email on June 12, 2012 and the permit application was withdrawn on June 13, 2012.

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the applications, associated documents, and comments submitted to determine whether the applications meet the requirements of section 10(a) of the ESA and Federal regulations. The final permit decisions will not be made until after the end of the 30-day comment period. NMFS will publish notice of its final actions in the **Federal Register**.

Dated: March 18, 2013.

Helen Golde,

Acting Office Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–06482 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC579

South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a series of public hearings pertaining to Amendment 30 to the Snapper Grouper Fishery Management Plan (FMP).

DATES: The meetings will be held from April 15, 2013 through April 25, 2013. All meetings will be held from 4 p.m. to 7 p.m. except for the April 23, 2013 meeting in North Charleston, SC. This meeting will follow a Snapper Grouper Advisory Panel meeting and will be held from 5:30 p.m. until 7 p.m.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** for specific meeting locations.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; telephone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: The meeting locations are as follows:

1. *Monday, April 15, 2013:* Jacksonville Marriott, 4670 Salisbury Road, Jacksonville, FL 32256; telephone: (904) 296–2222.
2. *Tuesday, April 16, 2013:* Radisson Resort at the Port, 8701 Astronaut Boulevard, Cape Canaveral, FL 32920; telephone: (321) 784–0000.
3. *Wednesday, April 17, 2013:* Holiday Inn Key Largo, 99701 Overseas Highway, Key Largo, FL 33037; telephone: (305) 451–2121.
4. *Tuesday, April 23, 2013:* Hilton Garden Inn, 5265 International Boulevard, North Charleston, SC 29418; telephone: (843) 308–9330.
5. *Thursday, April 25, 2013:* Doubletree by Hilton New Bern/Riverfront, 100 Middle Street, New Bern, NC 28560; telephone: (252) 638–3585.

The items of discussion are as follows:

Public Hearing: Amendment 30 to the Snapper Grouper FMP

1. This amendment considers a requirement for vessels with a Federal South Atlantic Commercial Snapper Grouper Permit that harvest snapper grouper stocks to be equipped with a satellite communications system (Vessel Monitoring Systems or VMS) in order to monitor fishing activities. The SAFMC is not considering a requirement for VMS on recreational or for-hire vessels unless these vessels also have a Federal South Atlantic Commercial Snapper Grouper Permit.

2. Written comments may be directed to Bob Mahood, Executive Director, SAFMC (see *Council address*) or via email to: *SGAmend30Comments@safmc.net.* Comments will be accepted until 5 p.m. on May 3, 2013.

Council staff will present an overview of the amendment and will be available for informal discussions and to answer questions. Members of the public will have an opportunity to go on record after the presentation to record their comments on the public hearing topics for consideration by the Council. Local Council representatives will attend the meetings and listen to public comment.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: March 18, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–06487 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC559

Fisheries of the Gulf of Mexico; Southeast Data, Assessment, and Review (SEDAR); Public Meetings

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

ACTION: Notice of SEDAR 31 Gulf of Mexico Red Snapper Assessment Workshop Webinars 7 and 8.

SUMMARY: The SEDAR 31 assessment of the Gulf of Mexico red snapper fishery will consist of a series of workshops and supplemental webinars. This notice is for two webinars in the Assessment Workshop portion of the SEDAR process. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 31 Assessment Workshop Webinars 7 and 8 will be held on April 11 and 18, 2013, respectively. The webinars will begin at 1 p.m. and conclude no later than 5 p.m. EDT.

ADDRESSES: *Meeting address:* The SEDAR 31 Assessment Workshop Webinars 7 and 8 will be held via GoToWebinar. The webinars are open to members of the public. Those interested in participating should contact Ryan Rindone at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request meeting information at least 24 hours in advance.

SEDAR address: 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Ryan Rindone, SEDAR Coordinator; telephone: (813) 348–1630; email: *ryan.rindone@gulfcouncil.org.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process including a workshop and webinars; and (3) Review Workshop. The product of the Data Workshop is a data report

which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Consensus Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the SEDAR 31 Assessment Workshop Webinars 7 and 8 are as follows:

Panelists will continue to review the progress of modeling efforts for Gulf of Mexico red snapper.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

These meetings are accessible to people with disabilities. Requests for auxiliary aids should be directed to the SEDAR office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: March 18, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–06488 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC578

Mid-Atlantic Fishery Management Council (MAFMC); Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) and its Research Set-Aside (RSA) Committee will hold public meetings.

DATES: The meetings will be held on Tuesday, April 9, 2013 through Thursday, April 11, 2013. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meetings will be held at the Embassy Suites Raleigh Crabtree, 4700 Creedmoor Road, Raleigh, NC 27612; telephone: (919) 881–0000.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State St., Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D. Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION:

Tuesday, April 9, 2013

1:30 until 3 p.m.—The RSA Committee will meet.

3 p.m.—The Council will convene.

3 p.m. until 4 p.m.—2014 Tilefish ABC will be discussed.

4 p.m. until 5 p.m.—The Standardized Bycatch Reporting Methodology (SBRM) will be discussed.

5 p.m. until 6 p.m.—A Listening Session will be held.

Wednesday, April 10, 2013

9 a.m.—The Council will convene.

9 a.m. until 12 noon—The Council will hold its regular Business Session to approve the December 2012 and February 2013 minutes, receive Organizational Reports, the New England and South Atlantic Liaison Reports, the Executive Director's Report, the Science Report, Committee Reports, and conduct any continuing and/or new business.

1 p.m. until 2 p.m.—Mackerel, Squid, and Butterfish will be discussed.

2 p.m. until 4 p.m.—The Omnibus Recreational Amendment will be discussed.

4 p.m. until 5 p.m.—Reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) will be discussed.

Thursday, April 11, 2013

8:30 a.m.—The Council will convene.

8:30 a.m. until 3 p.m.—A Forage Fish Workshop will be held.

Agenda items by day for the Council's Committees and the Council itself are:

Tuesday, April 9, 2013

The RSA Committee will discuss the National Marine Fisheries Service response to our Council letter and the next steps. The Council will review, discuss, and recommend any changes to the 2014 Tilefish ABC. The Council will review and approve the draft environmental assessment for the SBRM Omnibus Amendment. The Council will hold a Listening Session.

Wednesday, April 10, 2013

The Council will hold its regular Business Session to approve the December 2012 and February 2013 minutes, receive Organizational Reports, the New England and South Atlantic Liaison Reports, the Executive Director's Report, Science Report, Committee Reports, and conduct any continuing and/or new business. The Council will discuss the Squid workshop results and summary and the staff recommendation on the workshop results to include control dates, roll-over provisions, GRAs, port meetings, etc. The Council will review and approve the Omnibus Recreational Public Hearing Document. The Council will discuss potential reauthorization of the MSA and identify issues for Monitoring our Nations Fisheries III.

Thursday, April 11, 2013

A Forage Fish Workshop will be held to discuss the key issues relevant to forage fish assessment and management under the MSA. A panel of experts will discuss the role of forage species within ecosystems and best practices with respect to their exploitation, taking their role(s) within ecosystems into account.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues

specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: March 18, 2013.

Tracey L. Thompson,

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

[FR Doc. 2013–06486 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB155

Endangered Species; File No. 17095–01

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

ACTION: Notice, issuance of permit modification.

SUMMARY: Notice is hereby given that Entergy Nuclear Operations Inc., 450 Broadway, Suite 3, Buchanan, NY 10511 [Responsible Party: John Ventosa], has been issued a permit modification to take shortnose sturgeon (*Acipenser brevirostrum*) and Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*) for purposes of scientific research.

ADDRESSES: The permit modification and related documents are available for review upon written request or by appointment in the following offices:

- Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and
- Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead or Colette Cairns, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On January 29, 2013, notice was published in the **Federal Register** (78 FR 6072) that a request for a scientific research permit modification to take shortnose sturgeon and Atlantic sturgeon had been submitted by the above-named applicant. The requested permit modification has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 17095 currently authorizes the Permit Holder to: Monitor shortnose and Atlantic sturgeon abundance and distribution through the Hudson River Biological Monitoring Program (HRBMP) in the Hudson River from River Mile 0 (Battery Park, Manhattan, NY) to River Mile 152 at Troy Dam (Albany, NY). Researchers are authorized to non-lethally capture, handle, measure, weigh, scan for tags, insert passive integrated transponder and dart tags, photograph, tissue sample, and release up to 82 shortnose sturgeon and 82 Atlantic sturgeon annually. Additionally, researchers are permitted to lethally collect up to 40 shortnose sturgeon and up to 40 Atlantic sturgeon eggs and/or larvae (ELS) annually.

To account for a higher than expected catch per tow sampling performed authorized under Permit No. 17095, the Permit Holder now is authorized to increase the takes of juvenile, sub-adult and/or adult Atlantic sturgeon to 200 fish per year. Takes must not exceed a total of 600 Atlantic sturgeon captured over the permit life. The Permit Holder will also expand the sampling activities for juvenile, sub-adult and adult shortnose sturgeon and Atlantic sturgeon to include upper New York Harbor (~River Mile -2.0). The modification is valid until the permit expires August 28, 2017.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: March 18, 2013.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–06532 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC461

Takes of Marine Mammals Incidental to Specified Activities; Marine Geophysical Survey in the Northeast Atlantic Ocean, June to July, 2013

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

ACTION: Notice; proposed Incidental Harassment Authorization; request for comments.

SUMMARY: NMFS has received an application from the Lamont-Doherty Earth Observatory of Columbia University (L–DEO) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to conducting a marine geophysical (seismic) survey in the northeast Atlantic Ocean, June to July, 2013. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to L–DEO to incidentally harass, by Level B harassment only, 20 species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than April 22, 2013.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Goldstein@noaa.gov.* Please include 0648–XC461 in the subject line. NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* 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.

A copy of the application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the

contact listed here (see **FOR FURTHER INFORMATION CONTACT**) or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

The National Science Foundation (NSF), which owns the R/V *Marcus G. Langseth,* has prepared a draft ''Environmental Analysis of a Marine Geophysical Survey by the R/V *Marcus G. Langseth* for the Northeast Atlantic Ocean, June-July 2013,'' prepared by LGL Ltd., Environmental Research Associates, on behalf of NSF and L–DEO, which is also available at the same Internet address. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the MMPA, as amended (16 U.S.C. 1371 (a)(5)(D)), directs the Secretary of Commerce (Secretary) to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for the incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of such takings. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''…an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS's review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On January 8, 2013, NMFS received an application from the L–DEO requesting that NMFS issue an IHA for the take, by Level B harassment only, of small numbers of marine mammals incidental to conducting a marine seismic survey on the high seas (i.e., International Waters) and within the Exclusive Economic Zone of Spain during June to July, 2013. L–DEO plan to use one source vessel, the R/V *Marcus G. Langseth* (*Langseth*) and a seismic airgun array to collect seismic data as part of the proposed seismic survey in the northeast Atlantic Ocean.

In addition to the proposed operations of the seismic airgun array and hydrophone streamer, L–DEO intends to operate a multibeam echosounder and a sub-bottom profiler continuously throughout the survey.

Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array may have the potential to cause a behavioral disturbance for marine mammals in the survey area. This is the principal means of marine mammal taking associated with these activities and L–DEO has requested an authorization to take 20 species of marine mammals by Level B harassment. Take is not expected to result from the use of the multibeam echosounder or sub-bottom profiler, for reasons discussed in this notice; nor is take expected to result from collision with the source vessel because it is a single vessel moving at a relatively slow speed (4.6 knots [kts]; 8.5 kilometers per hour [km/hr]; 5.3 miles per hour [mph]) during seismic acquisition within the survey, for a relatively short period of time (approximately 39 days). It is likely that any marine mammal would be able to avoid the vessel.

Description of the Proposed Specified Activity

L–DEO proposes to conduct a high energy, two-dimensional (2D) and three-dimensional (3D) seismic survey in the northeast Atlantic Ocean, west of Spain (see Figure 1 of the IHA application). Water depths in the survey area range from approximately 3,500 to greater than 5,000 meters (m) (11,482.9 to 16,404.2 feet [ft]). The proposed seismic survey would be scheduled to occur for approximately 39 days during June 1 to July 14, 2013. Some minor deviation from these dates would be possible, depending on logistics and weather.

L–DEO plans to use conventional seismic methodology in the Deep Galicia Basin of the northeast Atlantic Ocean. The goal of the proposed research is to collect data necessary to study rifted continental to oceanic crust transition in the Deep Galicia Basin west of Spain. This margin and its conjugate are among the best studied magma-poor, rifted margins in the world, and the focus of studies has been the faulting mechanics and modification of the upper mantle associated with such margins. Over the years, a combination of 2D reflection profiling, general marine geophysics, and ocean drilling have identified a number of interesting features of the margin. Among these are the S reflector, which has been interpreted to be detachment fault overlain with fault bounded, rotated, continental crustal blocks and underlain by serpentinized peridotite, and the Peridotite Ridge, composed of serpentized peridotite and thought to be upper mantle exhumed to the seafloor during rifting.

To achieve the project's goals, the Principal Investigators (PIs), Drs. D. S. Sawyer (Rice University, J. K. Morgan (Rice University), and D. J. Shillington (L–DEO) propose to use a 3D seismic reflection survey, 2D survey, and a long-offset seismic program extending through the crust and S detachment into the upper mantle to characterize the last stage of continental breakup and the initiation of seafloor spreading, relate post-rifting subsidence to syn-rifting lithosphere deformation, and inform the nature of detachment faults. Ocean Bottom Seismometers (OBSs) and Ocean Bottom Hydrophones (OBHs) would also be deployed during the program. It is a cooperative program with scientists from the United Kingdom, Germany, Spain, and Portugal.

The proposed survey would involve one source vessel, the R/V *Marcus G. Langseth* (*Langseth*). The *Langseth* would deploy an array of 18 airguns as an energy source with a total volume of approximately 3,300 in^3. The receiving system would consist of four 6,000 m (19,685 ft) hydrophone streamers at 200 m (656.2 ft) spacing and up to 78 OBS and OBH instruments. The OBSs and OBHs would be deployed and retrieved by a second vessel, the R/V *Poseidon* (*Poseidon*), provided by the German Science Foundation. As the airgun array is towed along the survey lines, the hydrophone streamers would receive the returning acoustic signals and transfer the data to the on-board processing system. The OBS and OBHs record the returning acoustic signals internally for later analysis.

A total of approximately 5,834 km (3150.1 nmi) of survey lines, including turns, will be shot in a grid pattern with a single line extending to the west (see Figure 1). There will be additional seismic operations in the survey area associated with equipment testing, ramp-up, and possible line changes or repeat coverage of any areas where initial data quality is sub-standard. In L–DEO's estimated take calculations, 25% has been added for those additional operations.

In addition to the operations of the airgun array, a Kongsberg EM 122 multibeam echosounder and a Knudsen Chirp 3260 sub-bottom profiler will also be operated from the *Langseth* continuously throughout the survey. All planned geophysical data acquisition activities would be conducted by L–DEO with on-board assistance by the scientists who have proposed the study. The vessel will be self-contained, and the crew will live aboard the vessel for the entire cruise.

Vessel Specifications

The *Langseth,* a seismic research vessel owned by the NSF, will tow the 36 airgun array, as well as the hydrophone streamer(s), along predetermined lines (see Figure 1 of the IHA application). When the *Langseth* is towing the airgun array and the hydrophone streamer(s), the turning rate of the vessel is limited to three degrees per minute (2.5 km [1.5 mi]). Thus, the maneuverability of the vessel is limited during operations with the streamer. The vessel would ''fly'' the appropriate U.S. Coast Guard-approved day shapes (mast head signals used to communicate with other vessels) and display the appropriate lighting to designate the vessel has limited maneuverability.

The vessel has a length of 71.5 m (235 ft); a beam of 17.0 m (56 ft); a maximum draft of 5.9 m (19 ft); and a gross tonnage of 3,834. The *Langseth* was designed as a seismic research vessel with a propulsion system designed to be as quiet as possible to avoid interference with the seismic signals emanating from the airgun array. The ship is powered by two 3,550 horsepower (hp) Bergen BRG–6 diesel engines which drive two propellers directly. Each propeller has four blades and the shaft typically rotates at 750 revolutions per minute. The vessel also has an 800 hp bowthruster, which is not used during seismic acquisition. The *Langseth's* operation speed during seismic acquisition is typically 7.4 to 9.3 km per hour (hr) (km/hr) (4 to 5 knots [kts]). When not towing seismic survey gear, the *Langseth* typically cruises at 18.5 km/hr (10 kts). The *Langseth* has a range of 25,000 km (13,499 nmi) (the distance the vessel can travel without refueling).

The vessel also has an observation tower from which Protected Species Visual Observers (PSVO) will watch for marine mammals before and during the proposed airgun operations. When stationed on the observation platform, the PSVO's eye level will be approximately 21.5 m (71 ft) above sea level providing the PSVO an unobstructed view around the entire vessel. More details of the *Langseth* can be found in the IHA application and NSF/USGS PEIS.

The *Poseidon* is a German-flagged vessel, owned by the Federal State of Schleswig-Holstein and operated by Briese Schiffahrts GmbH &Co. KG. The *Poseidon* has a length of 60.8 m (199.5 ft), a beam of 11.4 m (37.4 ft), and a maximum draft of 4.7 m (15.4 ft). The ship is powered by diesel-electric propulsion. The traction motor produces 930 kW and drives one propeller directly. The propeller has five blades, and the shaft typically rotates at 220 revolutions per minute (rpm). The vessel also has a 394 hp bowthruster, which would not be used during OBS/OBH deployment and retrieval. The *Poseidon* typically cruises at 8.5 kt (11.5 km/hr) and has a range of 7,408 km (4,000 nmi).

Acoustic Source Specifications

Seismic Airguns

The *Langseth* will deploy a 36-airgun array, consisting of two 18 airgun (plus 2 spares) sub-arrays. Each sub-array will have a volume of approximately 3,300 cubic inches (in^3). The airgun array will consist of a mixture of Bolt 1500LL and Bolt 1900LLX airguns ranging in size from 40 to 360 in^3, with a firing pressure of 1,900 pounds per square inch (psi). The 18 airgun sub-arrays will be configured as two identical linear arrays or ''strings'' (see Figure 2.11 of the NSF/USGS PEIS). Each string will have 10 airguns, the first and last airguns in the strings are spaced 16 m (52.5 ft) apart. Of the 10 airguns, nine airguns in each string will be fired simultaneously (1,650 in^3), whereas the tenth is kept in reserve as a spare, to be turned on in case of failure of another airgun. The sub-arrays would be fired alternately during the survey. The two airgun sub-arrays will be distributed across an area of approximately 12 x 16 m (40 x 52.5 ft) behind the *Langseth* and will be towed approximately 140 m (459.3 ft) behind the vessel. Discharge intervals depend on both the ship's speed and Two Way Travel Time recording intervals. The shot interval will be 37.5 m (123 ft) during the study. The shot interval will be relatively short, approximately 15 to 20 seconds (s) based on an assumed boat speed of 4.5 knots. During firing, a brief (approximately 0.1 s) pulse sound is emitted; the airguns will be silent during the intervening periods. The dominant frequency components range from two to 188 Hertz (Hz).

The tow depth of the airgun array will be 9 m (29.5 ft) during the surveys. Because the actual source is a distributed sound source (18 airguns) rather than a single point source, the highest sound measurable at any location in the water will be less than the nominal source level. In addition, the effective source level for sound propagating in near-horizontal directions will be substantially lower than the nominal omni-directional source level applicable to downward propagation because of the directional nature of the sound from the airgun array (i.e., sound is directed downward).

Hydrophone Streamer

Acoustic signals will be recorded using a system array of four hydrophone streamers, which would be towed behind the *Langseth.* Each streamer would consist of Sentry Solid Streamer Sercel cable approximately 6 km (3.2 nmi) long. The streamers are attached by floats to a diverter cable, which keeps the streamer spacing at approximately 100 to 150 m (328 to 492 ft) apart.

Seven hydrophones will be present along each streamer for acoustic measurement. The hydrophones will consist of a mixture of Sonardyne Transceivers. Each streamer will contain three groups of paired hydrophones, with each group approximately 2,375 m (7,800 ft) apart. The hydrophones within each group will be approximately 300 m (984 ft) apart. One additional hydrophone will be located

on the tail buoy attached to the end of the streamer cable. In addition, one Sonardyne Transducer will be attached to the airgun array. Compass birds will be used to keep the streamer cables and hydrophones at a depth of approximately 10 m (32.8 ft). One compass bird will be placed at the front end of each streamer as well as periodically along the streamer.

Metrics Used in This Document

This section includes a brief explanation of the sound measurements frequently used in the discussions of acoustic effects in this document. Sound pressure is the sound force per unit area, and is usually measured in micropascals (μPa), where 1 pascal (Pa) is the pressure resulting from a force of one newton exerted over an area of one square meter. Sound pressure level (SPL) is expressed as the ratio of a measured sound pressure and a reference level. The commonly used reference pressure level in underwater acoustics is 1 μPa, and the units for SPLs are dB re: 1 μPa. SPL (in decibels [dB]) = 20 log (pressure/reference pressure).

SPL is an instantaneous measurement and can be expressed as the peak, the peak-to-peak (p-p), or the root mean square (rms). Root mean square (rms), which is the square root of the arithmetic average of the squared instantaneous pressure values, is typically used in discussions of the effects of sounds on vertebrates and all references to SPL in this document refer to the root mean square unless otherwise noted. SPL does not take the duration of a sound into account.

Characteristics of the Airgun Pulses

Airguns function by venting high-pressure air into the water which creates an air bubble. The pressure signature of an individual airgun consists of a sharp rise and then fall in pressure, followed by several positive and negative pressure excursions caused by the oscillation of the resulting air bubble. The oscillation of the air bubble transmits sounds downward through the seafloor and the amount of sound transmitted in the near horizontal directions is reduced. However, the airgun array also emits sounds that travel horizontally toward non-target areas.

The nominal source levels of the airgun arrays used by L–DEO on the *Langseth* are 236 to 265 dB re 1 μPa (p-p) and the rms value for a given airgun pulse is typically 16 dB re 1 μPa lower than the peak-to-peak value (Greene, 1997; McCauley *et al.,* 1998, 2000a). The specific source output for the 18 airgun array is 252 dB (peak) and 259 dB (p-p). However, the difference between rms and peak or peak-to-peak values for a given pulse depends on the frequency content and duration of the pulse, among other factors.

Accordingly, L–DEO have predicted the received sound levels in relation to distance and direction from the 18 airgun array and the single Bolt 1900LL 40 in^3 airgun, which will be used during power-downs. A detailed description of L–DEO modeling for this survey's marine seismic source arrays for protected species mitigation is provided in the NSF/USGS PEIS (see Appendix H). NMFS refers the reviewers to the IHA application and NSF/USGS PEIS documents for additional information.

Predicted Sound Levels for the Airguns

Tolstoy *et al.* (2009) reported results for propagation measurements of pulses from the Langseth's 36 airgun, 6,600 in^3 array in shallow-water (approximately 50 m [164 ft]) and deep water depths (approximately 1,600 m [5,249 ft]) in the Gulf of Mexico in 2007 and 2008. Results of the Gulf of Mexico calibration study (Tolstoy *et al.,* 2009) showed that radii around the airguns for various received levels varied with water depth and that sound propagation varied with array tow depth.

The L–DEO used the results from the Gulf of Mexico study to determine the algorithm for its model that calculates the mitigation exclusion zones for the 36-airgun array and the single airgun. L–DEO has used these calculated values to determine buffer (i.e., 160 dB) and exclusion zones for the 18 airgun array and previously modeled measurements by L–DEO for the single airgun, to designate exclusion zones for purposes of mitigation, and to estimate take for marine mammals in the northeast Atlantic Ocean. A detailed description of the modeling effort is provided in the NSF/USGS PEIS.

Comparison of the Tolstoy *et al.* (2009) calibration study with the L–DEO's model for the *Langseth's* 36-airgun array indicated that the model represents the actual received levels, within the first few kilometers and the locations of the predicted exclusion zones. However, the model for deep water (greater than 1,000 m; 3,280 ft) overestimated the received sound levels at a given distance but is still valid for defining exclusion zones at various tow depths. Because the tow depth of the array in the calibration study is less shallow (6 m [19.7 ft]) than the tow depths in the proposed survey (9 m [29.5 ft), L–DEO used the following correction factors for estimating the received levels during the proposed surveys (see Table 1). The correction factors are the ratios of the 160, 180, and 190 dB distances from the modeled results for the 6,600 in^3 airgun arrays towed at 6 m (19.7 ft) versus 9, 12, or 15 m (29.5, 39.4, or 49.2 ft) (LGL, 2008).

For a single airgun, the tow depth has minimal effect on the maximum near-field output and the shape of the frequency spectrum for the single airgun; thus, the predicted exclusion zones are essentially the same at different tow depths. The L–DEO's model does not allow for bottom interactions, and thus is most directly applicable to deep water.

Using the model (airgun array and single airgun), Table 1 (below) shows the distances at which three rms sound levels are expected to be received from the 18 airgun array and a single airgun. To avoid the potential for injury or permanent physiological damage (Level A harassment), NMFS's (1995, 2000) current practice is that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding 180 dB re: 1 μPa and 190 dB re: 1 μPa, respectively. L–DEO used these levels to establish the proposed exclusion zones. If marine mammals are detected within or about to enter the appropriate exclusion zone, the airguns will be powered-down (or shut-down, if necessary) immediately. NMFS also assumes that marine mammals exposed to levels exceeding 160 dB re: 1 μPa may experience Level B harassment.

Table 1 summarizes the predicted distances at which sound levels (160, 180, and 190 dB [rms]) are expected to be received from the 18 airgun array and a single airgun operating in deep water depths.

TABLE 1—MEASURED (ARRAY) OR PREDICTED (SINGLE AIRGUN) DISTANCES TO WHICH SOUND LEVELS ≥190, 180, AND 160 dB RE: 1 μPA (RMS) COULD BE RECEIVED IN DEEP WATER DURING THE PROPOSED SURVEY IN THE NORTHEAST ATLANTIC OCEAN, JUNE TO JULY, 2013

Sound source and volume	Tow depth (m)	Water depth (m)	Predicted RMS radii distances (m)	
			180 dB	160 dB
Single Bolt airgun (40 in³)	9	>1,000 m	100 m (328.1 ft)	388 m (1,273 ft)
18 airguns (3,300 in³)	9	>1,000 m	1,116 m (3,661.4 ft)	6,908 m (22,664 ft)

Along with the airgun operations, two additional acoustical data acquisition systems will be operated from the *Langseth* continuously during the survey. The ocean floor will be mapped with the Kongsberg EM 122 multibeam echosounder and a Knudsen 320B sub-bottom profiler. These sound sources will be operated continuously from the *Langseth* throughout the cruise.

Multibeam Echosounder

The *Langseth* will operate a Kongsberg EM 122 multibeam echosounder concurrently during airgun operations to map characteristics of the ocean floor. The hull-mounted multibeam echosounder emits brief pulses of sound (also called a ping) (10.5 to 13, usually 12 kHz) in a fan-shaped beam that extends downward and to the sides of the ship. The transmitting beamwidth is 1° or 2° fore-aft and 150° athwartship and the maximum source level is 242 dB re: 1 μPa.

Each ping consists of eight (in water greater than 1,000 m) or four (less than 1,000 m) successive, fan-shaped transmissions, each ensonifying a sector that extends 1° fore-aft. Continuous-wave pulses increase from 2 to 15 milliseconds (ms) long in water depths up to 2,600 m (8,350.2 ft), and frequency modulated (FM) chirp pulses up to 100 ms long are used in water greater than 2,600 m. The successive transmissions span an overall cross-track angular extent of about 150°, with 2 ms gaps between the pulses for successive sectors (see Table 1 of the IHA application).

Sub-Bottom Profiler

The *Langseth* will also operate a Knudsen Chirp 320B sub-bottom continuously throughout the cruise simultaneously with the multibeam echosounder to map and provide information about the sedimentary features and bottom topography. The beam is transmitted as a 27° cone, which is directed downward by a 3.5 kHz transducer in the hull of the *Langseth.* The maximum output is 1 kilowatt (kW), but in practice, the output varies with water depth. The pulse interval is one second, but a common mode of operation is to broadcast five pulses at one second intervals followed by a 5-second pause.

Both the multibeam echosounder and sub-bottom profiler are operated continuously during survey operations. Given the relatively shallow water depths of the survey area (20 to 300 m [66 to 984 ft]), the number of pings or transmissions would be reduced from 8 to 4, and the pulse durations would be reduced from 100 ms to 2 to 15 ms for the multibeam echosounder. Power levels of both instruments would be reduced from maximum levels to account for water depth. Actual operating parameters will be established at the time of the survey.

NMFS expects that acoustic stimuli resulting from the proposed operation of the single airgun or the 18 airgun array has the potential to harass marine mammals. NMFS does not expect that the movement of the *Langseth,* during the conduct of the seismic survey, has the potential to harass marine mammals because of the relatively slow operation speed of the vessel (approximately 4.6 knots [kts]; 8.5 km/hr; 5.3 mph) during seismic acquisition.

Dates, Duration, and Specified Geographic Region

The proposed survey would encompass the area between approximately 41.5 to 42.5° North and approximately 11.5 to 17.5° West in the northeast Atlantic Ocean to the west of Spain. The cruise will be in International Waters and in the Exclusive Economic Zone (EEZ) of Spain in water depts. In the range from approximately 3,500 to greater than 5,000 m (see Figure 1 of the IHA application). The exact dates of the proposed activities depend on logistics and weather conditions. The *Langseth* would depart from Lisbon, Portugal or Vigo, Spain on June, 1, 2013 and spend approximately 1 day in transit to the proposed survey area. The seismic survey is expected to take approximately 39 days, with completion on approximately July 12, 2013. When the survey is completed, the *Langseth* will then transit back to Lisbon, Portugal or Vigo, Spain.

Description of the Marine Mammals in the Area of the Proposed Specified Activity

Thirty-nine marine mammal species (36 cetaceans [whales, dolphins, and porpoises]) (29 odontocetes and 7 mysticetes] and 3 pinnipeds [seals and sea lions]) are known to or could occur in the eastern North Atlantic study area. Several of these species are listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), including the North Atlantic right (*Eubalaena glacialis*), humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balaenoptera physalus*), blue (*Balaenoptera musculus*), and sperm (*Physeter macrocephalus*) whales. Nine cetacean species, although present in the wider eastern North Atlantic ocean, likely would not be found near the proposed study area at approximately 42° North because their ranges generally do not extend south of approximately 45° North in the northeastern Atlantic waters (i.e., Atlantic white-sided dolphin [*Lagenorhynchus acutus*] and white-beaked dolphin [*Lagenorhynchus albirostris*]), or their ranges in the northeast Atlantic ocean generally do not extend north of approximately 20° North (Clymene dolphin [*Stenella clymene*]), 30° North (Fraser's dolphin [*Lagenodelphis hosei*]), 34° North (spinner dolphin [*Stenella longirostris*]), 35 ° North (melon-headed whale [*Peponocephala electra*]), 37° North (rough-toothed dolphin [*Steno bredandensis*]), or 40° North (Bryde's whale [*Balaenoptera brydei*] and pantropical spotted dolphin [*Stenella attenuata*]). Although Spitz *et al.* (2011) reported two strandings records of

melon-headed whales for the Bay of Biscay, this species will not be discussed further, as it is unlikely to occur in the proposed survey area.

The harbor porpoise (*Phocoena phocoena*) does not occur in deep offshore waters. No harbor porpoise were detected visually or acoustically during summer surveys off the continental shelf in the Biscay Bay area during 1989 and 2007 (Lens, 1991; Basto d'Andrade, 2008; Anonymous, 2009). Pinniped species are also not known to occur in the deep waters of the survey area.

General information on the taxonomy, ecology, distribution, and movements, and acoustic capabilities of marine mammals are given in sections 3.6.1 and 3.7.1 of the NSF/USGS PEIS. One of the qualitative analysis areas defined in the PEIS is on the Mid-Atlantic Ridge, at 26° North, 40° West, approximately 2,800 km (1,511.9 nmi) from the proposed survey area. The general distribution of mysticetes and odontocetes in the North Atlantic Ocean is discussed in sections 3.6.3.4 and 3.7.3.4 of the NSF/USGS PEIS, respectively. The rest of this section deals specifically with species distribution off the north and west coast of the Iberian Peninsula.

Several systematic surveys have been conducted in the Bay of Biscay area, which has been found to be one of the most productive areas and the centre of highest cetacean diversity in the northeast Atlantic Ocean (Hoyt, 2005). The second North Atlantic Sightings Survey (NASS) occurred in waters off the continental shelf from the southern U.K. to northern Spain in July to August, 1989 (Lens, 1991). The Cetacean Offshore Distribution and Abundance in the European Atlantic (CODA) included surveys from the U.K. to southern Spain during July, 2007 (Basto d'Andrade, 2008; Anonymous, 2009). Additional information is available from coastal surveys off northwest Spain (e.g., Lopez *et al.,* 2003), and sighting records off western central (Brito *et al.,* 2009) and southern Portugal (Castor *et al.,* 2010). Records from the Ocean Biogeographic Information System (OBIS) database hosted by Rutgers and Duke University (Read *et al.,* 2009) were also included.

Table 2 (below) presents information on the abundance, distribution, population status, conservation status, and population trend of the species of marine mammals that may occur in the proposed study area during June to July, 2013.

TABLE 2—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE PROPOSED SEISMIC SURVEY AREA IN THE NORTHEAST ATLANTIC OCEAN

[See text and Table 3 in L–DEO's application for further details.]

Species	Habitat	Population estimate in the North Atlantic	ESA[1]	MMPA[2]
Mysticetes:				
North Atlantic right whale (*Eubalaena glacialis*).	Pelagic, shelf and coastal.	396[3]	EN	D.
Humpback whale (*Megaptera novaeangliae*).	Mainly nearshore, banks.	11,570[4]	EN	D.
Minke whale (*Balaenoptera acutorostrata*).	Pelagic and coastal	121,000[5]	NL	NC.
Sei whale (*Balaenoptera borealis*)	Primarily offshore, pelagic.	12,000 to 13,000[6]	EN	D.
Fin whale (*Balaenoptera physalus*)	Continental slope, pelagic.	24,887[7]	EN	D.
Blue whale (*Balaenoptera musculus*)	Pelagic, shelf, coastal	937[8]	EN	D.
Odontocetes:				
Sperm whale (*Physeter macrocephalus*)	Pelagic, deep sea	13,190[9]	EN	D.
Pygmy sperm whale (*Kogia breviceps*)	Deep waters off the shelf.	395[3 10]	NL	NC.
Dwarf sperm whale (*Kogia sima*)	Deep waters off the shelf.		NL	NC.
Cuvier's beaked whale (*Ziphius cavirostris*).	Slope and Pelagic	6,992[11] 100,000[12]	NL	NC.
Northern bottlenose whale (*Hyperoodon ampullatus*).	Pelagic	40,000[13]	NL	NC.
True's beaked whale (*Mesoplodon mirus*).	Pelagic	6,992[11]	NL	NC.
Gervais' beaked whale (*Mesoplodon europaeus*).	Pelagic	6,992[11]	NL	NC.
Sowerby's beaked whale (*Mesoplodon bidens*).	Pelagic	6,992[11]	NL	NC.
Blainville's beaked whale (*Mesoplodon densirostris*).	Pelagic	6,992[11]	NL	NC.
Bottlenose dolphin (*Tursiops truncatus*)	Coastal, oceanic, shelf break.	19,295[14]	NL	NC D—Western North Atlantic coastal.
Atlantic spotted dolphin (*Stenella frontalis*).	Shelf, offshore	50,978[3]	NL	NC.
Striped dolphin (*Stenella coeruleoalba*)	Off continental shelf	67,414[14]	NL	NC.
Short-beaked common dolphin (*Delphinus delphis*).	Shelf, pelagic, seamounts.	116,709[14]	NL	NC.
Risso's dolphin (*Grampus griseus*)	Deep water, seamounts.	20,479[3]	NL	NC.
Pygmy killer whale (*Feresa attenuata*)	Pelagic	NA	NL	NC.
False killer whale (*Pseudorca crassidens*).	Pelagic	NA	NL	NC.

TABLE 2—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE PROPOSED SEISMIC SURVEY AREA IN THE NORTHEAST ATLANTIC OCEAN—Continued

[See text and Table 3 in L–DEO's application for further details.]

Species	Habitat	Population estimate in the North Atlantic	ESA[1]	MMPA[2]
Killer whale (*Orcinus orca*)	Pelagic, shelf, coastal	NA	NL EN—Southern resident.	NC D—Southern resident, AT1 transient.
Short-finned pilot whale (*Globicephala macrorhynchus*).	Pelagic, shelf coastal	780,000[15]	NL	NC.
Long-finned pilot whale (*Globicephala melas*).	Mostly pelagic		NC	NC.

NA = Not available or not assessed.
[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, DL = Delisted, NL = Not listed.
[2] U.S. Marine Mammal Protection Act: D = Depleted, NC = Not Classified.
[3] Western North Atlantic, in U.S. and southern Canadian waters (Waring *et al.,* 2012).
[4] Likely negatively biased (Stevick *et al.,* 2003).
[5] Central and Northeast Atlantic (IWC, 2012).
[6] North Atlantic (Cattanach *et al.,* 1993).
[7] Central and Northeast Atlantic (Vikingsson *et al.,* 2009).
[8] Central and Northeast Atlantic (Pike *et al.,* 2009).
[9] For the northeast Atlantic, Faroes-Iceland, and the U.S. east coast (Whitehead, 2002).
[10] Both *Kogia* species.
[11] For all beaked whales (Anonymous, 2009).
[12] Worldwide estimate (Taylor *et al.,* 2008).
[13] Eastern North Atlantic (NAMMCO, 1995).
[14] European Atlantic waters beyond the continental shelf (Anonymous, 2009).
[15] *Globicephala* spp. combined, Central and Eastern North Atlantic (IWC, 2012).

Refer to sections 3 and 4 of L–DEO's application for detailed information regarding the abundance and distribution, population status, and life history and behavior of these other marine mammal species and their occurrence in the proposed project area. The application also presents how L–DEO calculated the estimated densities for the marine mammals in the proposed survey area. NMFS has reviewed these data and determined them to be the best available scientific information for the purposes of the proposed IHA.

Potential Effects on Marine Mammals

Acoustic stimuli generated by the operation of the airguns, which introduce sound into the marine environment, may have the potential to cause Level B harassment of marine mammals in the proposed survey area. The effects of sounds from airgun operations might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, temporary or permanent hearing impairment, or non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007). Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the proposed project would result in any cases of temporary or permanent hearing impairment, or any significant non-auditory physical or physiological effects. Based on the available data and studies described here, some behavioral disturbance is expected. A more comprehensive review of these issues can be found in the ''Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement prepared for Marine Seismic Research that is funded by the National Science Foundation and conducted by the U.S. Geological Survey'' (NSF/USGS, 2011).

Tolerance

Richardson *et al.* (1995) defines tolerance as the occurrence of marine mammals in areas where they are exposed to human activities or man-made noise. In many cases, tolerance develops by the animal habituating to the stimulus (i.e., the gradual waning of responses to a repeated or ongoing stimulus) (Richardson, *et al.,* 1995; Thorpe, 1963), but because of ecological or physiological requirements, many marine animals may need to remain in areas where they are exposed to chronic stimuli (Richardson, *et al.,* 1995).

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Several studies have shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response. That is often true even in cases when the pulsed sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of the marine mammal group. Although various baleen whales and toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to airgun pulses under some conditions, at other times marine mammals of all three types have shown no overt reactions. The relative responsiveness of baleen and toothed whales are quite variable.

Masking

The term masking refers to the inability of a subject to recognize the occurrence of an acoustic stimulus as a result of the interference of another acoustic stimulus (Clark *et al.,* 2009). Introduced underwater sound may, through masking, reduce the effective communication distance of a marine mammal species if the frequency of the source is close to that used as a signal by the marine mammal, and if the anthropogenic sound is present for a significant fraction of the time (Richardson *et al.,* 1995).

Masking effects of pulsed sounds (even from large arrays of airguns) on marine mammal calls and other natural sounds are expected to be limited. Because of the intermittent nature and low duty cycle of seismic airgun pulses, animals can emit and receive sounds in the relatively quiet intervals between pulses. However, in some situations, reverberation occurs for much or the entire interval between pulses (e.g., Simard *et al.,* 2005; Clark and Gagnon, 2006) which could mask calls. Some baleen and toothed whales are known to continue calling in the presence of

seismic pulses, and their calls can usually be heard between the seismic pulses (e.g., Richardson *et al.,* 1986; McDonald *et al.,* 1995; Greene *et al.,* 1999; Nieukirk *et al.,* 2004; Smultea *et al.,* 2004; Holst *et al.,* 2005a,b, 2006; and Dunn and Hernandez, 2009). However, Clark and Gagnon (2006) reported that fin whales in the North Atlantic Ocean went silent for an extended period starting soon after the onset of a seismic survey in the area. Similarly, there has been one report that sperm whales ceased calling when exposed to pulses from a very distant seismic ship (Bowles *et al.,* 1994). However, more recent studies found that they continued calling in the presence of seismic pulses (Madsen *et al.,* 2002; Tyack *et al.,* 2003; Smultea *et al.,* 2004; Holst *et al.,* 2006; and Jochens *et al.,* 2008). Dilorio and Clark (2009) found evidence of increased calling by blue whales during operations by a lower-energy seismic source (i.e., sparker). Dolphins and porpoises commonly are heard calling while airguns are operating (e.g., Gordon *et al.,* 2004; Smultea *et al.,* 2004; Holst *et al.,* 2005a, b; and Potter *et al.,* 2007). The sounds important to small odontocetes are predominantly at much higher frequencies than are the dominant components of airgun sounds, thus limiting the potential for masking.

Marine mammals are thought to be able to compensate for masking by adjusting their acoustic behavior through shifting call frequencies, increasing call volume, and increasing vocalization rates. For example, blue whales are found to increase call rates when exposed to noise from seismic surveys in the St. Lawrence Estuary (Dilorio and Clark, 2009). The North Atlantic right whales (*Eubalaena glacialis*) exposed to high shipping noise increased call frequency (Parks *et al.,* 2007), while some humpback whales respond to low-frequency active sonar playbacks by increasing song length (Miller *et al.,* 2000). In general, NMFS expects the masking effects of seismic pulses to be minor, given the normally intermittent nature of seismic pulses.

Behavioral Disturbance

Marine mammals may behaviorally react to sound when exposed to anthropogenic noise. Disturbance includes a variety of effects, including subtle to conspicuous changes in behavior, movement, and displacement. Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007). These behavioral reactions are often shown as: changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where noise sources are located; and/or flight responses (e.g., pinnipeds flushing into the water from haul-outs or rookeries). If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (e.g., Lusseau and Bejder, 2007; Weilgart, 2007).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, and/or reproduction. Some of these significant behavioral modifications include:

- Change in diving/surfacing patterns (such as those thought to be causing beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography) and is also difficult to predict (Richardson *et al.,* 1995; Southall *et al.,* 2007). Given the many uncertainties in predicting the quantity and types of impacts of noise on marine mammals, it is common practice to estimate how many mammals would be present within a particular distance of industrial activities and/or exposed to a particular level of sound. In most cases, this approach likely overestimates the numbers of marine mammals that would be affected in some biologically-important manner.

Baleen Whales—Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable (reviewed in Richardson *et al.,* 1995; Gordon *et al.,* 2004). Whales are often reported to show no overt reactions to pulses from large arrays of airguns at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much longer distances. However, baleen whales exposed to strong noise pulses from airguns often react by deviating from their normal migration route and/or interrupting their feeding and moving away. In the cases of migrating gray and bowhead whales, the observed changes in behavior appeared to be of little or no biological consequence to the animals (Richardson, *et al.,* 1995). They simply avoided the sound source by displacing their migration route to varying degrees, but within the natural boundaries of the migration corridors.

Studies of gray, bowhead, and humpback whales have shown that seismic pulses with received levels of 160 to 170 dB re 1 μPa (rms) seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed (Malme *et al.,* 1986, 1988; Richardson *et al.,* 1995). In many areas, seismic pulses from large arrays of airguns diminish to those levels at distances ranging from 4 to 15 km (2.2 to 8.1 nmi) from the source. A substantial proportion of the baleen whales within those distances may show avoidance or other strong behavioral reactions to the airgun array. Subtle behavioral changes sometimes become evident at somewhat lower received levels, and studies have shown that some species of baleen whales, notably bowhead, gray, and humpback whales, at times, show strong avoidance at received levels lower than 160 to 170 dB re 1 μPa (rms).

Researchers have studied the responses of humpback whales to seismic surveys during migration, feeding during the summer months, breeding while offshore from Angola, and wintering offshore from Brazil. McCauley *et al.* (1998, 2000a) studied the responses of humpback whales off western Australia to a full-scale seismic survey with a 16 airgun array (2,678 in^3) and to a single airgun (20 in^3) with source level of 227 dB re 1 μPa (p-p). In the 1998 study, they documented that avoidance reactions began at 5 to 8 km (2.7 to 4.3 nmi) from the array, and that those reactions kept most pods approximately 3 to 4 km (1.6 to 2.2 nmi) from the operating seismic boat. In the 2000 study, they noted localized displacement during migration of 4 to 5 km (2.2 to 2.7 nmi) by traveling pods and 7 to 12 km (3.8 to 6.5 nmi) by more sensitive resting pods of cow-calf pairs. Avoidance distances with respect to the

single airgun were smaller but consistent with the results from the full array in terms of the received sound levels. The mean received level for initial avoidance of an approaching airgun was 140 dB re 1 μPa (rms) for humpback pods containing females, and at the mean closest point of approach distance the received level was 143 dB re 1 μPa (rms). The initial avoidance response generally occurred at distances of 5 to 8 km (2.7 to 4.3 nmi) from the airgun array and 2 km (1.1 nmi) from the single airgun. However, some individual humpback whales, especially males, approached within distances of 100 to 400 m (328 to 1,312 ft), where the maximum received level was 179 dB re 1 μPa (rms).

Data collected by observers during several seismic surveys in the Northwest Atlantic showed that sighting rates of humpback whales were significantly greater during non-seismic periods compared with periods when a full array was operating (Moulton and Holst, 2010). In addition, humpback whales were more likely to swim away and less likely to swim towards a vessel during seismic vs. non-seismic periods (Moulton and Holst, 2010).

Humpback whales on their summer feeding grounds in southeast Alaska did not exhibit persistent avoidance when exposed to seismic pulses from a 1.64–L (100 in^3) airgun (Malme *et al.,* 1985). Some humpbacks seemed ''startled'' at received levels of 150 to 169 dB re 1 μPa. Malme *et al.* (1985) concluded that there was no clear evidence of avoidance, despite the possibility of subtle effects, at received levels up to 172 dB re 1 μPa (rms). However, Moulton and Holst (2010) reported that humpback whales monitored during seismic surveys in the Northwest Atlantic had lower sighting rates and were most often seen swimming away from the vessel during seismic periods compared with periods when airguns were silent.

Studies have suggested that South Atlantic humpback whales wintering off Brazil may be displaced or even strand upon exposure to seismic surveys (Engel *et al.,* 2004). The evidence for this was circumstantial and subject to alternative explanations (IAGC, 2004). Also, the evidence was not consistent with subsequent results from the same area of Brazil (Parente *et al.,* 2006), or with direct studies of humpbacks exposed to seismic surveys in other areas and seasons. After allowance for data from subsequent years, there was ''no observable direct correlation'' between strandings and seismic surveys (IWC, 2007: 236).

Reactions of migrating and feeding (but not wintering) gray whales to seismic surveys have been studied. Malme *et al.* (1986, 1988) studied the responses of feeding eastern Pacific gray whales to pulses from a single 100 in^3 airgun off St. Lawrence Island in the northern Bering Sea. They estimated, based on small sample sizes, that 50 percent of feeding gray whales stopped feeding at an average received pressure level of 173 dB re 1 μPa on an (approximate) rms basis, and that 10 percent of feeding whales interrupted feeding at received levels of 163 dB re 1 μPa (rms). Those findings were generally consistent with the results of experiments conducted on larger numbers of gray whales that were migrating along the California coast (Malme *et al.,* 1984; Malme and Miles, 1985), and western Pacific gray whales feeding off Sakhalin Island, Russia (Wursig *et al.,* 1999; Gailey *et al.,* 2007; Johnson *et al.,* 2007; Yazvenko *et al.,* 2007a, b), along with data on gray whales off British Columbia (Bain and Williams, 2006).

Various species of *Balaenoptera* (blue, sei, fin, and minke whales) have occasionally been seen in areas ensonified by airgun pulses (Stone, 2003; MacLean and Haley, 2004; Stone and Tasker, 2006), and calls from blue and fin whales have been localized in areas with airgun operations (e.g., McDonald *et al.,* 1995; Dunn and Hernandez, 2009; Castellote *et al.,* 2010). Sightings by observers on seismic vessels off the United Kingdom from 1997 to 2000 suggest that, during times of good sightability, sighting rates for mysticetes (mainly fin and sei whales) were similar when large arrays of airguns were shooting vs. silent (Stone, 2003; Stone and Tasker, 2006). However, these whales tended to exhibit localized avoidance, remaining significantly further (on average) from the airgun array during seismic operations compared with non-seismic periods (Stone and Tasker, 2006). Castellote *et al.* (2010) reported that singing fin whales in the Mediterranean moved away from an operating airgun array.

Ship-based monitoring studies of baleen whales (including blue, fin, sei, minke, and humpback whales) in the Northwest Atlantic found that overall, this group had lower sighting rates during seismic vs. non-seismic periods (Moulton and Holst, 2010). Baleen whales as a group were also seen significantly farther from the vessel during seismic compared with non-seismic periods, and they were more often seen to be swimming away from the operating seismic vessel (Moulton and Holst, 2010). Blue and minke whales were initially sighted significantly farther from the vessel during seismic operations compared to non-seismic periods; the same trend was observed for fin whales (Moulton and Holst, 2010). Minke whales were most often observed to be swimming away from the vessel when seismic operations were underway (Moulton and Holst, 2010).

Data on short-term reactions by cetaceans to impulsive noises are not necessarily indicative of long-term or biologically significant effects. It is not known whether impulsive sounds affect reproductive rate or distribution and habitat use in subsequent days or years. However, gray whales have continued to migrate annually along the west coast of North America with substantial increases in the population over recent years, despite intermittent seismic exploration (and much ship traffic) in that area for decades (Appendix A in Malme *et al.,* 1984; Richardson *et al.,* 1995; Allen and Angliss, 2010). The western Pacific gray whale population did not seem affected by a seismic survey in its feeding ground during a previous year (Johnson *et al.,* 2007). Similarly, bowhead whales have continued to travel to the eastern Beaufort Sea each summer, and their numbers have increased notably, despite seismic exploration in their summer and autumn range for many years (Richardson *et al.,* 1987; Allen and Angliss, 2010). The history of coexistence between seismic surveys and baleen whales suggests that brief exposures to sound pulses from any single seismic survey are unlikely to result in prolonged effects.

Toothed Whales—Little systematic information is available about reactions of toothed whales to noise pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized above have been reported for toothed whales. However, there are recent systematic studies on sperm whales (e.g., Gordon *et al.,* 2006; Madsen *et al.,* 2006; Winsor and Mate, 2006; Jochens *et al.,* 2008; Miller *et al.,* 2009). There is an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (e.g., Stone, 2003; Smultea *et al.,* 2004; Moulton and Miller, 2005; Bain and Williams, 2006; Holst *et al.,* 2006; Stone and Tasker, 2006; Potter *et al.,* 2007; Hauser *et al.,* 2008; Holst and Smultea, 2008; Weir, 2008; Barkaszi *et al.,* 2009; Richardson *et al.,* 2009; Moulton and Holst, 2010).

Seismic operators and PSOs on seismic vessels regularly see dolphins and other small toothed whales near

operating airgun arrays, but in general there is a tendency for most delphinids to show some avoidance of operating seismic vessels (e.g., Goold, 1996a,b,c; Calambokidis and Osmek, 1998; Stone, 2003; Moulton and Miller, 2005; Holst *et al.,* 2006; Stone and Tasker, 2006; Weir, 2008; Richardson *et al.,* 2009; Barkaszi *et al.,* 2009; Moulton and Holst, 2010). Some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large arrays of airguns are firing (e.g., Moulton and Miller, 2005). Nonetheless, small toothed whales more often tend to head away, or to maintain a somewhat greater distance from the vessel, when a large array of airguns is operating than when it is silent (e.g., Stone and Tasker, 2006; Weir, 2008; Barry *et al.,* 2010; Moulton and Holst, 2010). In most cases, the avoidance radii for delphinids appear to be small, on the order of one km or less, and some individuals show no apparent avoidance.

Captive bottlenose dolphins (*Tursiops truncatus*) and beluga whales exhibited changes in behavior when exposed to strong pulsed sounds similar in duration to those typically used in seismic surveys (Finneran *et al.,* 2000, 2002, 2005). However, the animals tolerated high received levels of sound before exhibiting aversive behaviors.

Results for porpoises depend on species. The limited available data suggest that harbor porpoises show stronger avoidance of seismic operations than do Dall's porpoises (Stone, 2003; MacLean and Koski, 2005; Bain and Williams, 2006; Stone and Tasker, 2006). Dall's porpoises seem relatively tolerant of airgun operations (MacLean and Koski, 2005; Bain and Williams, 2006), although they too have been observed to avoid large arrays of operating airguns (Calambokidis and Osmek, 1998; Bain and Williams, 2006). This apparent difference in responsiveness of these two porpoise species is consistent with their relative responsiveness to boat traffic and some other acoustic sources (Richardson *et al.,* 1995; Southall *et al.,* 2007).

Most studies of sperm whales exposed to airgun sounds indicate that the sperm whale shows considerable tolerance of airgun pulses (e.g., Stone, 2003; Moulton *et al.,* 2005, 2006a; Stone and Tasker, 2006; Weir, 2008). In most cases the whales do not show strong avoidance, and they continue to call. However, controlled exposure experiments in the Gulf of Mexico indicate that foraging behavior was altered upon exposure to airgun sound (Jochens *et al.,* 2008; Miller *et al.,* 2009; Tyack, 2009).

There are almost no specific data on the behavioral reactions of beaked whales to seismic surveys. However, some northern bottlenose whales (*Hyperoodon ampullatus*) remained in the general area and continued to produce high-frequency clicks when exposed to sound pulses from distant seismic surveys (Gosselin and Lawson, 2004; Laurinolli and Cochrane, 2005; Simard *et al.,* 2005). Most beaked whales tend to avoid approaching vessels of other types (e.g., Wursig *et al.,* 1998). They may also dive for an extended period when approached by a vessel (e.g., Kasuya, 1986), although it is uncertain how much longer such dives may be as compared to dives by undisturbed beaked whales, which also are often quite long (Baird *et al.,* 2006; Tyack *et al.,* 2006). Based on a single observation, Aguilar-Soto *et al.* (2006) suggested that foraging efficiency of Cuvier's beaked whales may be reduced by close approach of vessels. In any event, it is likely that most beaked whales would also show strong avoidance of an approaching seismic vessel, although this has not been documented explicitly. In fact, Moulton and Holst (2010) reported 15 sightings of beaked whales during seismic studies in the Northwest Atlantic; seven of those sightings were made at times when at least one airgun was operating. There was little evidence to indicate that beaked whale behavior was affected by airgun operations; sighting rates and distances were similar during seismic and non-seismic periods (Moulton and Holst, 2010).

There are indications that some beaked whales may strand when naval exercises involving mid-frequency sonar operation are ongoing nearby (e.g., Simmonds and Lopez-Jurado, 1991; Frantzis, 1998; NOAA and USN, 2001; Jepson *et al.,* 2003; Hildebrand, 2005; Barlow and Gisiner, 2006; see also the ''Stranding and Mortality'' section in this notice). These strandings are apparently a disturbance response, although auditory or other injuries or other physiological effects may also be involved. Whether beaked whales would ever react similarly to seismic surveys is unknown. Seismic survey sounds are quite different from those of the sonar in operation during the above-cited incidents.

Odontocete reactions to large arrays of airguns are variable and, at least for delphinids and Dall's porpoises, seem to be confined to a smaller radius than has been observed for the more responsive of some mysticetes. However, other data suggest that some odontocete species, including harbor porpoises, may be more responsive than might be expected given their poor low-frequency hearing. Reactions at longer distances may be particularly likely when sound propagation conditions are conducive to transmission of the higher frequency components of airgun sound to the animals' location (DeRuiter *et al.,* 2006; Goold and Coates, 2006; Tyack *et al.,* 2006; Potter *et al.,* 2007).

Hearing Impairment and Other Physical Effects

Exposure to high intensity sound for a sufficient duration may result in auditory effects such as a noise-induced threshold shift—an increase in the auditory threshold after exposure to noise (Finneran, Carder, Schlundt, and Ridgway, 2005). Factors that influence the amount of threshold shift include the amplitude, duration, frequency content, temporal pattern, and energy distribution of noise exposure. The magnitude of hearing threshold shift normally decreases over time following cessation of the noise exposure. The amount of threshold shift just after exposure is called the initial threshold shift. If the threshold shift eventually returns to zero (i.e., the threshold returns to the pre-exposure value), it is called temporary threshold shift (TTS) (Southall *et al.,* 2007).

Researchers have studied TTS in certain captive odontocetes and pinnipeds exposed to strong sounds (reviewed in Southall *et al.,* 2007). However, there has been no specific documentation of TTS let alone permanent hearing damage, i.e., permanent threshold shift (PTS), in free-ranging marine mammals exposed to sequences of airgun pulses during realistic field conditions.

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007). Table 1 (above) presents the estimated distances from the *Langseth's* airguns at which the received energy level (per pulse, flat-weighted) would be

expected to be greater than or equal to 180 or 190 dB re 1 μPa (rms).

To avoid the potential for injury (i.e., Level A harassment), NMFS (1995, 2000) concluded that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding 180 and 190 dB re 1 μPa (rms), respectively. NMFS believes that to avoid the potential for Level A harassment, cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding 180 and 190 dB re 1 μPa (rms), respectively. The established 180 and 190 dB (rms) criteria are not considered to be the levels above which TTS might occur. Rather, they are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. NMFS also assumes that cetaceans and pinnipeds exposed to levels exceeding 160 dB re 1 μPa (rms) may experience Level B harassment.

For toothed whales, researchers have derived TTS information for odontocetes from studies on the bottlenose dolphin and beluga. The experiments show that exposure to a single impulse at a received level of 207 kPa (or 30 psi, p–p), which is equivalent to 228 dB re 1 Pa (p–p), resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within 4 minutes of the exposure (Finneran *et al.,* 2002). For the one harbor porpoise tested, the received level of airgun sound that elicited onset of TTS was lower (Lucke *et al.,* 2009). If these results from a single animal are representative, it is inappropriate to assume that onset of TTS occurs at similar received levels in all odontocetes (*cf.* Southall *et al.,* 2007). Some cetaceans apparently can incur TTS at considerably lower sound exposures than are necessary to elicit TTS in the beluga or bottlenose dolphin.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are assumed to be lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales than those of odontocetes (Southall *et al.,* 2007).

Permanent Threshold Shift—When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985). There is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. However, given the possibility that mammals close to an airgun array might incur at least mild TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS (e.g., Richardson *et al.,* 1995, p. 372*ff;* Gedamke *et al.,* 2008). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals (Southall *et al.,* 2007). PTS might occur at a received sound level at least several dBs above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise times. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis, and probably greater than 6 dB (Southall *et al.,* 2007).

Given the higher level of sound necessary to cause PTS as compared with TTS, it is considerably less likely that PTS would occur. Baleen whales generally avoid the immediate area around operating seismic vessels, as do some other marine mammals. Some pinnipeds show avoidance reactions to airguns, but their avoidance reactions are generally not as strong or consistent as those of cetaceans, and occasionally they seem to be attracted to operating seismic vessels (NMFS, 2010).

Stranding and Mortality—When a living or dead marine mammal swims or floats onto shore and becomes ''beached'' or incapable of returning to sea, the event is termed a ''stranding'' (Geraci *et al.,* 1999; Perrin and Geraci, 2002; Geraci and Lounsbury, 2005; NMFS, 2007). The legal definition for a stranding under the MMPA is that ''(A) a marine mammal is dead and is (i) on a beach or shore of the United States; or (ii) in waters under the jurisdiction of the United States (including any navigable waters); or (B) a marine mammal is alive and is (i) on a beach or shore of the United States and is unable to return to the water; (ii) on a beach or shore of the United States and, although able to return to the water is in need of apparent medical attention; or (iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.''

Marine mammals are known to strand for a variety of reasons, such as infectious agents, biotoxicosis, starvation, fishery interaction, ship strike, unusual oceanographic or weather events, sound exposure, or combinations of these stressors sustained concurrently or in series. However, the cause or causes of most strandings are unknown (Geraci *et al.,* 1976; Eaton, 1979; Odell *et al.,* 1980; Best, 1982). Numerous studies suggest that the physiology, behavior, habitat relationships, age, or condition of cetaceans may cause them to strand or might pre-dispose them to strand when exposed to another phenomenon. These suggestions are consistent with the conclusions of numerous other studies that have demonstrated that combinations of dissimilar stressors commonly combine to kill an animal or dramatically reduce its fitness, even though one exposure without the other does not produce the same result (Chroussos, 2000; Creel, 2005; DeVries *et al.,* 2003; Fair and Becker, 2000; Foley *et al.,* 2001; Moberg, 2000; Relyea, 2005a, 2005b; Romero, 2004; Sih *et al.,* 2004).

Strandings Associated with Military Active Sonar—Several sources have published lists of mass stranding events of cetaceans in an attempt to identify relationships between those stranding events and military active sonar (Hildebrand, 2004; IWC, 2005; Taylor et al., 2004). For example, based on a review of stranding records between 1960 and 1995, the International Whaling Commission (2005) identified ten mass stranding events and concluded that, out of eight stranding events reported from the mid-1980s to the summer of 2003, seven had been coincident with the use of mid-frequency active sonar and most involved beaked whales.

Over the past 12 years, there have been five stranding events coincident with military mid-frequency active

sonar use in which exposure to sonar is believed to have been a contributing factor to strandings: Greece (1996); the Bahamas (2000); Madeir (2000); Canary Islands (2002); and Spain (2006). Refer to Cox *et al.* (2006) for a summary of common features shared by the strandings events in Greece (1996), Bahamas (2000), Madeira (2000), and Canary Islands (2002); and Fernandez et al., (2005) for an additional summary of the Canary Islands 2002 stranding event.

Potential for Stranding from Seismic Surveys—Marine mammals close to underwater detonations of high explosives can be killed or severely injured, and the auditory organs are especially susceptible to injury (Ketten *et al.,* 1993; Ketten, 1995). However, explosives are no longer used in marine waters for commercial seismic surveys or (with rare exceptions) for seismic research. These methods have been replaced entirely by airguns or related non-explosive pulse generators. Airgun pulses are less energetic and have slower rise times, and there is no specific evidence that they can cause serious injury, death, or stranding even in the case of large airgun arrays. However, the association of strandings of beaked whales with naval exercises involving mid-frequency active sonar (non-pulse sound) and, in one case, the co-occurrence of an L–DEO seismic survey (Malakoff, 2002; Cox *et al.,* 2006), has raised the possibility that beaked whales exposed to strong ''pulsed'' sounds could also be susceptible to injury and/or behavioral reactions that can lead to stranding (e.g., Hildebrand, 2005; Southall *et al.,* 2007).

Specific sound-related processes that lead to strandings and mortality are not well documented, but may include:

(1) Swimming in avoidance of a sound into shallow water;

(2) A change in behavior (such as a change in diving behavior) that might contribute to tissue damage, gas bubble formation, hypoxia, cardiac arrhythmia, hypertensive hemorrhage or other forms of trauma;

(3) A physiological change such as a vestibular response leading to a behavioral change or stress-induced hemorrhagic diathesis, leading in turn to tissue damage; and

(4) Tissue damage directly from sound exposure, such as through acoustically-mediated bubble formation and growth or acoustic resonance of tissues.

Some of these mechanisms are unlikely to apply in the case of impulse sounds. However, there are indications that gas-bubble disease (analogous to ''the bends''), induced in supersaturated tissue by a behavioral response to acoustic exposure, could be a pathologic mechanism for the strandings and mortality of some deep-diving cetaceans exposed to sonar. The evidence for this remains circumstantial and associated with exposure to naval mid-frequency sonar, not seismic surveys (Cox *et al.,* 2006; Southall *et al.,* 2007).

Seismic pulses and mid-frequency sonar signals are quite different, and some mechanisms by which sonar sounds have been hypothesized to affect beaked whales are unlikely to apply to airgun pulses. Sounds produced by airgun arrays are broadband impulses with most of the energy below one kHz. Typical military mid-frequency sonar emits non-impulse sounds at frequencies of 2 to 10 kHz, generally with a relatively narrow bandwidth at any one time. A further difference between seismic surveys and naval exercises is that naval exercises can involve sound sources on more than one vessel. Thus, it is not appropriate to expect that the same to marine mammals will result from military sonar and seismic surveys. However, evidence that sonar signals can, in special circumstances, lead (at least indirectly) to physical damage and mortality (e.g., Balcomb and Claridge, 2001; NOAA and USN, 2001; Jepson *et al.,* 2003; Fernández *et al.,* 2004, 2005; Hildebrand 2005; Cox *et al.,* 2006) suggests that caution is warranted when dealing with exposure of marine mammals to any high-intensity sound.

There is no conclusive evidence of cetacean strandings or deaths at sea as a result of exposure to seismic surveys, but a few cases of strandings in the general area where a seismic survey was ongoing have led to speculation concerning a possible link between seismic surveys and strandings. Suggestions that there was a link between seismic surveys and strandings of humpback whales in Brazil (Engel *et al.,* 2004) were not well founded (IAGC, 2004; IWC, 2007). In September, 2002, there was a stranding of two Cuvier's beaked whales in the Gulf of California, Mexico, when the L–DEO vessel R/V *Maurice Ewing* was operating a 20 airgun (8,490 in^3) array in the general area. The link between the stranding and the seismic surveys was inconclusive and not based on any physical evidence (Hogarth, 2002; Yoder, 2002). Nonetheless, the Gulf of California incident plus the beaked whale strandings near naval exercises involving use of mid-frequency sonar suggests a need for caution in conducting seismic surveys in areas occupied by beaked whales until more is known about effects of seismic surveys on those species (Hildebrand, 2005). No injuries of beaked whales are anticipated during the proposed study because of:

(1) The high likelihood that any beaked whales nearby would avoid the approaching vessel before being exposed to high sound levels, and

(2) Differences between the sound sources operated by L–DEO and those involved in the naval exercises associated with strandings.

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. However, resonance effects (Gentry, 2002) and direct noise-induced bubble formations (Crum *et al.,* 2005) are implausible in the case of exposure to an impulsive broadband source like an airgun array. If seismic surveys disrupt diving patterns of deep-diving species, this might perhaps result in bubble formation and a form of the bends, as speculated to occur in beaked whales exposed to sonar. However, there is no specific evidence of this upon exposure to airgun pulses.

In general, very little is known about the potential for seismic survey sounds (or other types of strong underwater sounds) to cause non-auditory physical effects in marine mammals. Such effects, if they occur at all, would presumably be limited to short distances and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007), or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of seismic vessels, including most baleen whales, some odontocetes, and some pinnipeds, are especially unlikely to incur non-auditory physical effects.

Potential Effects of Other Acoustic Devices

Multibeam Echosounder

L–DEO will operate the Kongsberg EM 122 multibeam echosounder from the source vessel during the planned study. Sounds from the multibeam echosounder are very short pulses, occurring for 2 to 15 ms once every 5 to 20 s, depending on water depth. Most of the energy in the sound pulses emitted by this multibeam echosounder is at frequencies near 12 kHz, and the

maximum source level is 242 dB re 1 μPa (rms). The beam is narrow (1 to 2°) in fore-aft extent and wide (150°) in the cross-track extent. Each ping consists of eight (in water greater than 1,000 m deep) or four (in water less than 1,000 m deep) successive fan-shaped transmissions (segments) at different cross-track angles. Any given mammal at depth near the trackline would be in the main beam for only one or two of the nine segments. Also, marine mammals that encounter the Kongsberg EM 122 are unlikely to be subjected to repeated pulses because of the narrow fore-aft width of the beam and will receive only limited amounts of pulse energy because of the short pulses. Animals close to the ship (where the beam is narrowest) are especially unlikely to be ensonified for more than one 2 to 15 ms pulse (or two pulses if in the overlap area). Similarly, Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a multibeam echosounder emits a pulse is small. The animal would have to pass the transducer at close range and be swimming at speeds similar to the vessel in order to receive the multiple pulses that might result in sufficient exposure to cause TTS.

Navy sonars that have been linked to avoidance reactions and stranding of cetaceans: (1) Generally have longer pulse duration than the Kongsberg EM 122; and (2) are often directed close to horizontally versus more downward for the multibeam echosounder. The area of possible influence of the multibeam echosounder is much smaller—a narrow band below the source vessel. Also, the duration of exposure for a given marine mammal can be much longer for naval sonar. During L–DEO's operations, the individual pulses will be very short, and a given mammal would not receive many of the downward-directed pulses as the vessel passes by. Possible effects of a multibeam echosounder on marine mammals are described below.

Masking—Marine mammal communications will not be masked appreciably by the multibeam echosounder signals given the low duty cycle of the echosounder and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of baleen whales, the multibeam echosounder signals (12 kHz) do not overlap with the predominant frequencies in the calls, which would avoid any significant masking.

Behavioral Responses—Behavioral reactions of free-ranging marine mammals to sonars, echosounders, and other sound sources appear to vary by species and circumstance. Observed reactions have included silencing and dispersal by sperm whales (Watkins *et al.,* 1985), increased vocalizations and no dispersal by pilot whales (Rendell and Gordon, 1999), and the previously-mentioned beachings by beaked whales. During exposure to a 21 to 25 kHz ''whale-finding'' sonar with a source level of 215 dB re 1 μPa, gray whales reacted by orienting slightly away from the source and being deflected from their course by approximately 200 m (656.2 ft) (Frankel, 2005). When a 38 kHz echosounder and a 150 kHz acoustic Doppler current profiler were transmitting during studies in the Eastern Tropical Pacific, baleen whales showed no significant responses, while spotted and spinner dolphins were detected slightly more often and beaked whales less often during visual surveys (Gerrodette and Pettis, 2005).

Captive bottlenose dolphins and a beluga whale exhibited changes in behavior when exposed to 1 s tonal signals at frequencies similar to those that will be emitted by the multibeam echosounder used by L–DEO, and to shorter broadband pulsed signals. Behavioral changes typically involved what appeared to be deliberate attempts to avoid the sound exposure (Schlundt *et al.,* 2000; Finneran *et al.,* 2002; Finneran and Schlundt, 2004). The relevance of those data to free-ranging odontocetes is uncertain, and in any case, the test sounds were quite different in duration as compared with those from a multibeam echosounder.

Hearing Impairment and Other Physical Effects—Given recent stranding events that have been associated with the operation of naval sonar, there is concern that mid-frequency sonar sounds can cause serious impacts to marine mammals (see above). However, the multibeam echosounder proposed for use by L–DEO is quite different than sonar used for Navy operations. Pulse duration of the multibeam echosounder is very short relative to the naval sonar. Also, at any given location, an individual marine mammal would be in the beam of the multibeam echosounder for much less time given the generally downward orientation of the beam and its narrow fore-aft beamwidth; Navy sonar often uses near-horizontally-directed sound. Those factors would all reduce the sound energy received from the multibeam echosounder rather drastically relative to that from naval sonar.

NMFS believes that the brief exposure of marine mammals to one pulse, or small numbers of signals, from the multibeam echosounder is not likely to result in the harassment of marine mammals.

Sub-Bottom Profiler

L–DEO will also operate a sub-bottom profiler from the source vessel during the proposed survey. Sounds from the sub-bottom profiler are very short pulses, occurring for 1 to 4 ms once every second. Most of the energy in the sound pulses emitted by the sub-bottom profiler is at 3.5 kHz, and the beam is directed downward. The sub-bottom profiler on the *Langseth* has a maximum source level of 204 dB re 1 μPa. Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a bottom profiler emits a pulse is small—even for a sub-bottom profiler more powerful than that on the *Langseth.* If the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS.

Masking—Marine mammal communications will not be masked appreciably by the sub-bottom profiler signals given the directionality of the signal and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of most baleen whales, the sub-bottom profiler signals do not overlap with the predominant frequencies in the calls, which would avoid significant masking.

Behavioral Responses—Marine mammal behavioral reactions to other pulsed sound sources are discussed above, and responses to the sub-bottom profiler are likely to be similar to those for other pulsed sources if received at the same levels. However, the pulsed signals from the sub-bottom profiler are considerably weaker than those from the multibeam echosounder. Therefore, behavioral responses are not expected unless marine mammals are very close to the source.

Hearing Impairment and Other Physical Effects—It is unlikely that the sub-bottom profiler produces pulse levels strong enough to cause hearing impairment or other physical injuries even in an animal that is (briefly) in a position near the source. The sub-bottom profiler is usually operated simultaneously with other higher-power acoustic sources, including airguns. Many marine mammals will move away in response to the approaching higher-power sources or the vessel itself before the mammals would be close enough for there to be any possibility of effects from the less intense sounds from the sub-bottom profiler.

Vessel Movement and Collisions

Vessel movement in the vicinity of marine mammals has the potential to result in either a behavioral response or a direct physical interaction. Both scenarios are discussed below in this section.

Behavioral Responses to Vessel Movement—There are limited data concerning marine mammal behavioral responses to vessel traffic and vessel noise, and a lack of consensus among scientists with respect to what these responses mean or whether they result in short-term or long-term adverse effects. In those cases where there is a busy shipping lane or where there is a large amount of vessel traffic, marine mammals (especially low frequency specialists) may experience acoustic masking (Hildebrand, 2005) if they are present in the area (e.g., killer whales in Puget Sound; Foote *et al.,* 2004; Holt *et al.,* 2008). In cases where vessels actively approach marine mammals (e.g., whale watching or dolphin watching boats), scientists have documented that animals exhibit altered behavior such as increased swimming speed, erratic movement, and active avoidance behavior (Bursk, 1983; Acevedo, 1991; Baker and MacGibbon, 1991; Trites and Bain, 2000; Williams *et al.,* 2002; Constantine *et al.,* 2003), reduced blow interval (Ritcher *et al.,* 2003), disruption of normal social behaviors (Lusseau, 2003, 2006), and the shift of behavioral activities which may increase energetic costs (Constantine et al., 2003, 2004). A detailed review of marine mammal reactions to ships and boats is available in Richardson *et al.,* (1995). For each of the marine mammal taxonomy groups, Richardson *et al.,* (1995) provides the following assessment regarding reactions to vessel traffic:

Toothed whales—''In summary, toothed whales sometimes show no avoidance reaction to vessels, or even approach them. However, avoidance can occur, especially in response to vessels of types used to chase or hunt the animals. This may cause temporary displacement, but we know of no clear evidence that toothed whales have abandoned significant parts of their range because of vessel traffic.''

Baleen whales—''When baleen whales receive low-level sounds from distant or stationary vessels, the sounds often seem to be ignored. Some whales approach the sources of these sounds. When vessels approach whales slowly and non-aggressively, whales often exhibit slow and inconspicuous avoidance maneuvers. In response to strong or rapidly changing vessel noise, baleen whales often interrupt their normal behavior and swim rapidly away. Avoidance is especially strong when a boat heads directly toward the whale.''

Behavioral responses to stimuli are complex and influenced to varying degrees by a number of factors, such as species, behavioral contexts, geographical regions, source characteristics (moving or stationary, speed, direction, etc.), prior experience of the animal and physical status of the animal. For example, studies have shown that beluga whales' reaction varied when exposed to vessel noise and traffic. In some cases, beluga whales exhibited rapid swimming from ice-breaking vessels up to 80 km (43.2 nmi) away, and showed changes in surfacing, breathing, diving, and group composition in the Canadian high Arctic where vessel traffic is rare (Finley *et al.,* 1990). In other cases, beluga whales were more tolerant of vessels, but responded differentially to certain vessels and operating characteristics by reducing their calling rates (especially older animals) in the St. Lawrence River where vessel traffic is common (Blane and Jaakson, 1994). In Bristol Bay, Alaska, beluga whales continued to feed when surrounded by fishing vessels and resisted dispersal even when purposefully harassed (Fish and Vania, 1971).

In reviewing more than 25 years of whale observation data, Watkins (1986) concluded that whale reactions to vessel traffic were ''modified by their previous experience and current activity: habituation often occurred rapidly, attention to other stimuli or preoccupation with other activities sometimes overcame their interest or wariness of stimuli.'' Watkins noticed that over the years of exposure to ships in the Cape Cod area, minke whales changed from frequent positive interest (e.g., approaching vessels) to generally uninterested reactions; fin whales changed from mostly negative (e.g., avoidance) to uninterested reactions; fin whales changed from mostly negative (e.g., avoidance) to uninterested reactions; right whales apparently continued the same variety of responses (negative, uninterested, and positive responses) with little change; and humpbacks dramatically changed from mixed responses that were often negative to reactions that were often strongly positive. Watkins (1986) summarized that ''whales near shore, even in regions with low vessel traffic, generally have become less wary of boats and their noises, and they have appeared to be less easily disturbed than previously. In particular locations with intense shipping and repeated approaches by boats (such as the whale-watching areas of Stellwagen Bank), more and more whales had positive reactions to familiar vessels, and they also occasionally approached other boats and yachts in the same ways.''

Although the radiated sound from the *Langseth* and support vessels will be audible to marine mammals over a large distance, it is unlikely that marine mammals will respond behaviorally (in a manner that NMFS would consider harassment under the MMPA) to low-level distant shipping noise as the animals in the area are likely to be habituated to such noises (Nowacek *et al.,* 2004). In light of these facts, NMFS does not expect the *Langseth's* movements to result in Level B harassment.

Vessel Strike—Ship strikes of cetaceans can cause major wounds, which may lead to the death of the animal. An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or an animal just below the surface could be cut by a vessel's propeller. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Vanderlaan and Taggart, 2007).

The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (e.g., the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale, seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.,* 2004). These species are primarily large, slow moving whales. Smaller marine mammals (e.g., bottlenose dolphin) move quickly through the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike results in death (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Jensen and Silber, 2003; Vanderlaan and Taggart, 2007). In assessing records in which vessel speed was known, Laist *et al.* (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 13 kts (24.1 km/hr, 14.9 mph).

L–DEO's proposed operation of one source vessel and a support vessel for the proposed survey is relatively small in scale compared to the number of commercial ships transiting at higher speeds in the same area on an annual basis. The probability of vessel and marine mammal interactions occurring during the proposed survey is unlikely due to the *Langseth's* and Poseidon's slow operational speed, which is typically 4.6 kts (8.5 km/hr, 5.3 mph). Outside of seismic operations, the *Langseth's* cruising speed would be approximately 10 kts (18.5 km/hr, 11.5 mph), which is generally below the speed at which studies have noted reported increases of marine mammal injury or death (Laist *et al.,* 2001).

As a final point, the *Langseth* has a number of other advantages for avoiding ship strikes as compared to most commercial merchant vessels, including the following: the *Langseth's* bridge offers good visibility to visually monitor for marine mammal presence; PSOs posted during operations scan the ocean for marine mammals and must report visual alerts of marine mammal presence to crew; and the PSOs receive extensive training that covers the fundamentals of visual observing for marine mammals and information about marine mammals and their identification at sea.

Entanglement

Entanglement can occur if wildlife becomes immobilized in survey lines, cables, nets, or other equipment that is moving through the water column. The proposed seismic survey would require towing approximately 6.4 km^2 (1.9 nmi^2) of equipment and cables. This large of an array carries the risk of entanglement for marine mammals. Wildlife, especially slow moving individuals, such as large whales, have a low probability of becoming entangled due to slow speed of the survey vessel and onboard monitoring efforts. The NSF has no recorded cases of entanglement of marine mammals during any of their 160,934 km (86,897.4 nmi) of seismic surveys. In May, 2011, there was one recorded entanglement of an olive ridley sea turtle (*Lepidochelys olivacea*) in the *Langseth's* barovanes after the conclusion of a seismic survey off Costa Rica. There have cases of baleen whales, mostly gray whales (Heyning, 1990), becoming entangled in fishing lines. The probability for entanglement of marine mammals is considered not significant because of the vessel speed and the monitoring efforts onboard the survey vessel.

The potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections) which, as noted, are designed to effect the least practicable impact on affected marine mammal species and stocks.

Anticipated Effects on Marine Mammal Habitat

The proposed seismic survey is not anticipated to have any permanent impact on habitats used by the marine mammals in the proposed survey area, including the food sources they use (i.e. fish and invertebrates). Additionally, no physical damage to any habitat is anticipated as a result of conducting the proposed seismic survey. While it is anticipated that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and was considered in further detail earlier in this document, as behavioral modification. The main impact associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals in any particular area of the approximately 6,437 km^2 proposed project area, previously discussed in this notice. The next section discusses the potential impacts of anthropogenic sound sources on common marine mammal prey in the proposed survey area (i.e., fish and invertebrates).

Anticipated Effects on Fish

One reason for the adoption of airguns as the standard energy source for marine seismic surveys is that, unlike explosives, they have not been associated with large-scale fish kills. However, existing information on the impacts of seismic surveys on marine fish and invertebrate populations is limited. There are three types of potential effects of exposure to seismic surveys: (1) Pathological, (2) physiological, and (3) behavioral. Pathological effects involve lethal and temporary or permanent sub-lethal injury. Physiological effects involve temporary and permanent primary and secondary stress responses, such as changes in levels of enzymes and proteins. Behavioral effects refer to temporary and (if they occur) permanent changes in exhibited behavior (e.g., startle and avoidance behavior). The three categories are interrelated in complex ways. For example, it is possible that certain physiological and behavioral changes could potentially lead to an ultimate pathological effect on individuals (i.e., mortality).

The specific received sound levels at which permanent adverse effects to fish potentially could occur are little studied and largely unknown. Furthermore, the available information on the impacts of seismic surveys on marine fish is from studies of individuals or portions of a population; there have been no studies at the population scale. The studies of individual fish have often been on caged fish that were exposed to airgun pulses in situations not representative of an actual seismic survey. Thus, available information provides limited insight on possible real-world effects at the ocean or population scale. This makes drawing conclusions about impacts on fish problematic because, ultimately, the most important issues concern effects on marine fish populations, their viability, and their availability to fisheries.

Hastings and Popper (2005), Popper (2009), and Popper and Hastings (2009a,b) provided recent critical reviews of the known effects of sound on fish. The following sections provide a general synopsis of the available information on the effects of exposure to seismic and other anthropogenic sound as relevant to fish. The information comprises results from scientific studies of varying degrees of rigor plus some anecdotal information. Some of the data sources may have serious shortcomings in methods, analysis, interpretation, and reproducibility that must be considered when interpreting their results (see Hastings and Popper, 2005). Potential adverse effects of the program's sound sources on marine fish are noted.

Pathological Effects—The potential for pathological damage to hearing structures in fish depends on the energy level of the received sound and the physiology and hearing capability of the species in question. For a given sound to result in hearing loss, the sound must exceed, by some substantial amount, the hearing threshold of the fish for that sound (Popper, 2005). The consequences of temporary or permanent hearing loss in individual fish on a fish population are unknown; however, they likely depend on the number of individuals affected and whether critical behaviors involving sound (e.g., predator avoidance, prey capture, orientation and navigation, reproduction, etc.) are adversely affected.

Little is known about the mechanisms and characteristics of damage to fish that may be inflicted by exposure to seismic survey sounds. Few data have been presented in the peer-reviewed

scientific literature. As far as L–DEO and NMFS know, there are only two papers with proper experimental methods, controls, and careful pathological investigation implicating sounds produced by actual seismic survey airguns in causing adverse anatomical effects. One such study indicated anatomical damage, and the second indicated TTS in fish hearing. The anatomical case is McCauley *et al.* (2003), who found that exposure to airgun sound caused observable anatomical damage to the auditory maculae of pink snapper (*Pagrus auratus*). This damage in the ears had not been repaired in fish sacrificed and examined almost two months after exposure. On the other hand, Popper *et al.* (2005) documented only TTS (as determined by auditory brainstem response) in two of three fish species from the Mackenzie River Delta. This study found that broad whitefish (*Coregonus nasus*) exposed to five airgun shots were not significantly different from those of controls. During both studies, the repetitive exposure to sound was greater than would have occurred during a typical seismic survey. However, the substantial low-frequency energy produced by the airguns (less than 400 Hz in the study by McCauley *et al.* [2003] and less than approximately 200 Hz in Popper *et al.* [2005]) likely did not propagate to the fish because the water in the study areas was very shallow (approximately nine m in the former case and less than two m in the latter). Water depth sets a lower limit on the lowest sound frequency that will propagate (the ''cutoff frequency'') at about one-quarter wavelength (Urick, 1983; Rogers and Cox, 1988).

Wardle *et al.* (2001) suggested that in water, acute injury and death of organisms exposed to seismic energy depends primarily on two features of the sound source: (1) The received peak pressure, and (2) the time required for the pressure to rise and decay. Generally, as received pressure increases, the period for the pressure to rise and decay decreases, and the chance of acute pathological effects increases. According to Buchanan *et al.* (2004), for the types of seismic airguns and arrays involved with the proposed program, the pathological (mortality) zone for fish would be expected to be within a few meters of the seismic source. Numerous other studies provide examples of no fish mortality upon exposure to seismic sources (Falk and Lawrence, 1973; Holliday *et al.,* 1987; La Bella *et al.,* 1996; Santulli *et al.,* 1999; McCauley *et al.,* 2000a,b, 2003; Bjarti, 2002; Thomsen, 2002; Hassel *et al.,* 2003; Popper *et al.,* 2005; Boeger *et al.,* 2006).

An experiment of the effects of a single 700 in^3 airgun was conducted in Lake Meade, Nevada (USGS, 1999). The data were used in an Environmental Assessment of the effects of a marine reflection survey of the Lake Meade fault system by the National Park Service (Paulson *et al.,* 1993, in USGS, 1999). The airgun was suspended 3.5 m (11.5 ft) above a school of threadfin shad in Lake Meade and was fired three successive times at a 30 second interval. Neither surface inspection nor diver observations of the water column and bottom found any dead fish.

Some studies have reported, some equivocally, that mortality of fish, fish eggs, or larvae can occur close to seismic sources (Kostyuchenko, 1973; Dalen and Knutsen, 1986; Booman *et al.,* 1996; Dalen *et al.,* 1996). Some of the reports claimed seismic effects from treatments quite different from actual seismic survey sounds or even reasonable surrogates. However, Payne *et al.* (2009) reported no statistical differences in mortality/morbidity between control and exposed groups of capelin eggs or monkfish larvae. Saetre and Ona (1996) applied a 'worst-case scenario' mathematical model to investigate the effects of seismic energy on fish eggs and larvae. They concluded that mortality rates caused by exposure to seismic surveys are so low, as compared to natural mortality rates, that the impact of seismic surveying on recruitment to a fish stock must be regarded as insignificant.

Physiological Effects—Physiological effects refer to cellular and/or biochemical responses of fish to acoustic stress. Such stress potentially could affect fish populations by increasing mortality or reducing reproductive success. Primary and secondary stress responses of fish after exposure to seismic survey sound appear to be temporary in all studies done to date (Sverdrup *et al.,* 1994; Santulli *et al.,* 1999; McCauley *et al.,* 2000a,b). The periods necessary for the biochemical changes to return to normal are variable and depend on numerous aspects of the biology of the species and of the sound stimulus.

Behavioral Effects—Behavioral effects include changes in the distribution, migration, mating, and catchability of fish populations. Studies investigating the possible effects of sound (including seismic survey sound) on fish behavior have been conducted on both uncaged and caged individuals (e.g., Chapman and Hawkins, 1969; Pearson *et al.,* 1992; Santulli *et al.,* 1999; Wardle *et al.,* 2001; Hassel *et al.,* 2003). Typically, in these studies fish exhibited a sharp startle response at the onset of a sound followed by habituation and a return to normal behavior after the sound ceased.

The Minerals Management Service (MMS, 2005) assessed the effects of a proposed seismic survey in Cook Inlet. The seismic survey proposed using three vessels, each towing two, four-airgun arrays ranging from 1,500 to 2,500 in^3. MMS noted that the impact to fish populations in the survey area and adjacent waters would likely be very low and temporary. MMS also concluded that seismic surveys may displace the pelagic fishes from the area temporarily when airguns are in use. However, fishes displaced and avoiding the airgun noise are likely to backfill the survey area in minutes to hours after cessation of seismic testing. Fishes not dispersing from the airgun noise (e.g., demersal species) may startle and move short distances to avoid airgun emissions.

In general, any adverse effects on fish behavior or fisheries attributable to seismic testing may depend on the species in question and the nature of the fishery (season, duration, fishing method). They may also depend on the age of the fish, its motivational state, its size, and numerous other factors that are difficult, if not impossible, to quantify at this point, given such limited data on effects of airguns on fish, particularly under realistic at-sea conditions.

Anticipated Effects on Invertebrates

The existing body of information on the impacts of seismic survey sound on marine invertebrates is very limited. However, there is some unpublished and very limited evidence of the potential for adverse effects on invertebrates, thereby justifying further discussion and analysis of this issue. The three types of potential effects of exposure to seismic surveys on marine invertebrates are pathological, physiological, and behavioral. Based on the physical structure of their sensory organs, marine invertebrates appear to be specialized to respond to particle displacement components of an impinging sound field and not to the pressure component (Popper *et al.,* 2001).

The only information available on the impacts of seismic surveys on marine invertebrates involves studies of individuals; there have been no studies at the population scale. Thus, available information provides limited insight on possible real-world effects at the regional or ocean scale. The most important aspect of potential impacts concerns how exposure to seismic

survey sound ultimately affects invertebrate populations and their viability, including availability to fisheries.

Literature reviews of the effects of seismic and other underwater sound on invertebrates were provided by Moriyasu *et al.* (2004) and Payne *et al.* (2008). The following sections provide a synopsis of available information on the effects of exposure to seismic survey sound on species of decapod crustaceans and cephalopods, the two taxonomic groups of invertebrates on which most such studies have been conducted. The available information is from studies with variable degrees of scientific soundness and from anecdotal information. A more detailed review of the literature on the effects of seismic survey sound on invertebrates is provided in Appendix D of the NSF/USGS PEIS.

Pathological Effects—In water, lethal and sub-lethal injury to organisms exposed to seismic survey sound appears to depend on at least two features of the sound source: (1) The received peak pressure; and (2) the time required for the pressure to rise and decay. Generally, as received pressure increases, the period for the pressure to rise and decay decreases, and the chance of acute pathological effects increases. For the type of airgun array planned for the proposed program, the pathological (mortality) zone for crustaceans and cephalopods is expected to be within a few meters of the seismic source, at most; however, very few specific data are available on levels of seismic signals that might damage these animals. This premise is based on the peak pressure and rise/decay time characteristics of seismic airgun arrays currently in use around the world.

Some studies have suggested that seismic survey sound has a limited pathological impact on early developmental stages of crustaceans (Pearson *et al.,* 1994; Christian *et al.,* 2003; DFO, 2004). However, the impacts appear to be either temporary or insignificant compared to what occurs under natural conditions. Controlled field experiments on adult crustaceans (Christian *et al.,* 2003, 2004; DFO, 2004) and adult cephalopods (McCauley *et al.,* 2000a,b) exposed to seismic survey sound have not resulted in any significant pathological impacts on the animals. It has been suggested that exposure to commercial seismic survey activities has injured giant squid (Guerra *et al.,* 2004), but the article provides little evidence to support this claim. Tenera Environmental (2011b) reported that Norris and Mohl (1983, summarized in Mariyasu *et al.,* 2004) observed lethal effects in squid (*Loligo vulgaris*) at levels of 246 to 252 dB after 3 to 11 minutes.

Andre *et al.* (2011) exposed four species of cephalopods (*Loligo vulgaris, Sepia officinalis, Octopus vulgaris,* and *Ilex coindetii*), primarily cuttlefish, to two hours of continuous 50 to 400 Hz sinusoidal wave sweeps at 157±5 dB re 1 μPa while captive in relatively small tanks. They reported morphological and ultrastructural evidence of massive acoustic trauma (i.e., permanent and substantial alterations [lesions] of statocyst sensory hair cells) to the exposed animals that increased in severity with time, suggesting that cephalopods are particularly sensitive to low frequency sound. The received SPL was reported as 157±5 dB re 1 μPa, with peak levels at 175 dB re 1 μPa. As in the McCauley *et al.* (2003) paper on sensory hair cell damage in pink snapper as a result of exposure to seismic sound, the cephalopods were subjected to higher sound levels than they would be under natural conditions, and they were unable to swim away from the sound source.

Physiological Effects—Physiological effects refer mainly to biochemical responses by marine invertebrates to acoustic stress. Such stress potentially could affect invertebrate populations by increasing mortality or reducing reproductive success. Primary and secondary stress responses (i.e., changes in haemolymph levels of enzymes, proteins, etc.) of crustaceans have been noted several days or months after exposure to seismic survey sounds (Payne *et al.,* 2007). It was noted however, than no behavioral impacts were exhibited by crustaceans (Christian *et al.,* 2003, 2004; DFO, 2004). The periods necessary for these biochemical changes to return to normal are variable and depend on numerous aspects of the biology of the species and of the sound stimulus.

Behavioral Effects—There is increasing interest in assessing the possible direct and indirect effects of seismic and other sounds on invertebrate behavior, particularly in relation to the consequences for fisheries. Changes in behavior could potentially affect such aspects as reproductive success, distribution, susceptibility to predation, and catchability by fisheries. Studies investigating the possible behavioral effects of exposure to seismic survey sound on crustaceans and cephalopods have been conducted on both uncaged and caged animals. In some cases, invertebrates exhibited startle responses (e.g., squid in McCauley *et al.,* 2000a,b). In other cases, no behavioral impacts were noted (e.g., crustaceans in Christian *et al.,* 2003, 2004; DFO 2004). There have been anecdotal reports of reduced catch rates of shrimp shortly after exposure to seismic surveys; however, other studies have not observed any significant changes in shrimp catch rate (Andriguetto-Filho *et al.,* 2005). Similarly, Parry and Gason (2006) did not find any evidence that lobster catch rates were affected by seismic surveys. Any adverse effects on crustacean and cephalopod behavior or fisheries attributable to seismic survey sound depend on the species in question and the nature of the fishery (season, duration, fishing method).

Proposed Mitigation

In order to issue an Incidental Take Authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses.

L–DEO has reviewed the following source documents and have incorporated a suite of appropriate mitigation measures into their project description.

(1) Protocols used during previous NSF and USGS-funded seismic research cruises as approved by NMFS and detailed in the recently completed ''Final Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement for Marine Seismic Research Funded by the National Science Foundation or Conducted by the U.S. Geological Survey;''

(2) Previous IHA applications and IHAs approved and authorized by NMFS; and

(3) Recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), and Weir and Dolman, (2007).

To reduce the potential for disturbance from acoustic stimuli associated with the activities, L–DEO and/or its designees have proposed to implement the following mitigation measures for marine mammals:

(1) Planning Phase;

(2) Proposed exclusion zones around the airgun(s);

(3) Power-down procedures;

(4) Shut-down procedures;

(5) Ramp-up procedures; and

(6) Special procedures for situations or species of concern.

Planning Phase—Mitigation of potential impacts from the proposed activities begins during the planning phases of the proposed activities. Part of the considerations was whether thy research objectives could be met with a smaller source than the full, 36-airgun array (6,600 in^3) used on the *Langseth,* and it was decided that the scientific objectives could be met using two 18-airgun arrays, operating in ''flip-flop'' mode, and towed at a depth of approximately 9 m. Thus, the source volume would not exceed 3,300 in^3 at any time. The PIs worked with L–DEO and NSF to identify potential time periods to carry out the survey taking into consideration key factors such as environmental conditions (i.e., the seasonal presence of marine mammals and other protected species), weather conditions, equipment, and optimal timing for other proposed seismic surveys using the *Langseth.* Most marine mammal species are expected to occur in the area year-round, so altering the timing of the proposed project likely would result in no net benefits for those species.

Proposed Exclusion Zones—L–DEO use radii to designate exclusion and buffer zones and to estimate take for marine mammals. Table 1 (presented earlier in this document) shows the distances at which one would expect marine mammal exposures to received sound levels (160 and 180/190 dB) from the 18 airgun array and a single airgun. (The 180 dB and 190 dB level shut-down criteria are applicable to cetaceans and pinnipeds, respectively, as specified by NMFS [2000].) L–DEO used these levels to establish the exclusion and buffer zones.

If the PSVO detects marine mammal(s) within or about to enter the appropriate exclusion zone, the *Langseth* crew will immediately power-down the airgun array, or perform a shut-down if necessary (see ''Shut-down Procedures''). Table 1 summarizes the calculated distances at which sound levels (160 and 180 dB [rms]) are expected to be received from the 18 airgun array operating in and the single airgun operating in deep water depths. Received sound levels have been calculated by L–DEO, in relation to distance and direction from the airguns, for the 18 airgun array and for the single 1900LL 40 in^3 airgun, which will be used during power-downs.

If the PSVO detects marine mammal(s) within or about to enter the appropriate exclusion zone, the airguns will be powered-down (or shut-down, if necessary) immediately.

Power-down Procedures—A power-down involves decreasing the number of airguns in use to one airgun, such that the radius of the 180 dB zone is decreased to the extent that the observed marine mammal(s) are no longer in or about to enter the exclusion zone for the full airgun array. A power-down of the airgun array can also occur when the vessel is moving from the end of one seismic trackline to the start of the next trackline. During a power-down for mitigation, L–DEO will operate one airgun. The continued operation of one airgun is intended to (a) alert marine mammals to the presence of the seismic vessel in the area; and, (b) retain the option of initiating a ramp-up to full operations under poor visibility conditions. In contrast, a shut-down occurs when all airgun activity is suspended.

If the PSVO detects a marine mammal outside the exclusion zone and is likely to enter the exclusion zone, L–DEO will power-down the airguns to reduce the size of the 180 dB exclusion zone before the animal is within the exclusion zone. Likewise, if a mammal is already within the exclusion zone, when first detected L–DEO will power-down the airguns immediately. During a power-down of the airgun array, L–DEO will operate the single 40 in^3 airgun, which has a smaller exclusion zone. If the PSVO detects a marine mammal within or near the smaller exclusion zone around that single airgun (see Table 1), L–DEO will shut-down the airgun (see next section).

Resuming Airgun Operations After a Power-down—Following a power-down, the *Langseth* will not resume full airgun activity until the marine mammal has cleared the 180 or 190 dB exclusion zone (see Table 1). The PSO will consider the animal to have cleared the exclusion zone if:

- The observer has visually observed the animal leave the exclusion zone, or
- An observer has not sighted the animal within the exclusion zone for 15 minutes for species with shorter dive durations (i.e., small odontocetes or pinnipeds), or 30 minutes for species with longer dive durations (i.e., mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, and beaked whales); or
- The vessel has transited outside the original 180 dB exclusion zone after an 8 minute period minute wait period.

The *Langseth* crew will resume operating the airguns at full power after 15 minutes of sighting any species with short dive durations (i.e., small odontocetes or pinnipeds). Likewise, the crew will resume airgun operations at full power after 30 minutes of sighting any species with longer dive durations (i.e., mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, and beaked whales).

Because the vessel has transited away from the vicinity of the original sighting during the 8 minute period, implementing ramp-up procedures for the full array after an extended power-down (i.e., transiting for an additional 35 minutes from the location of initial sighting) would not meaningfully increase the effectiveness of observing marine mammals approaching or entering the exclusion zone for the full source level and would not further minimize the potential for take. The *Langseth's* PSOs are continually monitoring the exclusion zone for the full source level while the mitigation airgun is firing. On average, PSOs can observe to the horizon (10 km or 5.4 nmi) from the height of the *Langseth's* observation deck and should be able to state with a reasonable degree of confidence whether a marine mammal would be encountered within this distance before resuming airgun operations at full power.

Shut-down Procedures—L–DEO will shut-down the operating airgun(s) if a marine mammal is seen within or approaching the exclusion zone for the single airgun. L–DEO will implement a shut-down:

(1) If an animal enters the exclusion zone of the single airgun after L–DEO has initiated a power-down; or

(2) If an animal is initially seen within the exclusion zone of the single airgun when more than one airgun (typically the full airgun array) is operating (and it is not practical or adequate to reduce exposure to less than 180 dB [rms]).

Considering the conservation status for the North Atlantic right whale, the airguns will be shut-down immediately in the unlikely event that this species is observed, regardless of the distance from the *Langseth.* Ramp-up will only begin if the North Atlantic right whale has not been seen for 30 minutes.

Resuming Airgun Operations After a Shut-down—Following a shut-down in excess of 8 minutes, the *Langseth* crew will initiate a ramp-up with the smallest airgun in the array (40 in^3). The crew will turn on additional airguns in a sequence such that the source level of the array will increase in steps not exceeding 6 dB per five-minute period over a total duration of approximately 30 minutes. During ramp-up, the PSOs will monitor the exclusion zone, and if he/she sights a marine mammal, the *Langseth* crew will implement a power-down or shut-down as though the full airgun array were operational.

During periods of active seismic operations, there are occasions when the *Langseth* crew will need to temporarily

shut-down the airguns due to equipment failure or for maintenance. In this case, if the airguns are inactive longer than eight minutes, the crew will follow ramp-up procedures for a shut-down described earlier and the PSOs will monitor the full exclusion zone and will implement a power-down or shut-down if necessary.

If the full exclusion zone is not visible to the PSO for at least 30 minutes prior to the start of operations in either daylight or nighttime, the *Langseth* crew will not commence ramp-up unless at least one airgun (40 in^3 or similar) has been operating during the interruption of seismic survey operations. Given these provisions, it is likely that the vessel's crew will not ramp-up the airgun array from a complete shut-down at night or in thick fog, because the outer part of the zone for that array will not be visible during those conditions.

If one airgun has operated during a power-down period, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the approaching seismic vessel by the sounds from the single airgun and could move away. The vessel's crew will not initiate ramp-up of the airguns if a marine mammal is sighted within or near the applicable exclusion zones during the day or close to the vessel at night.

Ramp-up Procedures—Ramp-up of an airgun array provides a gradual increase in sound levels, and involves a step-wise increase in the number and total volume of airguns firing until the full volume of the airgun array is achieved. The purpose of a ramp-up is to ''warn'' marine mammals in the vicinity of the airguns, and to provide the time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities. L–DEO will follow a ramp-up procedure when the airgun array begins operating after an 8 minute period without airgun operations or when a power-down or shut down has exceeded that period. L–DEO has used similar periods (approximately 8 to 10 min) during previous L–DEO surveys.

Ramp-up will begin with the smallest airgun in the array (40 in^3). Airguns will be added in a sequence such that the source level of the array will increase in steps not exceeding six dB per five minute period over a total duration of approximately 35 minutes. During ramp-up, the PSOs will monitor the exclusion zone, and if marine mammals are sighted, L–DEO will implement a power-down or shut-down as though the full airgun array were operational.

If the complete exclusion zone has not been visible for at least 30 minutes prior to the start of operations in either daylight or nighttime, L–DEO will not commence the ramp-up unless at least one airgun (40 in^3 or similar) has been operating during the interruption of seismic survey operations. Given these provisions, it is likely that the airgun array will not be ramped-up from a complete shut-down at night or in thick fog, because the outer part of the exclusion zone for that array will not be visible during those conditions. If one airgun has operated during a power-down period, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the approaching seismic vessel by the sounds from the single airgun and could move away. L–DEO will not initiate a ramp-up of the airguns if a marine mammal is sighted within or near the applicable exclusion zones.

Use of a Small-Volume Airgun During Turns and Maintenance

Throughout the seismic survey, particularly during turning movements, and short-duration equipment maintenance activities, L–DEO will employ the use of a small-volume airgun (i.e., 40 in^3 ''mitigation airgun'') to deter marine mammals from being within the immediate area of the seismic operations. The mitigation airgun would be operated at approximately one shot per minute and would not be operated for longer than three hours in duration (turns may last two to three hours for the proposed project).

During turns or brief transits (e.g., less than three hours) between seismic tracklines, one mitigation airgun will continue operating. The ramp-up procedure will still be followed when increasing the source levels from one airgun to the full airgun array. However, keeping one airgun firing will avoid the prohibition of a ''cold start'' during darkness or other periods of poor visibility. Through use of this approach, seismic operations may resume without the 30 minute observation period of the full exclusion zone required for a ''cold start,'' and without ramp-up if operating with the mitigation airgun for under 8 minutes, or with ramp-up if operating with the mitigation airgun over 8 minutes. PSOs will be on duty whenever the airguns are firing during daylight, during the 30 minute periods prior to ramp-ups.

Special Procedures for Situations or Species of Concern—It is unlikely that a North Atlantic right whale would be encountered, but if so, the airguns will be shut-down immediately if one is sighted at any distance from the vessel because of its rarity and conservation status. The airgun array shall not resume firing until 30 minutes after the last documented whale visual sighting. Concentrations of humpback, sei, fin, blue, and/or sperm whales will be avoided if possible (i.e., exposing concentrations of animals to 160 dB), and the array will be powered-down if necessary. For purposes of this proposed survey, a concentration or group of whales will consist of three or more individuals visually sighted that do not appear to be traveling (e.g., feeding, socializing, etc.).

NMFS has carefully evaluated the applicant's proposed mitigation measures and has considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. NMFS's evaluation of potential measures included consideration of the following factors in relation to one another:

(1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;

(2) The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

(3) The practicability of the measure for applicant implementation.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

Proposed Monitoring

L–DEO proposes to sponsor marine mammal monitoring during the proposed project, in order to implement the proposed mitigation measures that require real-time monitoring, and to satisfy the anticipated monitoring requirements of the IHA. L–DEO's proposed ''Monitoring Plan'' is described below this section. The monitoring work described here has

been planned as a self-contained project independent of any other related monitoring projects that may be occurring simultaneously in the same region. L–DEO is prepared to discuss coordination of their monitoring program with any related work that might be done by other groups insofar as this is practical and desirable.

Vessel-Based Visual Monitoring

PSVOs will be based aboard the seismic source vessel and will watch for marine mammals near the vessel during daytime airgun operations and during any ramp-ups of the airguns at night. PSVOs will also watch for marine mammals near the seismic vessel for at least 30 minutes prior to the start of airgun operations after an extended shut-down (i.e., greater than approximately 8 minutes for this proposed cruise). When feasible, PSVOs will conduct observations during daytime periods when the seismic system is not operating (such as during transits) for comparison of sighting rates and behavior with and without airgun operations and between acquisition periods. Based on PSVO observations, the airguns will be powered-down or shut-down when marine mammals are observed within or about to enter a designated exclusion zone.

During seismic operations in the northeast Atlantic Ocean off of Spain, at least five PSOs (four PSVOs and one PSAO) will be based aboard the *Langseth.* L–DEO will appoint the PSOs with NMFS's concurrence. Observations will take place during ongoing daytime operations and nighttime ramp-ups of the airguns. During the majority of seismic operations, two PSVOs will be on duty from the observation tower (i.e., the best available vantage point on the source vessel) to monitor marine mammals near the seismic vessel. Use of two simultaneous PSVOs will increase the effectiveness of detecting animals near the source vessel. However, during meal times and bathroom breaks, it is sometimes difficult to have two PSVOs on effort, but at least one PSVO will be on duty. PSVO(s) will be on duty in shifts no longer than 4 hours in duration.

Two PSVOs will also be on visual watch during all daytime ramp-ups of the seismic airguns. A third PSAO will monitor the PAM equipment 24 hours a day to detect vocalizing marine mammals present in the action area. In summary, a typical daytime cruise would have scheduled two PSVOs on duty from the observation tower, and a third PSAO on PAM. Other crew will also be instructed to assist in detecting marine mammals and implementing mitigation requirements (if practical). Before the start of the seismic survey, the crew will be given additional instruction on how to do so.

The *Langseth* is a suitable platform for marine mammal observations. When stationed on the observation platform, the eye level will be approximately 21.5 m (70.5 ft) above sea level, and the PSVO will have a good view around the entire vessel. During daytime, the PSVO(s) will scan the area around the vessel systematically with reticle binoculars (e.g., 7 × 50 Fujinon), Big-eye binoculars (25 × 150), and with the naked eye. During darkness, night vision devices will be available (ITT F500 Series Generation 3 binocular—image intensifier or equivalent), when required. Laser range-finding binoculars (Leica LRF 1200 laser rangefinder or equivalent) will be available to assist with distance estimation. Those are useful in training observers to estimate distances visually, but are generally not useful in measuring distances to animals directly; that is done primarily with the reticles in the binoculars.

When marine mammals are detected within or about to enter the designated exclusion zone, the airguns will immediately be powered-down or shut-down if necessary. The PSVO(s) will continue to maintain watch to determine when the animal(s) are outside the exclusion zone by visual confirmation. Airgun operations will not resume until the animal is confirmed to have left the exclusion zone, or if not observed after 15 minutes for species with shorter dive durations (small odontocetes and pinnipeds) or 30 minutes for species with longer dive durations (mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales).

Vessel-Based Passive Acoustic Monitoring

Vessel-based, towed PAM will complement the visual monitoring program, when practicable. Visual monitoring typically is not effective during periods of poor visibility or at night, and even with good visibility, is unable to detect marine mammals when they are below the surface or beyond visual range. PAM can be used in addition to visual observations to improve detection, identification, and localization of cetaceans. The PAM will serve to alert visual observers (if on duty) when vocalizing cetaceans are detected. It is only useful when marine mammals call, but it does not depend on good visibility. It will be monitored in real time so that the PSVOs can be advised when cetaceans are detected.

The PAM system consists of hardware (i.e., hydrophones) and software. The ''wet end'' of the system consists of a towed hydrophone array that is connected to the vessel by a tow cable. The tow cable is 250 m (820.2 ft) long, and the hydrophones are fitted in the last 10 m (32.8 ft) of cable. A depth gauge is attached to the free end of the cable, and the cable is typically towed at depths less than 20 m (65.6 ft). The array will be deployed from a winch located on the back deck. A deck cable will connect from the winch to the main computer laboratory where the acoustic station, signal conditioning, and processing system will be located. The acoustic signals received by the hydrophones are amplified, digitized, and then processed by the Pamguard software. The system can detect marine mammal vocalizations at frequencies up to 250 kHz.

One PSAO, an expert bioacoustician (in addition to the four PSVOs) with primary responsibility for PAM, will be onboard the *Langseth.* The towed hydrophones will ideally be monitored by the PSAO 24 hours per day while at the proposed seismic survey area during airgun operations, and during most periods when the *Langseth* is underway while the airguns are not operating. However, PAM may not be possible if damage occurs to the array or back-up systems during operations. The primary PAM streamer on the *Langseth* is a digital hydrophone streamer. Should the digital streamer fail, back-up systems should include an analog spare streamer and a hull-mounted hydrophone. One PSAO will monitor the acoustic detection system by listening to the signals from two channels via headphones and/or speakers and watching the real-time spectrographic display for frequency ranges produced by cetaceans. The PSAO monitoring the acoustical data will be on shift for one to six hours at a time. All PSOs are expected to rotate through the PAM position, although the expert PSAO (most experienced) will be on PAM duty more frequently.

When a vocalization is detected while visual observations (during daylight) are in progress, the PSAO will contact the PSVO immediately, to alert him/her to the presence of cetaceans (if they have not already been seen), and to allow a power-down or shut-down to be initiated, if required. When bearings (primary and mirror-image) to calling cetacean(s) are determined, the bearings will be relayed to the PSVO(s) to help him/her sight the calling animal. During non-daylight hours, when a cetacean is detected by acoustic monitoring and may be close to the source vessel, the

Langseth crew will be notified immediately so that the proper mitigation measure may be implemented.

The information regarding the call will be entered into a database. Data entry will include an acoustic encounter identification number, whether it was linked with a visual sighting, date, time when first and last heard and whenever any additional information was recorded, position and water depth when first detected, bearing if determinable, species or species group (e.g., unidentified dolphin, sperm whale), types and nature of sounds heard (e.g., clicks, continuous, sporadic, whistles, creaks, burst pulses, strength of signal, etc.), and any other notable information. The acoustic detection can also be recorded for further analysis.

PSO Data and Documentation

PSVOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data will be used to estimate numbers of animals potentially 'taken' by harassment. They will also provide information needed to order a power-down or shut-down of the airguns when a marine mammal is within or near the exclusion zone. Observations will also be made during daytime periods when the *Langseth* is underway without seismic operations. There will also be opportunities to collect baseline biological data during the transits to, from, and through the study area.

When a sighting is made, the following information about the sighting will be recorded:

1. Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the airguns or vessel (e.g., none, avoidance, approach, paralleling, etc.), and behavioral pace.

2. Time, location, heading, speed, activity of the vessel, sea state, visibility, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

All observations and ramp-ups, power-downs, or shut-downs will be recorded in a standardized format. The PSOs will record this information onto datasheets. During periods between watches and periods when operations are suspended, those data will be entered into a laptop computer running a custom computer database. The accuracy of the data entry will be verified by computerized data validity checks as the data are entered and by subsequent manual checking of the database. These procedures will allow initial summaries of data to be prepared during and shortly after the field program, and will facilitate transfer of the data to statistical, graphical, and other programs for further processing and archiving.

Results from the vessel-based observations will provide:

1. The basis for real-time mitigation (airgun power-down or shut-down).

2. Information needed to estimate the number of marine mammals potentially taken by harassment, which must be reported to NMFS.

3. Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

4. Information to compare the distance and distribution of marine mammals relative to the source vessel at times with and without seismic activity.

5. Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

L–DEO will submit a comprehensive report to NMFS and NSF within 90 days after the end of the cruise. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report will summarize the dates and locations of seismic operations, and all marine mammal sightings (i.e., dates, times, locations, activities, associated seismic survey activities, and associated PAM detections). The report will minimally include:

- Summaries of monitoring effort—total hours, total distances, and distribution of marine mammals through the study period accounting for Beaufort sea state and other factors affecting visibility and detectability of marine mammals;
- Analyses of the effects of various factors influencing detectability of marine mammals including Beaufort sea state, number of PSOs, and fog/glare;
- Species composition, occurrence, and distribution of marine mammals sightings including date, water depth, numbers, age/size/gender, and group sizes; and analyses of the effects of seismic operations;
- Sighting rates of marine mammals during periods with and without airgun activities (and other variables that could affect detectability);
- Initial sighting distances versus airgun activity state;
- Closest point of approach versus airgun activity state;
- Observed behaviors and types of movements versus airgun activity state;
- Numbers of sightings/individuals seen versus airgun activity state; and
- Distribution around the source vessel versus airgun activity state.

The report will also include estimates of the number and nature of exposures that could result in ''takes'' of marine mammals by harassment or in other ways. After the report is considered final, it will be publicly available on the NMFS and NSF Web sites at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha* and *http://www.nsf.gov/geo/oce/encomp/index.jsp.*

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner not permitted by the authorization (if issued), such as an injury, serious injury, or mortality (e.g., ship-strike, gear interaction, and/or entanglement), the L–DEO shall immediately cease the specified activities and immediately report the incident to the Incidental Take Program Supervisor, Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov.* The report must include the following information:

Time, date, and location (latitude/longitude) of the incident;

- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source used in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

L–DEO shall not resume its activities until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with L–DEO to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The L–DEO may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that L–DEO discovers an injured or dead marine mammal, and

the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as NMFS describes in the next paragraph), the L–DEO will immediately report the incident to the Incidental Take Program Supervisor, Permits and Conservation Division, Office of Protected Resources, at 301–427–8401 and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov.* The report must include the same information identified in the paragraph above this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the L–DEO to determine whether modifications in the activities are appropriate.

In the event that L–DEO discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the authorized activities (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the L–DEO would report the incident to the Incidental Take Program Supervisor, Permits and Conservation Division, Office or Protected Resources, at 301–427–8401 and/or by email to *Jolie.Harrison@noaa.gov* and *Howard.Goldstein@noaa.gov,* within 24 hours of the discovery. The L–DEO would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Level B harassment is anticipated and proposed to be authorized as a result of the proposed marine seismic survey in the northeast Atlantic Ocean. Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array are expected to result in the behavioral disturbance of some marine mammals. There is no evidence that the planned activities could result in injury, serious injury, or mortality for which L–DEO seeks the IHA. The required mitigation and monitoring measures will minimize any potential risk for injury, serious injury, or mortality.

The following sections describe L–DEO's methods to estimate take by incidental harassment and present the applicant's estimates of the numbers of marine mammals that could be affected during the proposed seismic program in the northeast Atlantic Ocean. The estimates are based on a consideration of the number of marine mammals that could be harassed by seismic operations with the 18 airgun array to be used. The size of the proposed 2D and 3D seismic survey area in 2013 is approximately 5,834 km (3,150.1 nmi), as depicted in Figure 1 of the IHA application.

L–DEO assumes that, during simultaneous operations of the airgun array and the other sources, any marine mammals close enough to be affected by the multibeam echosounder and sub-bottom profiler would already be affected by the airguns. However, whether or not the airguns are operating simultaneously with the other sources, marine mammals are expected to exhibit no more than short-term and inconsequential responses to the multibeam echosounder and sub-bottom profiler given their characteristics (e.g., narrow, downward-directed beam) and other considerations described previously. Such reactions are not considered to constitute ''taking'' (NMFS, 2001). Therefore, L–DEO provided no additional allowance for animals that could be affected by sound sources other than airguns.

L–DEO used densities presented in the CODA final report for surveys off northwest Spain in 2007 (Anonymous, 2009; Macleod *et al.,* 2009) to estimate how many animals could be exposed during the proposed survey. The density reported for ''unidentified large whale'' was allocated to the humpback whale because there are a number of sightings of humpback whales off northwest Spain, although it wasn't sighted in the CODA surveys and most other large whales were. Macleod *et al.* (2008) didn't provide densities for beaked whale species, only ''beaked whales,'' therefore the density for beaked whales was allocated to Cuvier's beaked whale, as this was the most numerous species of beaked whale sighted during surveys off northwest Spain (see Basto d'Anstrade, 2008). Also, the CODA report (Anonymous, 2008) discussed two predicted high-density areas for beaked whales, in the most north-westerly section (Sowerby's beaked whale and northern bottlenose whale) and the most south-easterly section, the Gulf of Biscay (Cuvier's beaked whale). Except for beaked whales and bottlenose dolphins, all reported densities were corrected for trackline detection probability ($f[0]$) and availability ($g[0]$) biases by the authors of the CODA report. L–DEO chose not to correct the other densities, $f(0)$ and $g(0)$ are specific to the location and cetacean habitat. Although there is some uncertainty about the representativeness of the data and assumptions used in the calculations below, the approach used here is believed to be the best available approach. The CODA surveys were in July, 2007 (versus June to mid-July, 2013 for the proposed seismic survey), and CODA survey block 3, the closest to the proposed offshore survey area, includes waters closer to shore and is somewhat farther north (43 to 45° versus 42° North) and extends west to the north of Spain towards the Bay of Biscay.

The estimated numbers of individuals potentially exposed presented below are based on the 160 dB (rms) criterion currently used for all cetaceans. It is assumed that marine mammals exposed to airgun sounds that strong could change their behavior sufficiently to be considered ''taken by harassment.'' Table 3 shows the density estimates calculated as described above and the estimates of the number of different individual marine mammals that potentially could be exposed to greater than or equal to 160 dB (rms) during the seismic survey if no animals moved away from the survey vessel. The requested take authorization is given in the far right column of Table 3. For species for which densities were not calculated as described above, but for which there were Ocean Biogeographic Information System (OBIS) sightings around the Azores, L–DEO has included a requested take authorization for the mean group size for the species.

It should be noted that the following estimates of exposures to various sound levels assume that the proposed survey would be completed; in fact, the esonified areas calculated using the planned number of line-kilometers have been increased by 25% to accommodate turns, lines that may need to be repeated, equipment testing, etc. As typical during offshore ship surveys, inclement weather and equipment malfunctions are likely to cause delays and may limit the number of useful line-kilometers of seismic operations that can be undertaken. Also, any marine mammal sightings within or near the designated exclusion zones would result in shut-down of seismic operations as a mitigation measure. Thus, the following estimates of the numbers of marine mammals potentially exposed to 160 dB

(rms) sounds are precautionary and probably overestimate the actual numbers of marine mammals that could be involved. These estimates assume that there would be no weather, equipment, or mitigation delays, which is highly unlikely.

The number of different individuals that could be exposed to airgun sounds with received levels greater than or equal to 160 dB (rms) on one or more occasions can be estimated by considering the total marine area that would be within the 160 dB (rms) radius around the operating seismic source on at least one occasion, along with the expected density of animals in the area. The number of possible exposures (including repeated exposures of the same individuals) can be estimated by considering the total marine area that would be within the 160 dB radius around the operating airguns, including areas of overlap. During the proposed survey, the transect lines are closely spaced relative to the 160 dB distance. Thus, the area including overlap is 8.2 times the area excluding overlap, so a marine mammal that stayed in the survey area during the entire survey could be exposed approximately 8 times, on average. However, it is unlikely that a particular animal would stay in the area during the entire survey. The numbers of different individuals potentially exposed to greater than or equal to 160 dB (rms) were calculated by multiplying the expected species density times the anticipated area to be ensonified to that level during airgun operations excluding overlap. The area expected to be ensonified was determined by entering the planned survey lines into a MapInfo GIS, using the GIS to identify the relevant areas by ''drawing'' the applicable 160 dB buffer zone (see Table 1) around each seismic line, and then calculating the total area within the buffer zone.

TABLE 3—ESTIMATED DENSITIES OF MARINE MAMMAL SPECIES AND ESTIMATES OF POSSIBLE NUMBERS OF MARINE MAMMALS EXPOSED TO SOUND LEVELS ≥160 dB DURING L–DEO'S PROPOSED SEISMIC SURVEY IN THE NORTHEAST ATLANTIC OCEAN (IN THE DEEP GALICIA BASIN WEST OF SPAIN), JUNE TO JULY, 2013

Species	Reported/estimated density (#/km²)	Calculated take authorization [i.e., estimated number of individuals exposed to sound levels ≥ 160 dB re 1 μPa] (includes 25% contingency)	Requested take authorization with additional 25% (includes increase to group size)	Approximate percentage of estimated of regional population (requested take) [1]
Mysticetes:				
North Atlantic right whale	0	0	0	0
Humpback whale	0.001	8	8	0.07 (0.07)
Minke whale	0	0	3	0 (<0.01)
Sei whale	0.002	16	16	0.13 (0.13)
Fin whale	0.019	153	153	0.62 (0.62)
Blue whale	0	0	2	0 (0.21)
Odontocetes:				
Sperm whale	0.003	24	24	0.18 (0.18)
Kogia spp. (Pygmy and dwarf sperm whale)	0	0	0	0 (0)
Cuvier's beaked whale	0.004	32	32	0.46 (0.46)
Northern bottlenose whale	0	0	4	0 (0.01)
Mesoplodon spp. (i.e., True's, Gervais', Sowerby's, and Blainville's beaked whale	0	0	7	0 (0.1)
Bottlenose dolphin	0.005	40	40	0.21 (0.21)
Atlantic spotted dolphin	0	0	0	0 (0)
Striped dolphin	0.047	378	378	0.56 (0.56)
Short-beaked common dolphin	0.077	620	620	0.53 (0.53)
Risso's dolphin	0	0	4	0 (0.02)
Pygmy killer whale	0	0	0	NA (NA)
False killer whale	0	0	10	NA (NA)
Killer whale	0	0	5	NA (NA)
Short-finned pilot whale	0	0	5	0 (<0.01)
Long-finned pilot whale	0.001	8	8	<0.001 (<0.01)

NA = Not available or not assessed.
[1] Stock sizes are best populations from NMFS Stock Assessment Reports (see Table 2 above).
[2] Requested take authorization was increased to group size for species for which densities were not available but that have been sighted near the proposed survey area.

Applying the approach described above, approximately 6,437 km² (1,876.7 nmi²) (approximately 8,046 km² [2,345.8 nmi²] including the 25% contingency) would be within the 160 dB isopleth on one or more occasions during the proposed survey. Because this approach does not allow for turnover in the marine mammal populations in the area during the course of the survey, the actual number of individuals exposed may be underestimated, although the conservative (i.e., probably overestimated) line-kilometer distances used to calculate the area may offset this. Also, the approach assumes that no cetaceans would move away or toward the trackline as the *Langseth* approaches in response to increasing sound levels before the levels reach 160 dB (rms). Another way of interpreting the estimates that follow is that they represent the number of individuals that are expected (in the absence of a seismic program) to occur in the waters that would be exposed to greater than or equal to 160 dB (rms).

The estimate of the number of individual cetaceans by species that could be exposed to seismic sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) during

the proposed survey is (with 25% contingency) as follows: 8 humpback, 16 sei, 153 fin, and 24 sperm, which would represent 0.07, 0.13, 0.61, and 0.18% of the affected regional populations, respectively. In addition, 43 beaked whales, (including 32 Cuvier's, 4 northern bottlenose, and 7 *Mesoplodon* beaked whales) could be taken by Level B harassment during the proposed seismic survey, which would represent 0.46, 0.01, and 0.1% of the regional populations. Most of the cetaceans potentially taken by Level B harassment are delphinids; bottlenose, striped, and short-beaked common, dolphins, are estimated to be the most common delphinid species in the area, with estimates of 40, 378, and 620, which would represent 0.21, 0.56, and 0.53% of the regional populations, respectively.

Encouraging and Coordinating Research

L–DEO and NSF will coordinate the planned marine mammal monitoring program associated with the seismic survey with other parties that may have interest in this area. L–DEO and NSF will coordinate with applicable U.S. agencies (e.g., NMFS), and will comply with their requirements.

Negligible Impact and Small Numbers Analyses and Determinations

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS evaluated factors such as:

(1) The number of anticipated injuries, serious injuries, or mortalities;

(2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited); and

(3) The context in which the takes occur (i.e., impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);

(4) The status of stock or species of marine mammals (i.e., depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);

(5) Impacts on habitat affecting rates of recruitment/survival; and

(6) The effectiveness of monitoring and mitigation measures.

As described above and based on the following factors, the specified activities associated with the marine seismic survey are not likely to cause PTS, or other non-auditory injury, serious injury, or death. The factors include:

(1) The likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious;

(2) The potential for temporary or permanent hearing impairment is relatively low and would likely be avoided through the implementation of the power-down and shut-down measures;

No injuries, serious injuries, or mortalities are anticipated to occur as a result of L–DEO's planned marine seismic survey, and none are proposed to be authorized by NMFS. Table 3 of this document outlines the number of requested Level B harassment takes that are anticipated as a result of these activities. Further, the seismic surveys will not take place in areas of significance for marine mammal feeding, resting, breeding, or calving and will not adversely impact marine mammal habitat.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (i.e., 24 hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). While seismic operations are anticipated to occur on consecutive days, the estimated duration of the survey would last no more than 39 days. Additionally, the seismic survey will be increasing sound levels in the marine environment in a relatively small area surrounding the vessel (compared to the range of the animals), which is constantly travelling over distances, and some animals may only be exposed to and harassed by sound for shorter less than day.

As mentioned previously, NMFS estimates that 20 species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. The population estimates for the marine mammal species that may be taken by Level B harassment were provided in Table 3 of this document.

NMFS's practice has been to apply the 160 dB re 1 μPa (rms) received level threshold for underwater impulse sound levels to determine whether take by Level B harassment occurs. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* [2007]).

NMFS has preliminarily determined, provided that the aforementioned mitigation and monitoring measures are implemented, the impact of conducting a marine seismic survey in the northeast Atlantic Ocean, June to July, 2013, may result, at worst, in a modification in behavior and/or low-level physiological effects (Level B harassment) of certain species of marine mammals.

While behavioral modifications, including temporarily vacating the area during the operation of the airgun(s), may be made by these species to avoid the resultant acoustic disturbance, the availability of alternate areas within these areas for species and the short and sporadic duration of the research activities, have led NMFS to preliminary determine that the taking by Level B harassment from the specified activity will have a negligible impact on the affected species in the specified geographic region. Due to the nature, degree, and context of Level B (behavioral) harassment anticipated and described (see ''Potential Effects on Marine Mammals'' section above) in this notice, the activity is not expected to impact rates of annual recruitment or survival for any affected species or stock, particularly given the NMFS and the applicant's proposal to implement a mitigation and monitoring plans to minimize impacts to marine mammals.

The requested take estimates represent a small number relative to the affected species or stock size (i.e., all are less than 1%). See Table 3 for the requested authorized take number of marine mammals.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Section 101(a)(5)(D) of the MMPA also requires NMFS to determine that the authorization will not have an unmitigable adverse effect on the availability of marine mammal species or stocks for subsistence use. There are no relevant subsistence uses of marine mammals in the study area (in the northeast Atlantic Ocean) that implicate MMPA section 101(a)(5)(D).

Endangered Species Act

Of the species of marine mammals that may occur in the proposed survey area, several are listed as endangered under the ESA, including the North Atlantic right, humpback, sei, fin, blue, and sperm whales. L–DEO did not request take of endangered North Atlantic right whales due to the low

likelihood of encountering this species during the cruise. Under section 7 of the ESA, NSF has initiated formal consultation with the NMFS, Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, on this proposed seismic survey. NMFS's Office of Protected Resources, Permits and Conservation Division, has initiated formal consultation under section 7 of the ESA with NMFS's Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, to obtain a Biological Opinion evaluating the effects of issuing the IHA on threatened and endangered marine mammals and, if appropriate, authorizing incidental take. NMFS will conclude formal section 7 consultation prior to making a determination on whether or not to issue the IHA. If the IHA is issued, NSF and L–DEO, in addition to the mitigation and monitoring requirements included in the IHA, will be required to comply with the Terms and Conditions of the Incidental Take Statement corresponding to NMFS's Biological Opinion issued to both NSF and NMFS's Office of Protected Resources.

National Environmental Policy Act

With L–DEO's complete application, NSF and L–DEO provided NMFS a draft ''Environmental Analysis of a Marine Geophysical Survey by the R/V *Marcus G. Langseth* in the Northeast Atlantic Ocean, June-July 2013,'' prepared by LGL Ltd., Environmental Research Associates, on behalf of NSF and L–DEO. The EA analyzes the direct, indirect, and cumulative environmental impacts of the proposed specified activities on marine mammals including those listed as threatened or endangered under the ESA. Prior to making a final decision on the IHA application, NMFS, after review and evaluation of the NSF EA for consistency with the regulations published by the Council of Environmental Quality (CEQ) and NOAA Administrative Order 216–6, Environmental Review Procedures for Implementing the National Environmental Policy Act, will prepare an independent EA and make a decision of whether or not to issue a Finding of No Significant Impact (FONSI).

Proposed Authorization

NMFS proposes to issue an IHA to L–DEO for conducting a marine seismic survey in the northeast Atlantic Ocean, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The duration of the IHA would not exceed one year from the date of its issuance.

Information Solicited

NMFS requests interested persons to submit comments and information concerning this proposed project and NMFS's preliminary determination of issuing an IHA (see **ADDRESSES**). Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: March 18, 2013.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–06504 Filed 3–20–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0055]

Notice of Availability of Environmental Assessment and Draft Finding of No Significant Impact Regarding DLA Energy's Mobility Fuel Purchasing Programs

AGENCY: Defense Logistics Agency Energy (DLA Energy), DoD.

ACTION: Finding of no significant impact.

SUMMARY: As required under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.), an environmental assessment (EA) has been prepared to assess the potential environmental impacts associated with the proposed action to continue DLA Energy's current domestic mobility fuel purchase programs. DLA Energy currently operates two programs for mobility fuel contracts, Direct Delivery Fuels (DDF) and Bulk Petroleum, which were considered as part of the EA. The EA also analyzed the no-action alternative. Based on the analysis in the EA, DLA Energy has determined that the proposed action is not a major federal action significantly affecting the quality of the human environment within the context of NEPA. Therefore, the preparation of an environmental impact statement (EIS) is not required.

DATES: Comments on the Draft Finding of No Significant Impact must be postmarked or emailed by April 22, 2013.

ADDRESSES: You may submit comments, identified by the docket ID and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email: NEPA@dla.mil*. Include the docket ID in the subject line of the message.
- *Mail:* Project Manager for NEPA, DLA Installation Support for Energy, 8725 John J. Kingman Road, Suite 2828, Fort Belvoir, VA 22060.

Note: Before including your address, phone number, email address, or other personal identifying information in your comment, be advised that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Copies of this FONSI, the accompanying EA, and further information concerning the proposed action are available from: Project Manager for NEPA, DLA Installation Support for Energy, 8725 John J. Kingman Road, Suite 2828, Fort Belvoir, VA 22060, (703) 767–8312, *NEPA@dla.mil*. Additional information about the NEPA process can be obtained from the Council on Environmental Quality at *http://ceq.hss.doe.gov/*.

SUPPLEMENTARY INFORMATION: Need for the Proposed Action: DLA Energy is proposing to continue purchases of mobility fuels on behalf of the U.S. Department of Defense (DOD) and other government agencies. The purpose of the proposed action is to fulfill DLA Energy's mission to provide DOD and other government agencies with energy solutions in the most effective and efficient manner possible. The program is needed to fulfill the mobility fuel requirements of the military services and the federal civilian agencies.

Proposed Action: As authorized by federal regulation (10 U.S.C. chapter 137, and DOD Directives 4140.25, 5101.8, and 4140.26–M), DLA Energy acquires and distributes nearly all of the refined petroleum, oil, and lubricants used by the U.S. military through contracting programs that follow the policies defined in the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement. DLA Energy currently operates two programs for mobility fuel contracts, DDF and Bulk Petroleum, which were considered as part of the EA.

Alternatives Considered: The EA for DLA Energy's Mobility Fuel Purchase Programs, November 2012, evaluates the proposed action and the no-action alternative. Other alternatives were reviewed during the EA development process under the requirements of NEPA but were eliminated from further detailed analysis in the EA because they

did not meet the stated purpose and need for the action or were not practicable, for the reasons stated in the EA. The only practicable alternative is described in the ''Proposed Action'' section. The no-action alternative is the same as the proposed action; discontinuing DLA Energy's mobility fuel purchase programs is not reasonable.

Potential Environmental Impacts: The attached EA presents assessments of potential impacts to human health and the human environment. DLA Energy evaluated the following resources for potential impacts associated with the proposed action, as described below: Energy; transportation and infrastructure; air quality, including greenhouse gas (GHG) emissions; safety and human health; aquatic and terrestrial resources; and cultural resources.

Energy—With DLA Energy mobility fuel procurements representing 2 percent of the domestic mobility fuels market, and DLA Energy's continued efforts to procure, certify, and approve alternative fuels, the proposed action would have a negligible effect on the national energy market. The proposed action would have a negligible effect on the acquisition, handling, and processing of any crude oil feedstock including heavy crudes.

Transportation and Infrastructure—Under the proposed action, DLA would continue using existing transport systems and does not propose any specific structural changes to the national transportation infrastructure; any future structural modifications would undergo NEPA review on a case-by-case basis. In compliance with established regulations, the proposed action would have a negligible effect on transportation and infrastructure.

Air Quality—Unlike emissions from specific DOD services, emissions associated with the proposed action would not be attributable to a particular installation; emissions associated with the distribution of fuel to DLA Energy customers would be transient and distributed nationally. Forty-nine percent of DLA domestic fuel transport, by volume, occurs through pipelines, which have negligible GHG emissions in comparison to other transportation modes. The other 51 percent of DLA domestic fuel, by volume, is transported using mobile sources (truck, rail, and marine). DLA Energy's implementation of a systemic change to the use of commercial standard Jet A aviation fuel in most aircraft could significantly reduce fuel transport distances and associated emissions. Within the project scope and in compliance with federal, state, and local regulations, criteria air pollutant and GHG emissions would be negligible.

Safety and Human Health—Risks to health and safety are minimal if the operations comply with applicable regulations, release detection is properly planned, and response actions are undertaken swiftly. Under the proposed action, DLA would continue to use existing and highly regulated methods of fuel transportation and storage, including the current safety policies. The proposed action would have a negligible impact on human health and safety.

Aquatic, Terrestrial, and Cultural Resources—Transport and storage of fuel products is highly regulated. DLA Energy's customers are military installations and federal agencies that comply separately with biological and cultural resource protection requirements. Under the proposed action, DLA would continue using existing commercial methods for fuel distribution; any future structural modifications would undergo NEPA review on a case-by-case basis. Within the project scope and in compliance with established regulations, the proposed action would have no effects on aquatic and terrestrial resources, including threatened and endangered species. The proposed action would have no effects on cultural resources, including historic properties. Based on the analysis of the potential impacts to the human environment, the EA concludes that the proposed action would produce no significant adverse impacts.

Determination: Based on the results of the analyses performed during the preparation of the EA, I conclude that the proposed action does not constitute a major federal action significantly affecting the quality of the human environment within the context of NEPA. Therefore, an EIS for the proposed action is not required.

Dated: March 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–06535 Filed 3–20–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0049]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to alter a System of Records.

SUMMARY: The Defense Logistics Agency proposes to alter a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on April 22, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before April 22, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler, DLA/FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221, or by phone at (703) 767–5045.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**. The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on March 5, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: March 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S375.80

SYSTEM NAME:

Alternate Worksite Records (April 15, 2010; 75 FR 19624).

CHANGES:

* * * * *

SYSTEM NAME:

Delete entry and replace with ''DLA Telework Program Records''.

SYSTEM LOCATION:

Delete entry and replace with ''Office of the Director, Human Resources, Headquarters, Defense Logistics Agency, 8725 John J. Kingman Road, Suite 6231, Fort Belvoir, VA 22060–6221, and DLA Primary Level Field Activities. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Change ''DLA Alternate Worksite'' to ''DLA Telework''.

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Records include individual's name; position title, grade, and job series; duty station address and telephone number; approved telework address, telephone number(s), Telework request forms (Telework Request and Approval Form, Telework Agreement, Self-Certification Home Safety Checklist, and Supervisor-Employee Checklist); approvals/disapprovals; description of government owned equipment and software provided to the Teleworker.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Add to entry ''DLA Instruction 7212, Defense Logistics Agency Telework Program.''

PURPOSE(S):

Within entry replace ''alternate worksite'' with ''telework''.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Second paragraph has been rewritten ''To the Department of Labor when an employee is injured while teleworking, i.e., telework address and safety checklists may be disclosed.''

Replace fourth paragraph with ''The DoD Blanket Routine Uses may apply to this system of records''.

* * * * *

STORAGE:

Delete entry and replace with ''Records are maintained on paper.''

* * * * *

SAFEGUARDS:

Delete entry and replace with ''Records are maintained in a controlled area with physical entry restricted by the use of badges, card swipe, or sign-in protocols. Paper records are maintained in areas accessible only to DLA personnel who must use the records to perform their duties. Records are secured in locked or guarded buildings, locked offices, or locked cabinets during non-duty hours.''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Records are destroyed 1 year after employee's participation in the program ends. Unapproved requests are destroyed 1 year after the request is denied.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Director, Human Resources, Headquarters, Defense Logistics Agency, 8725 John J. Kingman Road, Suite 6231, Fort Belvoir, VA 22060–6221.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Inquiry should contain the record subject's full name and the DLA facility/activity where employee requested to participate in the DLA Telework Program.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Inquiry should contain the record subject's full name and the DLA facility/activity where employee requested to participate in the DLA Telework Program.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The DLA rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR part 323, or may be obtained from the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Data is supplied by the record subject, supervisors, and information technology offices.''

* * * * *

[FR Doc. 2013–06490 Filed 3–20–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0056]

Privacy Act of 1974; System of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to amend a System of Records.

SUMMARY: The Defense Logistics Agency is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on April 22, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before April 22, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler, DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221, or by phone at (703) 767–5045.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The proposed changes to the record system being amended are set forth below. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: March 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S310.07

SYSTEM NAME:

Military Personnel System (March 4, 2011, 76 FR 12078).

CHANGES:

* * * * *

SYSTEM NAME:

Delete entry and replace with ''Military On-Line Personnel System.''

SYSTEM LOCATION:

Delete entry and replace with ''Defense Logistics Agency (DLA), Director, Human Resources Services—Military Personnel and Administration (DHRS–M), 8725 John J. Kingman Road, Suite 3516, Fort Belvoir, VA 22060–6221, and in the Personnel Technician Office within each DLA Primary Level Field Activity (PLFA). Mailing addresses may be obtained from the system manager identified in this notice.''

* * * * *

SAFEGUARDS:

Add ''annually'' to end of entry.

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Director, Human Resources Services—Military Personnel and Administration (DHRS–M), Defense Logistics Agency Headquarters, 8725 John J. Kingman Road, Suite 3516, Fort Belvoir, VA 22060–6221, and the Heads of the DLA Primary Level Field Activities. Mailing addresses are published as an appendix to DLA's compilation of systems of records notices.''

* * * * *

[FR Doc. 2013–06540 Filed 3–20–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0047]

Privacy Act of 1974; System of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to alter a System of Records.

SUMMARY: The Defense Logistics Agency proposes to alter a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on April 22, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before April 22, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler, DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221, or by phone at (703) 767–5045.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on March 5, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: March 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S190.24

SYSTEM NAME:

Biography File (April 12, 2011; 76 FR 20341).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''Public Affairs Offices of the Defense Logistics Agency. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Members of the Senior Executive Service and general/flag officers in senior positions.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Add to end of entry ''or by their staff with their permission.''

* * * * *

PURPOSE(S):

Replace ''and for site visits'' with ''for site visits; and as general information to employees and members of the public.''

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''The Heads of the DLA Public Affairs Offices. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.''

* * * * *

[FR Doc. 2013–06527 Filed 3–20–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID USAF–2013–0017]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to alter a System of Records.

SUMMARY: The Department of the Air Force proposes to alter a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on April 22, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before April 22, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Charles J. Shedrick, Department of the Air Force Privacy Office, Air Force Privacy Act Office, Office of Warfighting Integration and Chief Information Officer, ATTN: SAF/CIO A6, 1800 Air Force Pentagon, Washington, DC 20330–1800, or by phone at (571) 256–2515.

SUPPLEMENTARY INFORMATION: The Department of the Air Force's notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, were submitted on March 5, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: March 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F036 AFPC K

SYSTEM NAME:

Historical Airman Promotion Master Test File (MTF) (June 11, 1997, 62 FR 31793).

CHANGES:

* * * * *

SYSTEM NAME:

Delete entry and replace with ''Enlisted Promotion Testing Record.''

SYSTEM LOCATION:

Delete entry and replace with ''Headquarters Air Force Personnel Center, Enlisted Promotion and Military Testing Branch (HQ AFPC/DPSOE), 550 C Street West, Randolph Air Force Base, TX 78150–4711.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Active duty enlisted personnel in the ranks of Senior Airman (E–4) to Senior Master Sergeant (E–8).''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Name; rank; Social Security Number (SSN); Department of Defense Identification Number (DoD ID Number); Promotion Test Answer Sheets for Specialty Knowledge Test (SKT), Promotion Fitness Examination (PFE) and United States Air Force Supervisory Examination (USAFSE); date tested; score; item responses; correspondence to and from Air Force Board for Correction of Military Records.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''10 U.S.C. 8013, Secretary of the Air Force; DoDD 1304.20, Enlisted Personnel Management System; DoDI 1304.30, Enlisted Personnel Management Plan Procedures; Air Force Policy Directive (AFPD) 36–25, Military Promotion and Demotion; Air Force Instruction (AFI) 36–2502, Air Force Enlisted Promotions; AFI 36–2605, Air Force Military Personnel Testing System; and E.O. 9397 (SSN), as amended.''

PURPOSE(S):

Delete entry and replace with ''Used by Air Force Personnel Center/Enlisted Promotion Branch (AFPC/DPSOE) to research and/or correct promotion status for previous cycles and to score Air Force Specialty Knowledge, Promotion Fitness Examination, and Supervisory Examination tests. Data is used to resolve inquiries, provide supplemental consideration, prepare Air Staff advisories to the Air Force Board for Correction of Military Records, and manage the Airman Promotion Program.''

* * * * *

STORAGE:

Delete entry and replace with ''Paper records and electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''Name, SSN, and/or DoD ID number.''

SAFEGUARDS:

Delete entry and replace with ''Records are accessed by the program manager and by person(s) responsible for servicing the record system in the performance of their official duties that are properly screened and cleared for need-to-know. Paper records are stored in secured file cabinets in a locked building with controlled access entry requirements. System software uses Primary Key Infrastructure (PKI)/Common Access Card (CAC) authentication to lock out unauthorized access. Access to the building is controlled by Security Access Card.''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Answer sheets are maintained for 6 months following the completion of promotion cycle for which member was tested, then destroyed by burning or shredding. Electronic systems supplement temporary hard copy records where the hard copy records are retained to meet recordkeeping requirements and destroyed when agency determines the electronic records are superseded, obsolete, or no longer needed for administrative legal, audit, or other operational purposes. Historical Airman Promotion Master Test File (MTF) are maintained for 10 years computed from the date of the original selection process.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Chief, Air Force Personnel Center, Enlisted Promotion and Military Testing Branch (HQ AFPC/DPSOE), 550 C Street West, Randolph Air Force Base, TX 78150–4711.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to Chief, Air Force Personnel Center, Enlisted Promotion and Military Testing Branch (HQ AFPC/DPSOE), 550 C Street West,

Randolph Air Force Base, TX 78150–4711.

For verification purposes, individual should provide their full name, SSN and/or DoD ID number, any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

IF EXECUTED OUTSIDE THE UNITED STATES:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to their servicing Military Personnel Section (MPS) Enlisted Promotions Office, Headquarters of Major Commands or separate operating agencies, or the Assistant Deputy Chief of Staff, Air Force Personnel Center, Randolph Air Force Base, TX 78150.

For verification purposes, individual should provide their full name, SSN and/or DoD ID number, any details which may assist in locating records, and their signature.

In addition, the requester must provide a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the following format:

IF EXECUTED OUTSIDE THE UNITED STATES:

'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The Air Force rules for accessing records, contesting contents, and appealing initial agency determinations are published in Air Force Instruction 33–332, Air Force Privacy Program; 32 CFR part 806b; or may be obtained from the system manager.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Member, promotion testing personnel, Military Personnel Data System (MilPDS), Automated Records Management System (ARMS), and Air Force Promotion System (AFPROMS).''

* * * * *

[FR Doc. 2013–06489 Filed 3–20–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2013–0003]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to amend a System of Records.

SUMMARY: The Department of the Army is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on April 22, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before April 22, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Leroy Jones, Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905 or by calling (703) 428–6185.

SUPPLEMENTARY INFORMATION: The Department of the Army systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The Department of the Army proposes to amend a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: March 18, 2013.

Aaron Siegel,

Alternate Federal Register Liaison Officer, Department of Defense.

A0500–3c DAMO

SYSTEM NAME:

Emergency Relocation Group (ERG) Roster Files (January 30, 2002, 67 FR 4411).

CHANGES:

* * * * *

PURPOSE(S):

Delete entry and replace with ''To notify designated Headquarters, Department of the Army personnel as to their responsibilities and relocation assignments in conditions of emergency. The Emergency Alert and Notification System (SendWordNow) will execute the notification of the Emergency Relocation Group (ERG). Therefore, ERG members will ensure the execution of essential missions and functions during the emergency situation.''

* * * * *

RETENTION AND DISPOSAL:

Delete entry and replace with ''Keep in CFA until event occurs and then until no longer needed for conducting business, but not longer than 6 years after the event, then destroy.''

* * * * *

[FR Doc. 2013–06539 Filed 3–20–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP13–84–000; PF12–19–000]

Texas Eastern Transmission, LP; Notice of Application for Certificate of Public Convenience and Necessity and Authorization for Abandonment

Take notice that on February 27, 2013, Texas Eastern Transmission, LP (Texas Eastern), 5400 Westheimer Court, Houston, Texas 77056, filed with the Federal Energy Regulatory Commission an application under Sections 7(b) and 7(c) of the Natural Gas Act (NGA) for its proposed TEAM 2014 Project. Specifically, Texas Eastern requests authorization under NGA Sections 7(b) and 7(c) to construct, own, operate, and maintain certain pipeline and compression facilities and related appurtenances and to abandon in place certain compression facilities. Texas Eastern states that the project is necessary to increase capacity on the Texas Eastern system by 600,000 dekatherms per day from supply points in the Marcellus Shale region to delivery points in New York, New Jersey, Ohio, Mississippi and Louisiana. Texas Eastern also seeks authority to charge initial incremental recourse rates for firm service on the TEAM 2014 Project facilities and existing system rates for interruptible service on such facilities, as well as any waivers, authority, and further relief as may be necessary to implement the proposal described in its application. The complete application is on file with the Commission and open to public inspection.

On July 13, 2012, the Commission staff granted Texas Eastern's request to utilize the Pre-Filing Process and assigned Docket No. PF12–19 to staff activities involved with Texas Eastern's TEAM 2014 Project. Now, as of the filing of the application on February 27, 2013, the Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP13–84–000, as noted in the caption of this Notice.

Texas Eastern states that the facilities that are proposed as part of the TEAM 2014 Project involve pipeline looping and aboveground modifications located on various segments of the Texas Eastern system in Pennsylvania, West Virginia, Ohio, Kentucky, Tennessee, Alabama, and Mississippi. This comprises approximately 33.6 miles of new 36-inch diameter pipeline loop and related aboveground facilities, compressor station upgrades and abandonments resulting in a net increase of 77,100 horsepower of compression, and certain other facility modifications to accommodate bi-directional flow along Texas Eastern's system. The cost of the TEAM 2014 Project is approximately $519.7 million.

Copies of this filing are available for review at the Commission in the Public Reference Room, or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Questions, correspondence and communications concerning this application should be addressed to Berk Donaldson, Director, Rates and Certificates, Texas Eastern Transmission, LP, P.O. Box 1642, Houston, TX 77251–1642; Phone (713) 627–4488, FAX (713) 627–5947.

Texas Eastern has requested that the Commission issue a final order in this proceeding by November 21, 2013, to enable timely commencement of construction of the proposed facilities to meet a November 1, 2014 in-service date.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, before the comment date of this notice, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's web site (*www.ferc.gov*) under the ''e-Filing'' link. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on April 5, 2013.

Dated: March 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–06465 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12429–009]

Clark Canyon Hydro, LLC; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of License.

b. *Project No:* 12429–009.

c. *Date Filed:* January 28, 2013.

d. *Applicant:* Northwest Power Services on behalf of Clark Canyon Hydro, LLC.

e. *Name of Project:* Clark Canyon Dam Hydroelectric Project.

f. *Location:* The Clark Canyon Dam Hydroelectric Project is located on the Beaverhead River 18 air miles southwest of the town of Dillon, in Beaverhead County, Montana.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Brent Smith, President, Northwest Power Services, Inc., P.O. Box 535, Rigby, ID 83442, (208) 521–2473.

i. *FERC Contact:* Mary Karwoski at (202) 502–6543, or email: *mary.karwoski@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* April 15, 2013.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (p–2601–021) on any comments, motions, or recommendations filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The applicant proposes to modify Article 406 *Timing of Construction Activities* of the original license [1] by: (1) Removing the restriction that construction activities be limited to normal daytime business hours; (2) removing the restriction that no construction shall take place two days before and after the peak summer holiday weekends (Memorial Day, Independence Day, and Labor Day); and requiring only that no construction will take place on holidays and peak summer holiday weekends (Memorial Day, Independence Day, and Labor Day). The applicant indicates that the benefit to this modification is that construction can be completed within one year, thereby limiting the impact to recreation users in nearby campsites to one recreation season. The site of the proposed construction activities is at the Clark Canyon dam, located near the intersection of Montana 324 and Interstate 15 in southwest Montana.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field (P–12429) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: March 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–06461 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

[1] *See* Order Issuing Original License, August 26, 2009 (128 FERC ¶ 62,129).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–94–000]

Kinder Morgan Texas Pipeline LLC; Notice of Application

Take notice that on March 1, 2013 Kinder Morgan Texas Pipeline LLC (KM Texas), 1001 Louisiana Street, Houston, Texas 77002, filed in Docket No. CP13–94–000, an application pursuant to section 3 of the Natural Gas Act (NGA), to amend its authorization and Presidential Permits to allow it to import and export natural gas from the United States to Mexico utilizing KM Texas's existing cross-border facilities. Specifically, KM Texas proposes to increase the authorized design capacity of its border facilities from approximately 425 million cubic feet (MMcf) per day to 700 MMcf per day to provide Pemex-Gas Y Petroquimica Basica and other potential end users in Mexico with increased gas supplies, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, call (202) 502–8659 or TTY, (202) 208–3676.

Any questions regarding this application should be directed to Lee Baskin, Director, Regulatory, Kinder Morgan Texas Pipeline Group, 1001 Louisiana Street, Suite 1000, Houston, Texas 77002, or phone (713) 369–8810 or facsimile (713) 495–4845 or email *lee_baskin@kindermorgan.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the

Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: 5:00 p.m. Eastern Time on April 4, 2013.

Dated: March 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–06463 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER109–1997–000; ER10–1997–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Informational Response of The Midwest Independent Transmission System Operator, Inc.
Filed Date: 3/14/13.
Accession Number: 20130314–5023.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER10–2763–007; ER10–2732–007; ER10–2733–007; ER10–2734–007; ER10–2736–007; ER10–2737–007; ER10–2741–007; ER10–2749–007; ER12–2492–003; ER12–2493–003; ER10–2752–007; ER12–2494–003; ER12–2495–003; ER12–2496–003.
Applicants: Bangor Hydro Electric Company, Emera Energy Services, Inc., Emera Energy U.S. Subsidiary No. 1, Inc., Emera Energy U.S. Subsidiary No. 2, Inc., Emera Energy Services Subsidiary No. 1 LLC, Emera Energy Services Subsidiary No. 2 LLC, Emera Energy Services Subsidiary No. 3 LLC, Emera Energy Services Subsidiary No. 4 LLC, Emera Energy Services Subsidiary No. 5 LLC, Emera Energy Services Subsidiary No. 6 LLC, Emera Energy Services Subsidiary No. 7 LLC, Emera Energy Services Subsidiary No. 8 LLC, Emera Energy Services Subsidiary No. 9 LLC, Emera Energy Services Subsidiary No. 10 LLC.
Description: Errata to February 27, 2013 Notice of Change in Status of Bangor Hydro Electric Company, et al.
Filed Date: 3/13/13.
Accession Number: 20130313–5188.
Comments Due: 5 p.m. ET 4/3/13.

Docket Numbers: ER13–1078–000.
Applicants: PacifiCorp.
Description: NW Energy AMPS 230 kV Line 46 MW Construction. Agreement to be effective 5/13/2013.
Filed Date: 3/13/13.
Accession Number: 20130313–5087.
Comments Due: 5 p.m. ET 4/3/13.

Docket Numbers: ER13–1079–000.
Applicants: J.P. Morgan Commodities Canada Corporation.
Description: Revision to market-based rate tariff to be effective 3/14/2013.
Filed Date: 3/13/13.
Accession Number: 20130313–5093.
Comments Due: 5 p.m. ET 4/3/13.

Docket Numbers: ER13–1081–000.
Applicants: Just Energy New York Corp.
Description: Market-Based Rates application to be effective 3/14/2013.
Filed Date: 3/13/13.
Accession Number: 20130313–5160.
Comments Due: 5 p.m. ET 4/3/13.

Docket Numbers: ER13–1082–000.
Applicants: Granite State Electric Company.
Description: Borderline Sales Tariff Update to be effective 11/1/2012.
Filed Date: 3/13/13.
Accession Number: 20130313–5170.
Comments Due: 5 p.m. ET 4/3/13.

Docket Numbers: ER13–1083–000.
Applicants: Union Atlantic Electricity.
Description: Union Atlantic MBR Application to be effective 5/14/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5022.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1084–000.
Applicants: Southwest Power Pool, Inc.
Description: 2532 EDF Renewable Development, Inc. GIA to be effective 2/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5032.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1085–000.
Applicants: BE Alabama LLC.
Description: Revision to market-based rate schedule to be effective 3/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5055.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1086–000.
Applicants: BE Allegheny LLC.
Description: Revisions to market-based rate tariff to be effective 3/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5056.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1087–000.
Applicants: BE CA LLC.
Description: Revisions to market-based rate tariff to be effective 3/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5057.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1088–000.
Applicants: AES Creative Resources, L.P.
Description: AES Creative Resources Tariff Cancellation to be effective 3/15/2013.

Filed Date: 3/14/13.
Accession Number: 20130314–5058.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1089–000.
Applicants: BE Ironwood LLC.
Description: Revisions to market-based rate tariff to be effective 3/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5059.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1090–000.
Applicants: BE KJ LLC.
Description: Revisions to market-based rate tariff to be effective 3/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5060.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1091–000.
Applicants: AES Eastern Energy, L.P.
Description: AES Eastern Energy Tariff Cancellation to be effective 3/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5061.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1092–000.
Applicants: AEE2, L.L.C.
Description: AEE2 MBR Tariff Cancellation to be effective 3/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5071.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1093–000.
Applicants: AEE2, L.L.C.
Description: AEE2 ES Westover Lease Cancellation to be effective 3/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5080.
Comments Due: 5 p.m. ET 4/4/13.

Docket Numbers: ER13–1094–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: Revisions to 13.1_Term to be effective 6/30/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5101.
Comments Due: 5 p.m. ET 4/4/13

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 14, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–06515 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–680–000.
Applicants: Dominion Cove Point LNG, LP.
Description: DCP—NAESB Extension of Time Removal to be effective 4/15/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5062.
Comments Due: 5 p.m. ET 3/26/13.

Docket Numbers: RP13–681–000.
Applicants: Natural Gas Pipeline Company of America.
Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.204: Negotiated Rate to be effective 4/1/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5127.
Comments Due: 5 p.m. ET 3/26/13.

Docket Numbers: RP13–682–000.
Applicants: Natural Gas Pipeline Company of America.
Description: Natural Gas Pipeline Company of America LLC submits tariff filing per 154.204: Sequent Negotiated Rate Filing to be effective 4/1/2013.
Filed Date: 3/14/13.
Accession Number: 20130314–5128.
Comments Due: 5 p.m. ET 3/26/13.

Docket Numbers: RP13–683–000.
Applicants: Columbia Gulf Transmission, LLC.
Description: Columbia Gulf Transmission, LLC submits tariff filing per 154.601: Non-Conforming Remediation—March Filing to be effective 4/15/2013.
Filed Date: 3/15/13.
Accession Number: 20130315–5005.
Comments Due: 5 p.m. ET 3/27/13.

Docket Numbers: RP13–684–000.
Applicants: Columbia Gas Transmission, LLC.
Description: Columbia Gas Transmission, LLC submits tariff filing per 154.601: Non-Conforming Remediation—March Filing to be effective 4/15/2013.
Filed Date: 3/15/13.
Accession Number: 20130315–5018.
Comments Due: 5 p.m. ET 3/27/13.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 15, 2013.

Nathaniel J. Davis, Sr.

Deputy Secretary

[FR Doc. 2013–06511 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 1975–102; 2061–086]

Idaho Power Company; Notice of Availability of Final Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 CFR part 380, Commission staff has reviewed the applications for amendment of the licenses for the Bliss Project (FERC No. 1975) and Lower Salmon Falls Project (FERC No. 2061) and has prepared a Final Environmental Assessment. The projects are located on the Snake River in Gooding, Twin Falls, and Elmore Counties, Idaho. Both projects occupy lands managed by the Bureau of Land Management. The Lower Salmon Falls Project also occupies lands within the Hagerman Fossil Beds National Monument managed by the National Park Service.

The Final Environmental Assessment contains the Commission staff's analysis

of the potential environmental effects of the proposed change from run-of-river to load-following operations of the projects and concludes that authorizing the amendments, with appropriate environmental protective measures would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the Final Environmental Assessment is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY contact (202) 502–8695.

You may register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support. For further information, contact Rachel Price by telephone at 202–502–8907 or by email at *Rachel.Price@ferc.gov.*

Dated: March 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–06462 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–1081–000]

Just Energy New York Corp.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Just Energy New York Corp.'s application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is April 4, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 15, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–06512 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL13–52–000]

Western Electricity Coordinating Council; Notice of Petition for Declaratory Order

Take notice that on March 12, 2013, pursuant to section 207(a)(2) of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207(a)(2), the Western Electricity Coordinating Council (WECC) filed a petition for declaratory order requesting that the Commission issue a declaratory order confirming the funding arrangements proposed by WECC in connection with its plan to establish a separate, independent company to perform the Reliability Coordinator functions within the WECC footprint that are currently performed by WECC.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on April 11, 2013.

Dated: March 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–06464 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped chronologically, in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket No.	Filed date	Presenter or requester
Exempt:		
1. P–14295–000	03–5–13	Hon. Kirk Pearson.
2. ER13–64–000, *et al*	03–5–13	Hon. Ron Wyden.
3. P–2790–000	03–11–13	Jon Kurland, Chairman.

Dated: March 15, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–06514 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM07–16–000; RM01–5–000; RM12–3–000]

Filing via the Internet; Electronic Tariff Filings; Revisions to Electric Quarterly Report Filing Process; Notice of Technical Conference

Take notice that on April 16, 2013, the staff of the Federal Energy Regulatory Commission (Commission) will hold a technical conference on changes to the company registration process applicable to filers of electronic tariffs (eTariff) and other filings, such as Electric Quarterly Reports (EQRs), requiring the use of a company registration account, as directed by the Commission in its February 7, 2013 order.[1] The conference will take place from 10:00 a.m. to 1:00 p.m. (EST), in a Commission Meeting Room at 888 First Street NE., Washington, DC 20426. The public may attend.

The Company registration system applies only to certain specified filings that require the use of a company identification number and does not apply to, or change the procedures relating to, other filings made through the Commission's eFiling system. At the conference, Commission staff will demonstrate the new company registration system and address questions. As described in the February 7, 2013 order, the new system adopts a revised method of authenticating filings requiring the use of a company registration number. Under this system, the filer will maintain a list of eRegistered agents which it has authorized to submit filings on its behalf. Each agent will use its eRegistration account to log onto FERC Online, where the agent will choose the type of filing (e.g., eTariff), and then will be presented with a list of all the filing companies for which they are registered to make that type of filing.[2]

Teleconferencing and WebEx will be available. Off-site participants interested in attending via teleconference or viewing the demonstration through WebEx must register at *https://www.ferc.gov/whats-new/registration/etariff-form-04-16-13.asp,* and do so by close of business on April 9, 2013. WebEx and teleconferencing may not be available to those who do not register.

Commission staff will post meeting materials prior to the technical conference, and encourages participants to email questions in advance to *Nicholas.Gladd@ferc.gov.* When emailing questions, please include ''Technical Conference'' in the subject line. Information on the conference will be posted on the Calendar of Events on the Commission's Web site, *http://www.ferc.gov,* prior to the conference.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov*

[1] *Revisions to Company Registration and Establishing Technical Conference,* 142 FERC ¶ 61,097 (2013). The Commission also has required the use of company registration for filers of Electric Quarterly Reports. *Revisions to Electric Quarterly Report Filing Process,* Order No. 770, 77 FR 71288 (Nov. 30, 2012), FERC Stats. & Regs. [Regulation Preambles] ¶ 31,338 (cross-referenced at 141 FERC ¶ 61,120) (Nov. 15, 2012).

[2] In addition, filing companies also will be able to designate personnel as Company Registration account administrators who in addition to making filings themselves, will have additional rights to administer the company registration account settings and designate agents to make filings.

or call toll free 1–866–208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about the technical conference, please contact: Nicholas Gladd, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8836, *Nicholas.Gladd@ferc.gov.*

Dated: March 8, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–06513 Filed 3–20–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OA–2013–0122; 9793–2]

National Advisory Council for Environmental Policy and Technology

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Federal Advisory Committee Meeting Postponed and Rescheduled as a Teleconference.

SUMMARY: Under the Federal Advisory Committee Act, Pub. L. 92463, EPA gives notice that the public meeting for the National Advisory Council for Environmental Policy and Technology (NACEPT) initially scheduled for March 7–8, 2013, was postponed due to the predicted inclement weather that closed the Federal Government. The NACEPT meeting has been rescheduled as a teleconference for April 4, 2013. NACEPT provides advice to the EPA Administrator on a broad range of environmental policy, technology, and management issues. NACEPT represents diverse interests from academia, industry, non-governmental organizations, and local, State, and tribal governments.

Purpose of Meeting: NACEPT will discuss and approve draft recommendations in response to the National Academy of Sciences' report on ''Sustainability and the U.S. EPA.'' NACEPT's second letter on sustainability will address two topics: (1) what strengths EPA can leverage to successfully deploy sustainability practices across the Agency, and (2) what 3–5 year breakthrough objectives can help bring about sustainability implementation. The agenda and meeting materials will be available at *http://www.epa.gov/ofacmo/nacept/cal-nacept.htm* and *http://www.regulations.gov* under Docket ID: EPA–HQ–OA–2013–0122.

DATES: NACEPT will now hold a teleconference meeting on Thursday, April 4, 2013, from 12:00 p.m. to 4:00 p.m. (EST). Due to budgetary uncertainties, EPA is announcing this teleconference with less than 15 calendar days public notice.

FOR FURTHER INFORMATION CONTACT: For further information regarding the teleconference and background materials, contact Mark Joyce, Acting Designated Federal Officer, at *joyce.mark@epa.gov,* (202) 564–2130, U.S. EPA, Office of Federal Advisory Committee Management and Outreach (1601M), 1200 Pennsylvania Avenue NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: Requests to make oral comments or to provide written comments to NACEPT should be sent to Eugene Green at *green.eugene@epa.gov* by Friday, March 29, 2013. The teleconference is open to the public, with limited conference lines available on a first-come, first-served basis. Members of the public wishing to attend should contact Eugene Green at *green.eugene@epa.gov* or (202) 564–2432 by March 29, 2013.

Meeting Access: Information regarding accessibility and/or accommodations for individuals with disabilities should be directed to Eugene Green at the email address or phone number listed above. To ensure adequate time for processing, please make requests for accommodations at least 10 days prior to the meeting.

Dated: March 14, 2013.

Mark Joyce,

Acting Designated Federal Officer.

[FR Doc. 2013–06546 Filed 3–20–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9793–1; EPA–HQ–OA–2013–0124]

Good Neighbor Environmental Board; Notification of Public Advisory Committee Teleconference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of Public Advisory Committee Teleconference.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Good Neighbor Environmental Board (GNEB) will hold a public teleconference on April 2, 2013 from 12 p.m. to 4 p.m. Eastern Standard Time. Due to budgetary uncertainties, EPA is announcing this teleconference with less than 15 calendar days public notice. The meeting is open to the public. For further information regarding the teleconference and background materials, please contact Mark Joyce at the number listed below.

Background: GNEB is a federal advisory committee chartered under the Federal Advisory Committee Act, PL 92463. GNEB provides advice and recommendations to the President and Congress on environmental and infrastructure issues along the U.S. border with Mexico.

Purpose of Meeting: The purpose of this teleconference is to discuss the Good Neighbor Environmental Board's Sixteenth Report. The report will focus on environmental infrastructure issues in the U.S.-Mexico border region.

SUPPLEMENTARY INFORMATION: If you wish to make oral comments or submit written comments to the Board, please contact Mark Joyce at least five days prior to the meeting. Written comments may also be submitted at *http://www.regulations.gov.*

General Information: The agenda and meeting materials will be available at *http://www.regulations.gov* under Docket ID: EPA–HQ–OA–2013–0124. General information about GNEB can be found on its Web site at *www.epa.gov/ofacmo/gneb.*

Meeting Access: For information on access or services for individuals with disabilities, please contact Mark Joyce at (202) 564–2130 or email at *joyce.mark@epa.gov.* To request accommodation of a disability, please contact Mark Joyce at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

Dated: March 14, 2013.

Mark Joyce,

Acting Designated Federal Officer.

[FR Doc. 2013–06549 Filed 3–20–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 13–50; DA 13–281]

Media Bureau Announces Filing of Request for Clarification of the Commission's Policies and Procedures Under the Communications Act by the Coalition for Broadcast Investment

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document seeks comment on an August 31, 2012 letter from the Coalition for Broadcast Investment asking the Commission to

clarify its policies and procedures under Section 310(b)(4) of the Communications Act, 47 U.S.C. 310(b)(4), which restricts foreign ownership and voting interests in entities that control Commission licensees.

DATES: Interested parties may file comments on or before April 15, 2013, and reply comments on or before April 30, 2013.

FOR FURTHER INFORMATION CONTACT: Jake Riehm, Media Bureau (202) 418–2166, or email at *Jake.Riehm@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's document in MB Docket No. 13–50, DA 13–281, released February 26, 2013. The complete text of the document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 12th Street SW., Washington, DC 20054. Customers may contact BCPI, Inc. at their Web site *http://www.bcpi.com* or call 1–800–378–3160.

Summary of the Public Notice

1. On August 31, 2012, the Coalition for Broadcast Investment (CBI) submitted a letter (the Letter) asking the Commission to clarify its policies and procedures under Section 310(b)(4) of the Communications Act, 47 U.S.C. Section 310(b)(4), which restricts foreign ownership and voting interests in entities that control Commission licensees. CBI states that it is a group comprised of national broadcast networks, radio and television station licensees, and community and consumer organizations. Specifically, CBI asks the Commission to clarify that it will conduct a substantive, facts and circumstances evaluation of proposals for foreign investment in excess of 25 percent in the parent company of a broadcast licensee, consistent with and in furtherance of its authority under 47 U.S.C. Section 310(b)(4).

2. The Media Bureau invites public comment on the Letter from interested parties. The complete text of the Letter dated August 31, 2012, is as follows:

3. We write on behalf of the Coalition for Broadcast Investment * to ask the Commission to clarify and affirm, at the earliest possible time, the following:

Going forward, the FCC will conduct substantive, facts and circumstances evaluation of proposals for foreign investment in excess of 25 percent in the parent company of a broadcast licensee, consistent with and in furtherance of its authority under Section 310(b)(4) of the Communications Act.

4. For the avoidance of doubt, we seek here only confirmation of the Commission's intent to exercise its statutory discretion to consider, in any particular case, whether it would serve the public interest to authorize, condition, or disallow proposed foreign investment in excess of the 25 percent benchmark.

5. The clarification requested here is squarely within the Commission's existing statutory authority and would neither change (or require any change in) any FCC rule nor predetermine the outcome of any particular case. Rather, we are asking the Commission merely to advise the public prospectively of the manner in which [it] proposes to exercise a discretionary power granted to it by Congress under Section 310(b)(4) of the Act. *American Mining Cong.* v. *Mine Safety and Health Admin.,* 995 F.2d 1106, 1109 (D.C. Cir. 1993).

6. Taking this modest procedural step would place broadcasters on the same footing as every other industry participant and signal that the broadcast sector continues to be a vital and valued part of the 21st-century media and telecommunications ecosystem. It would send a positive and powerful message to the industry, the capital markets, viewers, listeners and advertisers alike that in the appropriate circumstances U.S. broadcasters may be afforded access to new sources of capital. It would incent entry into the broadcast sector, including by minority- and women-owned businesses. It would facilitate investment in new services and infrastructure, create jobs and, ultimately, enhance service to local communities and their viewers and listeners.

7. Absent a clear statement from the Commission, the marketplace will continue to assume that proposals for above-benchmark foreign investment in broadcasters will not even be considered regardless of the facts and circumstances presented or the merits of a particular proposal. As a result, transactions that the Commission may have found to enhance local broadcast service will continue never to see the light of day—an outcome that surely would disserve the public interest.

Introduction and Summary

8. Clarifying that the Commission is prepared to exercise its discretion with respect to broadcast proposals under Section 310(b)(4) would acknowledge the competitive realities of the 21st century telecommunications and media environment. Today, programmers, consumers and advertisers have at their fingertips a multitude of choices on radio, television, cable and satellite services, mobile devices, the Internet, and elsewhere.

9. *The Commission's Discretion under Section 310(b)(4).* Nearly 80 years ago, Congress established a 25 percent flexible benchmark with respect to aggregate foreign investment in the parent company of a broadcast or common carrier licensee. Section 310(b)(4) of the Communications Act of 1934, as amended, provides, in pertinent part:

(b) No broadcast or common carrier * * * license shall be granted to or held by

* * * * *

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. 310(b)(4).

10. The text of Section 310(b)(4) makes clear that the 25 percent figure was intended to be a public interest yardstick only, and not a cap. Under the plain language of the Act the FCC is authorized to disallow a particular instance of foreign investment in excess of the benchmark only upon a finding that the public interest will be served by prohibiting it. Just two weeks ago the Commission reiterated that it has discretion under Section 310(b)(4) to permit foreign investment above the 25 percent benchmark unless it finds such ownership would be inconsistent with the public interest. *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended,* Report and Order, FCC 12–93 (rel. Aug. 17, 2012) (adopting a proposal

* The Coalition for Broadcast Investment seeks to promote enhanced access to capital by U.S. broadcasters. The Coalition believes that access to additional and new sources of investment capital will benefit the broadcast industry and American consumers by financing advanced infrastructure, innovative services and high quality programming; and by promoting the creation of highly skilled, well-paying jobs. Coalition members comprise national broadcast networks, radio and television station licensees and community and consumer organizations. A list of Coalition members is attached.

set out in Public Notice, International Bureau Seeks Further Comment on Foreign Ownership Policies: Forbearance from Section 310(b)(3) for Common Carrier Licensees, 27 FCC Rcd 3946 (Int'l Bur., 2012)) (the *Forbearance Order*) at 3 (Section 5).

11. Consistent with the language and intent of Section 310(b)(4), the Commission repeatedly has evaluated above-benchmark foreign investment in the common carrier context and exercised its discretion to approve or condition such investment when and as appropriate. Yet, at the same time, the Commission to date has maintained what the FCC itself has characterized as an irrefutable presumption against even considering—much less authorizing—proposals for foreign investment in broadcasters that would exceed the 25 percent benchmark.

12. *Changed circumstances.* The Commission's refusal even to consider exercising its discretion under Section 310(b)(4) in the broadcast context has been attributed variously to concerns that foreign governments could disrupt communications during wartime or commandeer public opinion through propaganda aired on radio and television stations. Regardless of whether the American public ever could have been susceptible to such perceived threats, technological and marketplace developments have obviated these concerns.

• Americans live, work and play in a multichannel, multi-platform environment in which they can produce and consume content freely—locally, nationally, and internationally.

➢ Today, in addition to broadcasting, many other sources of information are available to the U.S. public.

➢ Today, consumers have access to local, national, and international news and information from myriad sources—including the Internet, mobile applications, video and audio streaming services, cable and satellite programming networks, and social networking tools. None of these outlets are subject to limitations on foreign investment.

• At the same time, the Commission has developed substantial expertise and tools to evaluate the merits of proposed foreign investment.

➢ The Commission routinely conducts on-the-merits reviews of foreign investment in common carriers pursuant to a presumption that the public interest is served by capital sourced from WTO-member states.

➢ Close coordination with federal national security agencies ensures that U.S. security interests are taken into account and that, where appropriate, transactions are conditioned or disapproved.

13. *Public interest benefits.* The modest relief requested here would enable local broadcast stations to join their cable, satellite and online counterparts in having the opportunity to gain access to significant new or additional sources of capital. Ceasing to single out broadcasters, and broadcasters alone, for a *per se* ban on above-benchmark foreign investment would ensure that common carrier and broadcast licensees' respective ability to participate in world capital markets is not determined by a false dichotomy in the application of the statutory benchmark.

• Broadcasters should be able to access the capital markets on the same terms as their unregulated competitors.

➢ In the multiplatform, multi-channel environment in which broadcasters now compete, being the sole medium without even potential access to above-benchmark levels of foreign capital is arbitrary and inequitable.

➢ This is especially true at a time when the Commission has liberalized its foreign investment policies and procedures for common carriers, which are subject to the same statutory regime as broadcasters for evaluation of foreign investment.

• In exercising its discretion to consider proposals for above-benchmark indirect foreign investment in broadcast licensees, the Commission could provide new opportunities for minority businesses and entrepreneurs, whose access to the domestic capital markets has been limited, thereby advancing the public interest in viewpoint diversity and media competition.

14. *Alignment with U.S. Policy.* Clarifying that the Commission will no longer maintain an ad hoc presumption against above-benchmark foreign investment in radio and television broadcasters would be consistent with broader U.S. policy favoring inbound foreign investment, a recognized source of jobs and capital for businesses that operate locally in the United States. The irony in the persistence of any historical presumption against inbound foreign investment in broadcasters is that today, it is *outbound* investment that causes debate among policymakers and the public alike—for example, the transfer of a manufacturing plant to another country with lower labor costs. It is remarkable that the world's leading economy would restrict the broadcast sector, almost alone, in its ability to create jobs, build infrastructure, and otherwise serve local American communities using foreign capital.

• As the White House stated in June 2011, The United States welcomes the investment and jobs supported by the U.S. affiliates of foreign-domiciled companies. These companies play an important role in the U.S. economy, as they build plants and other facilities or provide additional capital to businesses that already operate locally in the United States.

• *See* SelectUSA, available at *http://selectusa.commerce.gov*, a U.S. government site listing as industries represent[ing] unparalleled opportunity for global growth and success aerospace, automotive, biotechnology, chemical, consumer goods, creative and media, energy, environmental technology, financial services, healthcare and medical technology, logistics and transportation, machinery and equipment, pharmaceuticals, professional services, retail trade, semiconductors, software and information technology services, textiles, and travel, tourism, and hospitality.

15. *Authority to Act.* The Coalition asks merely that the Commission clarify that it will accept and consider on the merits proposals for indirect foreign investment in broadcasters in excess of the 25 percent benchmark. Such a clarification constitutes precisely the type of ''general statement[] of policy'' that the Commission is authorized to make on its own motion pursuant to Section 553(b) of the Administrative Procedure Act. 5 U.S.C. 553(b)(B). Indeed, in the Forbearance Order issued earlier this month, the Commission clarified its intent, going forward, to forbear in certain circumstances from applying the 20 percent foreign ownership limit set forth in Section 310(b)(3) of the Act to the class of common carrier licensees in which foreign interests are held through U.S.-organized entities that do not control the licensee.

16. A comprehensive discussion of the origins and historical application of the Section 310(b)(4) benchmark, the Commission's discretion under the statute, and the acknowledged public interest benefits of enhanced access to capital, is set out in the Appendix. We emphasize that the relief we are seeking here—a clear statement by the Commission that, going forward, it will exercise its authority to evaluate on the merits broadcast proposals under Section 310(b)(4)—would not dictate the result of any particular substantive evaluation precisely because, under the Act, the *outcome* of any review under Section 310(b)(4) is within the Commission's discretion in the application of its public interest test.

Conclusion

17. The Commission's effective presumption against enhanced foreign investment in the broadcast sector no longer serves the public interest—if it ever did. It deters investment in businesses that provide service to local communities and invest in jobs and infrastructure in those communities. It disadvantages a single class of participants in an increasingly complex media and telecommunications ecosystem that faces rigorous competition from firms that are not subject to any restrictions on foreign investment. Meanwhile, the concerns that once informed the Commission's presumptive policy have lost their meaning.

18. Accordingly, for all the reasons stated herein and in the Appendix, we respectfully request that the Commission promptly clarify and affirm that, going forward, it will conduct a case-by-case evaluation of proposals for foreign investment in U.S. broadcast holding companies at levels exceeding the 25 percent benchmark.

19. Kindly direct any questions concerning this submission to the undersigned.

Respectfully Submitted,

Mace Rosenstein
Gerald J. Waldron

Counsel for the Coalition for Broadcast Investment

Attachments

cc: Hon. Julius Genachowski, Chairman
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Ajit Pai
Commissioner Jessica Rosenworcel

The Coalition for Broadcast Investment

Adelante Media Group Bonten
Media Group BuenaVision
Television Network Bustos Media
Holdings, LLC CBS Corporation
Clear Channel Communications, Inc.
Cuban National Council
Emmis Communications Corporation
Entravision Communications
Corporation
Hearst Television Inc.
International Black Broadcasters
Association
ION Media Networks, Inc.
Latinos in Information Science and
Technology Association
League of United Latin American
Citizens LIN
Television Corporation d/b/a LIN Media
Minority Media & Telecommunications
Council
National Association of Black County
Officials
National Black Caucus—Local Elected
Officials
National Black Chamber of Commerce
National Organization of Black Elected
Legislative Women
The National Puerto Rican Chamber of
Commerce
Nexstar Broadcasting Group Inc.
Schurz Communications Inc.
Sinclair Broadcast Group, Inc.
Una Vez Mas Television Group
United States Hispanic Chamber of
Commerce
Univision Communications Inc.
The Walt Disney Company

Appendix

I. Historical Justifications for Disparate Treatment of Broadcasters Under Section 310(b)(4) Have Been Overtaken by Technological and Market Developments

20. The Commission has recognized that ''Congress has given [the FCC] the flexibility to consider a broad range of factors, and to adapt [its] policies and rules to reflect current conditions'' in making its public interest determination under Section 310(b)(4).[1] Just as the technological and competitive environment in which broadcasters operate today was unimaginable in 1934, so the historical moment in which the Commission first implemented Section 310(b)(4) is unrecognizable and, we would submit, irrelevant, today.

21. In the common carrier context the Commission, over time, has modified its practices under Section 310(b)(4) in order to consider and, where appropriate, authorize foreign investment in excess of the statutory benchmark in order to encourage a more open and competitive U.S. telecommunications market.[2] Yet, during the same period in which the Commission has, among other things, established a rebuttable presumption *in favor* of foreign investment in common carriers in most circumstances, it has effectively created the presumption in the broadcast area that, absent special considerations that outweigh the statutory concerns, the public interest [would] be served by *denying* licenses to entities with alien ownership above 25 percent.[3]

22. The Commission has discretion in applying the benchmark to broadcast investment. Yet diametrically opposed presumptions—one in favor of foreign investment for common carriers, another against foreign investment for broadcasters—are at least anachronistic in today's marketplace, as carriers continue to expand their service offerings to deliver audio and video content to consumers, and to compete directly with broadcast licensees for programming inputs, advertisers and viewers.

23. We need not catalogue here nearly eight decades' worth of disruptive innovation in the media and telecommunications industry affecting common carriers and broadcasters alike. One thing is clear: In the face of such momentous changes the Commission's effective presumption against even the consideration of broadcasters' Section 310(b)(4) proposals is neither justifiable nor sustainable.

A. The Availability of Myriad Sources of News, Information, Sports, and Entertainment Content Delivered Over Multiple Competing Platforms Has Undermined the Commission's Historical Rationale for Refusing To Consider Above-Benchmark Broadcast Foreign Investment

24. The historical justification for the Commission's categorical refusal even to consider indirect broadcast foreign investment above the 25 percent benchmark, dating from the earliest days of wireless communications, was that foreign powers could acquire and disrupt ship-to-shore and governmental communications facilities during wartime.[4] Later, with the emergence of commercial broadcasting, some expressed concern that a hostile foreign power could use broadcast outlets—which, at the time, were the only real-time mass communications platform—to manipulate American public opinion.

25. Even accepting the validity of those concerns for purposes of argument, they reflect a factual predicate that long ago was overtaken by marketplace and technological developments. Now, nearly 80 years following enactment of Section 310(b)(4), the media landscape has been transformed.

- Broadcast services compete with myriad sources of information and entertainment in a highly and increasingly competitive broadband environment.[5]
- 92 percent of Americans use multiple platforms to access news and information content.[6]
- Broadcast stations compete with other media outlets not only for viewers and listeners, but also for advertising revenue.[7]

26. Broadcasters today must compete with a vast number of non-broadcast media outlets for news and information—and diverse editorial viewpoints—both domestically and from around the world. These include satellite-delivered news channels owned and operated by foreign governments, such as the RT (Russia Today) Network, Al Jazeera, Deutsche Welle and the BBC; online news sites such as The Guardian, Japan Today and The Jerusalem Post; Internet portals such as Google, Yahoo! and AOL; and streaming video sites such as Hulu and Bambuser—among others.[8] Yet neither the countless competing program services that vie for consumers' attention, nor the cable and satellite systems and Internet service providers that deliver them, are subject to presumptive—or any—limitations on foreign investment.

- The availability of rich and varied content, including news and information programming, from around the world—as owned or chosen by many non-U.S. persons—disseminated over the air, on cable and satellite systems and on the Internet, has done no discernible harm to the public interest. Nor has harm from such content been alleged.

27. The FCC last considered adopting a more flexible approach to foreign investment in the broadcast context in 1995—at the dawn of the Internet age and before the explosion of information outlets throughout our society and economy.[9] Even then, the FCC acknowledged that the burgeoning number of information and entertainment

sources has lessened the concern that misinformation and propaganda broadcast by alien-controlled licensees could overwhelm other media voices.[10] But in 1995 the Commission did not believe that the time ha[d] yet come to ease restrictions on alien ownership of broadcast license[e]s.[11]

28. The technological and commercial revolution that was only beginning in 1995 has matured within the space of a generation. The media marketplace is, truly, cacophonous, and each local broadcaster must vie to be heard by consumers who are distracted by a multiplicity of competing choices from here and abroad. There is no basis in fact or law for continuing to impose an *ad hoc* ban on even the consideration of indirect foreign investment above the statutory benchmark in broadcast licensees.

B. The Perception That Foreign Editorial Control Over a U.S. Broadcaster Poses a Greater National Security Risk Than Foreign Control of Domestic Telecommunications Networks or Other Media Outlets Is Outdated and Inaccurate

29. In contrast to what the Commission has characterized as its ''traditionally heightened concern for foreign influence over or control of licensees which exercise editorial discretion over the content of their transmissions,'' [12] the Commission has justified its willingness to consider foreign investment in common carrier licensees on the ground that they are passive conduits for information provided by others.[13] But this outdated rationale, too, can no longer be squared with the realities of telecommunications technology and the media marketplace in the 21st century.

30. Indeed, the current threat of greatest concern to policymakers comes not from editorial control over broadcast transmissions, but the possibility that foreign agents will engage in cyber-warfare using our communications networks. President Obama has identified cybersecurity as one of the most serious economic and national security challenges we face as a nation.[14] Chairman Genachowski also has observed this phenomenon:

Broadband Internet—over wired and wireless communications networks— has transformed our economy and society, opening up a new world of broad opportunity. $8 trillion are exchanged over these wired and wireless networks each year, and growing. If you shut down the Internet, you'd shut down our economy.[15]

31. In an era in which ostensibly passive wired and wireless networks play such an essential role in our economy and society, including the dissemination of data and information from around the world, and yet routinely are permitted to exceed the benchmark, a presumption against foreign investment on the basis that broadcasting is a more active service simply makes no sense with respect to communications, national security, trade or competition policy concerns. Yet broadcasters continue to be subject to this stark structural disadvantage vis-à-vis every other participant in the 21st century media marketplace—cable television operators, direct-to-home satellite systems, national and regional non-broadcast programming networks, wireless broadband networks, online content aggregators, Internet portals, Web site hosts, and others.

C. The Commission Would Continue To Have Plenary Authority To Enforce Commercial Broadcasters' Compliance With Their Public Interest Obligations Under the Act

32. Notwithstanding their locus of ownership or investment, broadcast stations are obligated under the Act to provide service in the public interest to their local communities. We are not seeking any change in those fundamental obligations. The Commission's exercise of its discretion under Section 310(b)(4) to consider and, where appropriate, authorize foreign investment in excess of the 25 percent benchmark would not abrogate its fundamental responsibility under Section 310(d) of the Act to evaluate the nature and extent of a broadcaster's service to its community—among other matters—to determine whether a station license should be granted or renewed.

33. The Commission's authority to ensure that broadcasters continue to discharge their obligations under the public interest standard is analogous to its power to ensure that common carrier licensees comply with the nondiscrimination provisions of the Act. Significantly, the Commission has observed that, in its experience in authorizing up to 100 percent foreign ownership and control of U.S. wireless parent companies under section 310(b)(4), we find no evidence that the foreign ownership of a common carrier licensee, in and of itself, is directly relevant to the carrier's compliance with its statutory obligations.[16] Furthermore, because the other, more tailored tools at [the Commission's] disposal'' enable it ''to ensure that rates, practices and classifications of common carrier licensees are just and reasonable and not unjustly or unreasonably discriminatory, authorizing increased foreign investment ''would not hinder the Commission's ability to enforce carriers' compliance with their obligations under the Act * * *'' [17]

34. Similarly, in the broadcast context, precisely the same tools that have always been available to the Commission under Section 310(d) in the licensing and renewal processes—for example, ensuring that local stations' programming decisions are responsive to the needs, interests and concerns of their communities, and reviewing broadcasters' compliance with the rules pertaining to children's programming and political broadcasting, among other things—will continue to enable the Commission to enforce broadcasters' compliance with their obligations under the Act. Meanwhile, improved access to foreign capital may enhance a broadcast licensee's ability to meet its public interest obligations by financing improvements in existing broadcast services and the development of new and innovative ones.

II. Foreign Investment Is Beneficial for United States Industry and Consumers and Could Benefit Broadcasters and the Communities They Serve

35. To gauge the opportunity costs of the Commission's historical refusal to consider above-benchmark foreign investment in broadcasters one need look no further than the telecommunications industry and the many competitive and consumer benefits of inbound foreign investment in that sector. Today, [f]ew sectors are more global than telecommunications. Telecommunications technology, services, and equipment are a major driver of trade, growth, and innovation.[18] Globalization, growth, and innovation are a direct result of the discretion the Commission has exercised to consider and, where appropriate after a merits-based review, authorize foreign investment in common carriers in excess of the statutory benchmark.

36. The impact of foreign investment on the U.S. telecommunications industry is well documented. Foreign investment has proven to be an important source of equity financing for U.S. telecommunications companies, fostering technical innovation, economic growth, and job creation.[19]

- Verizon Wireless, the nation's largest wireless provider, is a joint venture of Verizon Communications, Inc., and Vodafone Group PLC, a United Kingdom Company.[20] Verizon Wireless owns and operates the nation's largest 4G LTE network, covering more than 200 million people in more than 230 markets across the United States.[21]
- T-Mobile USA, Inc., a wholly owned subsidiary of German telecommunications provider Deutsche Telekom AG, is the fourth largest wireless provider in the United States by subscribership.[22] The Commission has recognized the important role foreign-owned T-Mobile has played in the development of a more competitive mobile services marketplace by engaging in both pricing and technical innovation.[23]

37. Other sectors of the telecommunications industry likewise have benefited from significant foreign investment made possible by the Commission's exercise of its discretion under Section 310(b)(4).

- The Commission has approved above-benchmark foreign investment in Global Crossing Ltd., a major Tier One common carrier and Internet Service Provider, and in Level 3, a major Department of Defense contractor.[24] The merged companies' extensive U.S. and international network reaches more than 450 core markets in North America, Latin America, Europe, the Middle East, Africa, and Asia.[25]
- The Commission has twice exercised its statutory discretion to permit significant foreign investment in Iridium,[26] an integral element in the U.S. Government's communications infrastructure, approximately 25 percent of whose revenue is attributable to its contracts as a communications services provider to the Department of Defense.[27]

38. As recently as August 17, 2012, the Commission reiterated its belief ''that providing greater flexibility in the structuring of foreign investment in common carrier licensees will enhance opportunities for technological innovation and promote economic growth and potential job creation in the telecommunications sector.'' [28] By contrast, the Commission's refusal even to consider transactions involving indirect foreign investment in excess of 25 percent in

broadcasters has deprived the broadcast sector of needed and available capital and its concomitant benefits. It is, of course, impossible to quantify precisely the effect of the Commission's policy on the broadcast sector or American consumers. Because the industry understands the Commission's policy to result in an effective irrefutable presumption against foreign investment, broadcasters do not even seek Commission review of potentially beneficial transactions.

39. Nevertheless, just as the telecommunications sector and other industries benefit from enhanced growth and productivity, job creation and increased competition as a result of foreign investment, there is ample basis to conclude that broadcasters and the American public likewise would benefit from broadcasters' enhanced access to foreign capital. In fact, a more balanced approach to inbound foreign investment in broadcasting would serve several historical goals of U.S. telecommunications policy.

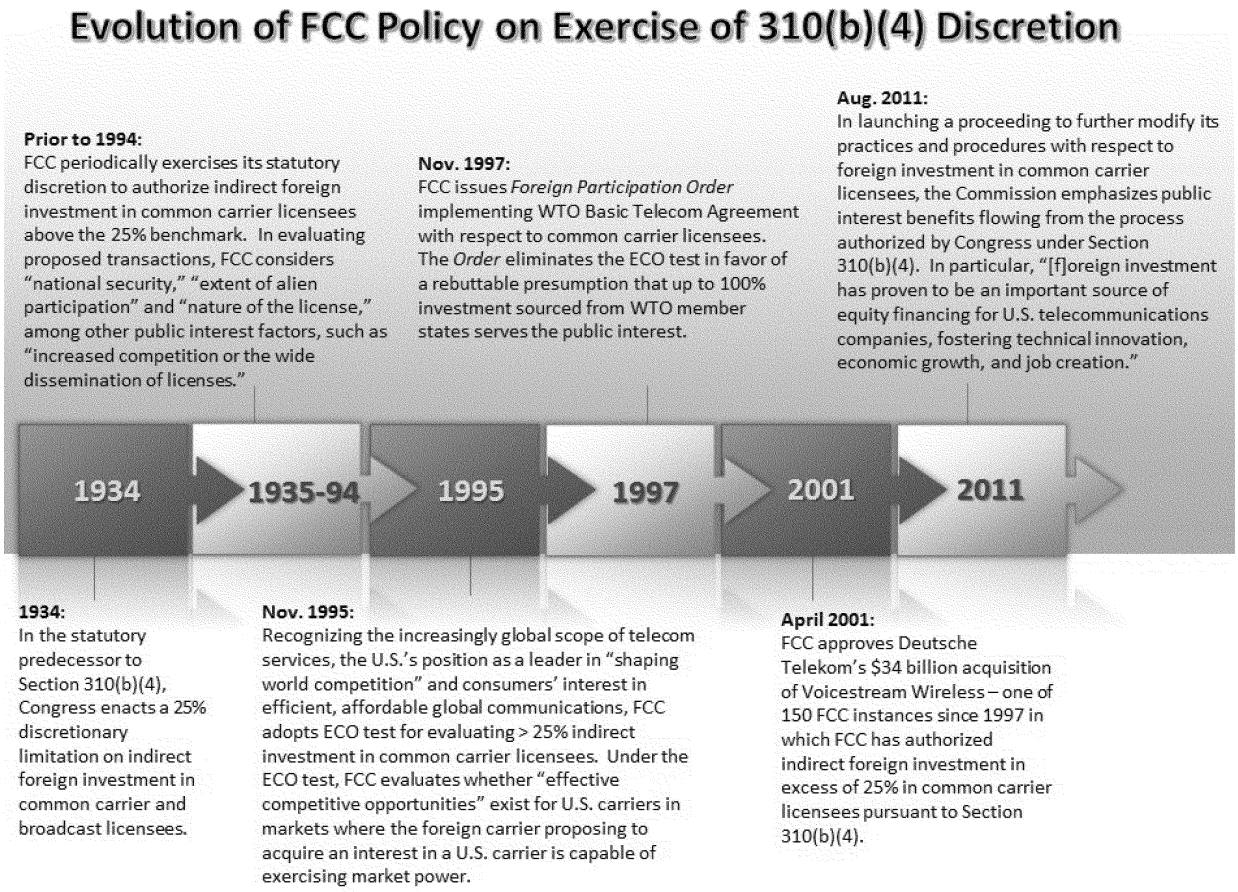
Policy goal	Potential effect of enhanced foreign investment in broadcasting
Diversity	• In exercising its discretion to consider proposals for above-benchmark indirect foreign investment in broadcast licensees, the Commission could provide new opportunities for minority- and women-owned businesses and entrepreneurs whose access to the domestic capital markets has been limited.[29] • Several public interest organizations and the Commission's own Advisory Committee for Diversity have demonstrated that revisiting the Commission's broadcast policy under Section 310(b)(4) could advance the public interest in media diversity.[30]
Innovation	• Expanding broadcasters' access to capital would enable them to expand the services they offer their communities and to provide a competitive spur to other media companies to do the same. • Broadcasters already have begun to use mobile applications and social media to coordinate responses to emergencies or to keep the public continuously updated on local and national news issues.[31] • Radio stations are investing millions of dollars in digital technology to augment and expand their service to local communities. • Improved access to capital would facilitate the implementation of these initiatives and fund the development of new, as yet unforeseeable, innovations.
Competition	• A more conducive environment for foreign investment in broadcasting would promote the Commission's policy of fostering competition in the marketplace for the delivery of video programming.[32] • Broadcasters should be able to seek access to the same sources of investment capital that are available to their unregulated competitors. • As Chairman Genachowski observed in a recent speech to the National Association of Broadcasters, in order to compete in the dramatically changed multi-platform digital broadband world, broadcasters must pursue innovative strategies to reach audiences in new ways and are investing millions of dollars in digital products to serve their communities.[33]

40. But these and other benefits that could be realized by facilitating broadcasters' access to capital will not, and cannot, materialize without the clarification we are requesting here. Absent guidance from the Commission, broadcasters and the capital markets will continue to assume that any proposal seeking authorization under Section 310(b)(4) for above-benchmark foreign investment will be denied, or effectively denied by not being acted on.

III. The Commission Has the Expertise and Resources Necessary To Evaluate Broadcast Sector Foreign Investment as a Result of Its Historical Exercise of Its Section 310(b)(4) Discretion in the Common Carrier Sector

41. The FCC already possesses the substantive expertise, practical experience and institutional resources to conduct on-the-merits reviews of indirect foreign investment in broadcast licensees, based upon its extensive and ongoing experience under Section 310(b)(4) in reviewing transactions involving foreign investment in the parent companies of common carrier licensees. The Commission has considered and approved, denied or (where appropriate) conditioned numerous instances of indirect foreign investment in excess of the statutory benchmark. Furthermore, in doing so, the Commission has evaluated the potential costs and benefits of foreign investment to the telecommunications industry and American consumers, including with respect to competition and diversity.

42. In exercising its Section 310(b)(4) responsibility with respect to common carrier licensees, the Commission has developed and refined the procedures and criteria generally applicable to the consideration of above-benchmark foreign investment in harmony with its recognition of the benefits of foreign investment in the U.S. telecommunications industry:



The Commission's consideration of proposed broadcast foreign investment could include the same factors that inform the exercise of its Section 310(b)(4) discretion with respect to common carrier licensees. For example, looking to whether the source country or countries enjoy ''close and friendly relations with the United States'' could help the Commission determine whether a proposed transaction implicates a national security concern.[34]

43. In addition, today the Commission regularly refers requests for declaratory rulings under Section 310(b)(4) to Team Telecom, an interagency group consisting of representatives of the Department of Justice, the Federal Bureau of Investigation and the Department of Homeland Security, and grants those agencies de facto authority to disallow a transaction unless and until any national security concerns have been addressed.[35] Alternatively, Team Telecom can, and often does, intervene on its own motion in FCC foreign ownership review proceedings, requesting that the FCC defer action on a transaction until such time as Team Telecom's national security analysis has been completed. Where the Team Telecom agencies have concerns about potential national security implications of a transaction, they typically require the transaction parties to enter into national security agreements as a condition of approval. These requirements, in turn, are relevant to the Commission's ultimate determination whether the proposed investment would disserve the public interest under Section 310(b)(4).[36]

44. The Team Telecom process ensures that broadcast transactions proposing foreign investment in excess of the 25 percent benchmark would receive a second-line review that was not available at the time the Commission developed its presumption against such investment; indeed, under existing procedures, the FCC will not authorize foreign investment subject to a Section 310(b)(4) review until it has been authorized to do so by Team Telecom. The Commission itself reiterated earlier this month in the *Forbearance Order* that authorizing above-benchmark foreign investment does not impair national security because the Commission's Section 310(b)(4) policies and procedures provide Executive Branch expert agencies the opportunity to review proposed foreign ownership in the controlling U.S.-organized parents of common carrier licensees for any national security, law enforcement, or public safety issues.[37]

45. The Commission's historical exercise of its statutory responsibility under Section 310(b)(4) with respect to common carrier licensees is doubly instructive. First, it demonstrates that the Commission already possesses the technical expertise and resources needed to review and analyze indirect foreign investment. Second, it confirms that the Commission is capable of exercising its ultimate discretion under Section 310(b)(4) in a manner that both serves the Act's fundamental public interest requirements and is cognizant of, and responsive to, the competitive dynamics of a flourishing and increasingly global telecommunications industry—all to the benefit of the U.S. telecommunications industry and American consumers.

46. The Commission already is equally well equipped to review indirect foreign investment in broadcast licensees and can satisfy Congress's directive in Section 310(b)(4) by taking into consideration bedrock communications policy tenets such as promoting competition and fostering media diversity; by ensuring that the national security is protected and that no other public interest harms are likely to materialize; and by taking into consideration the acknowledged benefits of technological innovation, economic growth and job creation.

Notes and References

[1] *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4)* of the Communications Act of 1934, as Amended, Notice of Proposed Rulemaking, FCC 11–121 (rel. Aug. 9, 2011) (2011 NPRM), at para. 3.

[2] *Market Entry and Regulation of Foreign-Affiliated Entities,* Report and Order, 12 FCC Rcd 23891 (1995) (ECO Order), at para. 183.

[3] *Fox Television Stations, Inc.,* 11 FCC Rcd 5714 (1995), at para. 21 (Fox II) (emphasis added).

[4] *See,* e.g., *Radio Communication: Hearings on S. 3620 and S. 5334 Before the House*

Commerce Committee, 62nd Cong. 35–37 (Mar. 1, 1912).

[5] *See* Steven Waldman *et al., The Information Needs of Communities* (July 2011), at 73 (describing broadcast audience drift to cable, satellite, and the Internet.

[6] Kristen Purcell *et al., Understanding the Participatory News Customer* (March 2010), available at *http://www.pewinternet.org/Reports/2010/Online-News.aspx.*

[7] Pew Research Center, Project for Excellence in Journalism, *2012 State of the News Media,* available at *http://stateofthemedia.org/* (2012 State of the Media).

[8] LinkTV, available on DirecTV and Dish Network, which brings satellite news from around the world to American households, Paul Wilner, *Broadcasting a Global Sampler,* The New York Times (Jan. 13, 2008), available at *http://query.nytimes.com/gst/fullpage.html?res=9D03E6DC1739F930A25752C0A96E9C8B63& pagewanted=all,* provides a unique perspective on international news, current events, and diverse cultures, presenting issues not often covered in the U.S. media. *About Link TV,* available at *http://www.linktv.org/about.*

[9] *ECO Order* at paras. 190–94.

[10] *Id.* at para. 194.

[11] *Id.*

[12] *Market Entry and Regulation of Foreign-Affiliated Entities,* Notice of Proposed Rulemaking, 10 FCC Rcd 4884 (1995), at paras. 99–101.

[13] *See, e.g., GRC Cablevision,* 47 FCC 2d 467, at para. 5 (1974); *Cable & Wireless, Inc.* 10 FCC Rcd 13177, at para. 18 (1995) (We have concluded that concern about the effect of alien ownership is lessened when common carrier radio licenses are involved because they are 'passive' in nature and there is no control over the content of the transmission.).

[14] National Security Council, *The Comprehensive National Cybersecurity Initiative,* available at *http://www.whitehouse.gov/cybersecurity/comprehensive-national-cybersecurity-initiative.*

[15] Prepared Remarks of FCC Chairman Julius Genachowski, Bipartisan Policy Center, Washington, DC, Feb. 22, 2012, available at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-312602A1.pdf.*

[16] *Forbearance Order* at para. 15.

[17] *Id.*

[18] *Ambassador Kirk Announces Results of Annual 1377 Review,* Press Release, Office of the United States Trade Representative (April 2010), available at *http://www.ustr.gov/about-us/press-office/press-releases/2010/april/ambassador-kirk-announces-results-annual-1377-review.*

[19] *2011 NPRM* at para. 2.

[20] *See Cellco Partnership d/b/a/Verizon Wireless and Atlantis Holdings LLC,* 23 FCC Rcd 17444, at paras. 6–8 (2008).

[21] *Verizon Wireless Facts-at-a-Glance,* available at *http://aboutus.verizonwireless.com/ataglance.html.*

[22] *AT&T Inc. and Deutsche Telekom AG,* Staff Analysis and Findings, 26 FCC Rcd 1184, at para. 8 (November 2011).

[23] *Id.* at para. 22.

[24] *Global Crossing Ltd.,* 18 FCC Rcd 20301 (2003).

[25] *Level 3 Company History,* available at *http://www.level3.com/en/about-us/company-information/company-history/.*

[26] *Space Station System Licensee, Inc.,* 17 FCC Rcd 2271 (2002); *Iridium Holdings LLC and Iridium Carrier Holdings LLC,* 24 FCC Rcd 10725 (2009).

[27] *Iridium Announces Fourth-Quarter and Full-Year 2011 Results,* Press Release (Mar. 6, 2012), available at *http://investor.iridium.com/releasedetail.cfm?ReleaseID=654525;* Elizabeth Woyke, *Satellite Phone Surge,* Forbes.com (Sept. 2008), available at *http://www.forbes.com/2008/09/16/satellite-phones-disaster-techsolutions08-personal-cx_ew_0916satphone.html.*

[28] *Forbearance Order* at para. 3.

[29] *2010 Quadrennial Regulatory Review,* Reply Comments of the Minority Media and Telecommunications Council, MB Docket No. 09–182, at 4 (filed Jul. 26, 2010).

[30] *See* Advisory Committee on Diversity, Recommendation on Adoption of a Declaratory Ruling on Section *310(b)(4) Waivers* (Dec. 10, 2004), available at *http://www.fcc.gov/DiversityFAC/adopted-recommendations/ForeignOwnership Final.doc; see also 2006 Quadrennial Regulatory Review, Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking,* MB Docket No. 06–121, at 3, 37–39 (filed Oct. 1, 2007).

[31] 2012 *State of the News Media.*

[32] *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* FCC 07–207 (2009).

[33] Prepared Remarks of FCC Chairman Julius Genachowski, NAB Show 2012, Las Vegas, Nevada, April 16, 2012, available at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0417/DOC-313605A1.pdf*

[34] *GRC Cablevision* at para. 5.

[35] *See FCC Homeland Security Liaison Activities* (Mar. 2012), available at *http://transition.fcc.gov/pshs/docs/liaison.pdf.*

[36] *See, e.g., Verizon Communications, Inc.,* 22 FCC Rcd 6195 (2007); *Guam Cellular and Paging, Inc. and Docomo Guam Holdings, Inc.,* 21 FCC Rcd 13580 (2006). Furthermore, the review process administered by the Committee on Foreign Investment in the United States (CFIUS) ensures that foreign investment in all market sectors is thoroughly screened for any detrimental national security implications. Although this process is voluntary, CFIUS is widely used and provides statutory certainty to investors in the form of firm timelines for review and ruling.

[37] *Forbearance Order* at para. 20.

47. *Procedural Matters:* The proceeding this Notice initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's ex parte rules.[1] Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

48. *Comment Information:* Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

▪ *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*

▪ For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet email. To get filing instructions, filers should send an email to *ecfs@fcc.gov*, and include the following words in the body of the message ''get form.'' A Sample form and directions will be sent in response.

▪ *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or

[1] 47 CFR para. 1.1200 *et seq.*

by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.
- People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

[FR Doc. 2013–06548 Filed 3–20–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:00 a.m. on Tuesday, March 19, 2013, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision, corporate, and resolution activities.

In calling the meeting, the Board determined, on motion of Vice Chairman Thomas M. Hoenig, seconded by Director Jeremiah O. Norton (Appointive), concurred in by Director Thomas J. Curry (Comptroller of the Currency), Director Richard Cordray (Director, Consumer Financial Protection Bureau), and Chairman Martin J. Gruenberg, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550–17th Street NW., Washington, D.C.

Dated: March 19, 2013.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2013–06615 Filed 3–19–13; 4:15 pm]

BILLING CODE P

FEDERAL HOUSING FINANCE AGENCY

[No. 2013–N–03]

No FEAR Act Notice

AGENCY: Federal Housing Finance Agency.

ACTION: Notice.

SUMMARY: The Federal Housing Finance Agency (FHFA or agency) is providing notice to all its employees, former employees, and applicants for employment about the rights and remedies that are available to them under the Federal antidiscrimination laws and whistleblower protection laws. This notice fulfills FHFA's notification obligations under the Notification and Federal Employees Antidiscrimination Retaliation Act as implemented by Office of Personnel Management regulations.

FOR FURTHER INFORMATION CONTACT: Nancy Burnett, Acting Associate Director of the Office of Minority and Women Inclusion, *Nancy.Burnett@fhfa.gov,* (202) 649–3017; Brian Guy, Manager of EEO Services, *Brian.Guy@fhfa.gov,* (202) 649–3019; or Janice Kullman, Associate General Counsel, *Janice.Kullman@fhfa.gov,* (202) 649–3077 (not toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20024. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION: On May 15, 2002, Congress enacted the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, which is now known as the No FEAR Act (No FEAR Act), (Pub. L. 107–174). One purpose of the No FEAR Act is to require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws. In support of this purpose, Congress found that agencies cannot be run effectively if those agencies practice or tolerate discrimination.

The No FEAR Act also requires Federal agencies to inform Federal employees, former Federal employees, and applicants for Federal employment of the rights and protections available to them under Federal antidiscrimination and whistleblower protection laws.

Establishment of a New Independent Agency

Effective July 30, 2008, the Housing and Economic Recovery Act of 2008 (HERA), (Pub. L. 110–289), established FHFA as an independent agency of the Federal Government. HERA also combined the staffs of the Office of Federal Housing Enterprise Oversight (OFHEO), the Federal Housing Finance Board (FHFB), and the Government-Sponsored Enterprise mission office of the Department of Housing and Urban Development. Although each predecessor agency published its own No FEAR Act notice during 2006 (*See* 71 FR 63761 (Oct. 31, 2006) and 71 FR 70525 (Dec. 5, 2006)), FHFA is now publishing its own notice to affirm its commitment to the requirements of the No FEAR Act.

Antidiscrimination Laws

A Federal agency cannot discriminate against an employee or applicant with respect to the terms, conditions, or privileges of employment on the basis of race, color, religion, sex, national origin, age, disability, marital status, or political affiliation. Discrimination on these bases is prohibited by one or more of the following statutes: 5 U.S.C. 2302(b)(1), 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791, and 42 U.S.C. 2000e–16.

If you believe that you have been the victim of unlawful discrimination on the basis of race, color, religion, sex, national origin, or disability, you must contact an Equal Employment Opportunity (EEO) counselor within 45 calendar days of the alleged discriminatory action, or, in the case of a personnel action, within 45 calendar days of the effective date of the action, before you can file a formal complaint of discrimination with your agency. *See, e.g.,* 29 CFR 1614. If you believe that you have been the victim of unlawful discrimination on the basis of age, you must either contact an EEO counselor as noted above or give notice of intent to sue to the Equal Employment Opportunity Commission (EEOC) within 180 calendar days of the alleged discriminatory action. If you are alleging discrimination based on marital status or political affiliation, you may file a

written complaint with the U.S. Office of Special Counsel (OSC) (see contact information below). In the alternative (or in some cases, in addition), you may pursue a discrimination complaint by filing a grievance through your agency's administrative or negotiated grievance procedures, if such procedures apply and are available.

Whistleblower Protection Laws

A Federal employee with authority to take, direct others to take, recommend, or approve any personnel action must not use that authority to take or fail to take, or threaten to take or fail to take, a personnel action against an employee or applicant because of disclosure of information by that individual that is reasonably believed to evidence violations of law, rule, or regulation; gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, unless disclosure of such information is specifically prohibited by law and such information is specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Retaliation against an employee or applicant for making a protected disclosure is prohibited by 5 U.S.C. 2302(b)(8). If you believe that you have been the victim of whistleblower retaliation, you may file a written complaint (Form OSC–11) with the U.S. Office of Special Counsel at 1730 M Street NW., Suite 218, Washington, DC 20036–4505 or online through the OSC Web site at *http://www.osc.gov.*

Retaliation for Engaging in Protected Activity

A Federal agency cannot retaliate against an employee or applicant because that individual exercises his or her rights under any of the Federal antidiscrimination or whistleblower protection laws listed above. If you believe that you are the victim of retaliation for engaging in protected activity, you must follow, as appropriate, the procedures described in the Antidiscrimination Laws and Whistleblower Protection Laws sections of this notice or, if applicable, FHFA's administrative or negotiated grievance procedures in order to pursue any legal remedy.

Disciplinary Actions

Under the existing laws, each agency retains the right, where appropriate, to discipline a Federal employee for conduct that is inconsistent with Federal antidiscrimination and whistleblower protection laws up to and including removal. If OSC has initiated an investigation under 5 U.S.C. 1214, however, according to 5 U.S.C. 1214(f), agencies must seek approval from the OSC to discipline employees for, among other activities, engaging in prohibited retaliation. Nothing in the No FEAR Act alters existing laws or permits an agency to take unfounded disciplinary action against a Federal employee or to violate the procedural rights of a Federal employee who has been accused of discrimination.

Additional Information

For further information regarding the No FEAR Act regulations, refer to 5 CFR part 724, as well as the appropriate offices within your agency (*e.g.,* OMWI's branch of EEO Services, Office of Human Resource Management, or Office of General Counsel). Additional information regarding Federal antidiscrimination, whistleblower protection, and retaliation laws can be found at the EEOC Web site at *http://www.eeoc.gov* and the OSC Web site at *http://www.osc.gov.*

Existing Rights Unchanged

Pursuant to section 205 of the No FEAR Act, neither the Act nor this notice creates, expands, or reduces any rights otherwise available to any employee, former employee, or applicant under the laws of the United States, including the provisions of law specified in 5 U.S.C. 2302(d).

Dated: March 12, 2013.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2013–06426 Filed 3–20–13; 8:45 am]

BILLING CODE 8070–01–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 April 8, 2013.

A. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Peter John Kovalski,* Metuchen, New Jersey, to acquire up to 24.9 percent of the voting common stock of Gold Canyon Bank, Gold Canyon, Arizona.

Board of Governors of the Federal Reserve System, March 18, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–06538 Filed 3–20–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0029; Docket 2012–0076; Sequence 27]

Federal Acquisition Regulation; Submission for OMB Review; Extraordinary Contractual Action Requests

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning extraordinary contractual action requests. A notice was published in the **Federal Register** on September 12, 2012 (77 FR 56213). One comment was received.

DATES: Submit comments on or before April 22, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0029, Extraordinary Contractual Action Requests, 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 9000–0029, Extraordinary Contractual Action Requests''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0029, Extraordinary Contractual Action Requests'' 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 9000–0029, Extraordinary Contractual Action Requests.

Instructions: Please submit comments only and cite Information Collection 9000–0029, Extraordinary Contractual Action Requests, 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 at *Cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

FAR Subpart 50.1 prescribes policies and procedures that allow contracts to be entered into, amended, or modified in order to facilitate national defense under the extraordinary emergency authority granted under 50 U.S.C. 1431 et seq. and Executive Order (EO) 10789 dated November 14, 1958, et seq. In order for a contractor to be granted relief under the FAR, specific evidence must be submitted which supports the firm's assertion that relief is appropriate and that the matter cannot be disposed of under the terms of the contract.

The information is used by the Government to determine if relief can be granted under FAR and to determine the appropriate type and amount of relief.

B. Analysis of Public Comments

One respondent submitted public comments on the extension of the previously approved information collection. The analysis of the public comments is summarized as follows:

Comment: The respondent commented that the extension of the information collection would violate the fundamental purposes of the Paperwork Reduction Act because of the burden it puts on the entity submitting the information and the agency collecting the information.

Response: In accordance with the Paperwork Reduction Act (PRA), agencies can request an OMB approval of an existing information collection. The PRA requires that agencies use the **Federal Register** notice and comment process, to extend the OMB's approval, at least every three years. This extension, to a previously approved information collection, pertains to information collections associated with extraordinary contractual actions as authorized under 50 U.S.C. 1431 et seq. and Executive Order (EO) 10789 dated November 14, 1958, as amended by E.O. 12919 dated June 3, 1994, EO 13232 dated October 20, 2001, and EO 13286 dated February 28, 2003, as implemented in FAR Part 50, that allow contracts to be entered into, amended, or modified in order to facilitate national defense. In order for a firm to be granted relief under the Act, specific evidence must be submitted which supports the firm's assertion that relief is appropriate and that the matter cannot be disposed of under the terms of the contract. The information is used by the Government to determine if relief can be granted under the Act and to determine the appropriate type and amount of relief.

Comment: The respondent commented that the agency did not accurately estimate the public burden challenging that the agency's methodology for calculating it is insufficient and inadequate and does not reflect the total burden each respondent faces to comply. The respondent suggested that the estimated total burden hours be reassessed and revised for greater accuracy. Specifically, the respondent stated that the ''estimate of only 100 respondents that will be subject to this requirement is understated'' and estimated, without providing substantive supporting data, that ''the number of respondents is more likely closer to 500 annually.'' In addition, the respondent questioned the estimate of 16 hours of burden associated with each response, and suggested that ''a more reasonable estimate would be in the range of 80 to 160 hours per response.'' For these reasons, the same respondent provided that the burden of compliance with the information collection requirement greatly exceeds the agency's estimate and outweighs any potential utility of the extension.

Response: Serious consideration is given, during the open comment period, to all comments received and adjustments are made to the paperwork burden estimate based on reasonable considerations provided by the public. This is evidenced, as the respondent notes, in FAR Case 2007–006 where an adjustment was made from the total preparation hours from three to 60. This change was made considering particularly the hours that would be required for review within the company, prior to release to the Government.

The burden is prepared taking into consideration the necessary criteria in OMB guidance for estimating the paperwork burden put on the entity submitting the information. For example, consideration is given to an entity reviewing instructions; using technology to collect, process, and disclose information; adjusting existing practices to comply with requirements; searching data sources; completing and reviewing the response; and transmitting or disclosing information. The estimated burden hours for a collection are based on an average between the hours that a simple disclosure by a very small business might require and the much higher numbers that might be required for a very complex disclosure by a major corporation. Also, the estimated burden hours should only include projected hours for those actions which a company would not undertake in the normal course of business.

Careful consideration went into assessing the burden hours for this collection, and it is determined that an upward adjustment is not required.

The respondent expressed concern that the ''estimate of only 100 respondents that will be subject to this requirement is understated'' and estimated, without providing substantive supporting data, that ''the number of respondents is more likely closer to 500 annually.'' We disagree. FAR Part 50 prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under extraordinary emergency authorities. Executive Order 10789 authorizes 15 agencies to exercise the authority conferred by Pub. L. 85–804 (50 U.S.C. 1431–1434). The estimate of 100 respondents would, therefore, average to approximately seven actions issued under extraordinary contracting authority per agency per year. We find this to be a more reasonable estimate and more in keeping with the extraordinary, thus, rare nature for exercise of the authority than the average of 33 actions per agency per year estimated by the commenter when citing that ''the number of respondents is more likely closer to 500 annually.'' The respondent is reminded that the estimate provided is based on an average which considers that not every one of the 15 agencies with extraordinary contracting authority uses that authority in a given year.

In addition, the respondent questioned the estimate of 16 hours of burden associated with each response, and again, without providing substantive supporting data, suggested that ''a more reasonable estimate would be in the range of 80 to 160 hours per response.'' The respondent is reminded that estimated burden hours should only include projected hours for those actions which a company would not undertake in the normal course of business. We believe that the estimated 16 hours of burden reasonably reflect the time necessary for a contractor to perform the actions associated with its role in extraordinary contractual actions that go beyond the normal course of business, e.g., issue a request and certification, provide supporting information, as appropriate. Therefore, in the absence of substantive data to support doing otherwise, no adjustments are deemed necessary for the estimated number of respondents or estimated burden hours per respondent.

C. Annual Reporting Burden

The annual reporting burden is not changed from what was published in the **Federal Register** on September 24, 2009 (74 FR 48744). Based on coordination with subject matter experts and consideration of the requirements for estimating the burden within the Paperwork Burden Act, the determination was made to not revise the annual reporting burden. However, at any point, members of the public may submit comments for further consideration, and are encouraged to provide data to support their request for an adjustment.

The annual reporting burden is estimated as follows:

Respondents: 100.
Responses per Respondent: 1.
Total Responses: 100.
Hours per Response: 16.
Total Burden Hours: 1,600.
Obtaining Copies of Proposals: Requester 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. 9000–0029, Extraordinary Contractual Action Requests, in all correspondence.

Dated: March 15, 2013.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2013–06516 Filed 3–20–13; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–13–0217]

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 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Vital Statistics Training Application, OMB No. 0920–0217 (expires May 31, 2013)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In the United States, legal authority for the registration of vital events, i.e., births, deaths, marriages, divorces, fetal deaths, and induced terminations of pregnancy, resides individually with the States (as well as cities in the case of New York City and Washington, DC) and Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. These governmental entities are the full legal proprietors of vital records and the information contained therein. As a result of this State authority, the collection of registration-based vital statistics at the national level, referred to as the U.S. National Vital Statistics System (NVSS), depends on a cooperative relationship between the States and the Federal government. This data collection, authorized by 42 U.S.C. 242k, has been carried out by NCHS since it was created in 1960.

NCHS assists in achieving the comparability needed for combining data from all States into national statistics, by conducting a training program for State and local vital statistics staff to assist in developing expertise in all aspects of vital registration and vital statistics. The training offered under this program includes courses for registration staff, statisticians, and coding specialists, all designed to bring about a high degree of uniformity and quality in the data provided by the States. This training program is authorized by 42 U.S.C. 242b, section 304(a). NCHS notifies State and local vital registration officials, as well as Canadian counterparts, about upcoming training. Individual candidates for training then submit an application form including name, address, occupation, and other relevant information. NCHS is requesting 3 years of OMB clearance for these training application forms. There is no cost to respondents other than their time. The total burden for this project is 30 hours.

AVERAGE ANNUAL BURDEN

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
State, Local health department and Canadian vital health employees.	Application for Mortality coding Training	60	1	15/60
State, Local health department and Canadian vital health employees.	Application for Vital Statistics Training	60	1	15/60

Dated: March 15, 2013.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director.

[FR Doc. 2013–06495 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–13–12QP]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Development of an Evaluation Plan to Evaluate Grantee Attainment of Selected Activities of Comprehensive Cancer Control Priorities—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Comprehensive Cancer Control Program (NCCCP) is administered by the Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Division of Cancer Prevention and Control (DCPC). Through NCCCP, CDC supports comprehensive cancer control (CCC) programs in 50 states, the District of Columbia, seven tribes and tribal organizations, and seven U.S. Associated Pacific Islands/territories. CDC works with NCCCP awardees to establish coalitions, assess the burden of cancer, determine intervention priorities, and develop and implement CCC plans.

CDC has developed six priorities to guide the work of NCCCP grantees: (1) Emphasize primary prevention of cancer; (2) support early detection and treatment activities; (3) address public health needs of cancer survivors; (4) implement policies, systems, and environmental changes to guide sustainable cancer control; (5) promote health equity as it relates to cancer control; and (6) demonstrate outcomes through evaluation. These six priorities were shared with the CCC program directors, and they were asked to integrate and emphasize the priorities in their updated cancer plans. The six priorities were also incorporated in the new five-year coordinated cooperative agreement, Cancer Prevention and Control Programs for State, Territorial and Tribal Organizations.

CDC is requesting information needed to (1) assess the extent to which CCC programs are implementing the six NCCCP priorities, and (2) assess existing evaluation capacity building tools and revise tools as needed to support the implementation of NCCCP priorities. The information collection will consist of a web-based survey and focus groups that may be conducted in-person or by telephone.

Respondents for the National Comprehensive Cancer Control Program Survey will include 65 program directors representing 50 states, the District of Columbia, seven tribes and tribal organizations, and seven U.S.-affiliated territories. In addition, respondents will include four program directors representing the four component states of The Pacific Island Jurisdiction of the Federated States of Micronesia (FSM). Due to the diversity of the FSM, a survey will be distributed to each state-level FSM program director as well as the FSM national program director. The total number of respondents for the survey is 69 and the estimated burden per response is 30 minutes. The survey will be administered twice over a two-year period.

Information will also be collected through focus groups involving approximately 40 program directors and evaluators. Up to four focus groups will be conducted with a maximum of ten respondents per group. The estimated burden per response is 1.5 hours. Focus groups will be conducted once over a two-year period.

OMB approval is requested for two years. Participation is voluntary and there are no costs to the respondents other than their time. The total estimated burden hours per year are 65.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hr)
NCCCP State Grantee Program Director	National Comprehensive Cancer Control Program Survey.	69	1	0.5
NCCCP State Grantee Program Project Director or Designated CCC Staff Member.	National Comprehensive Cancer Control Program Focus Group.	20	1	1.5

Dated: March 15, 2013.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director.

[FR Doc. 2013–06483 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–13–13JQ]

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

Health Professional Application for Training (HPAT)—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 CDC is requesting the Office of Management and Budget (OMB) grant a three year approval to collect data that comprises the Health Professional Application for Training (HPAT).This instrument was previously approved under OMB #0920–0017, expires 3/31/2013. However CDC is requesting to use the form in NCHHSTP and there will be no duplication of information collection. It will serve as the official training application form used for training activities conducted by the Sexually Transmitted Disease (STD)/Human immunodeficiency virus (HIV) Prevention Training Centers' (PTCs) grantees and the HIV Capacity Building Assistance (CBAs) grantees funded by the (CDC).

The PTCs and CBAs are funded by CDC/Division of STD Prevention (DSTDP) and Division of HIV/AIDS Prevention (DHAP) to provide capacity-building that includes information, training, technical assistance and technology transfer.

The PTCs and CBAs offer classroom and experiential training, web-based training, clinical consultation, and capacity building assistance to maintain and enhance the capacity of health care professionals to control and prevent STDs and HIV. The HPATHPAT is used to monitor and evaluate performance of grantees that offer STD and HIV prevention training, training assistance, and capacity building assistance to physicians, nurses, disease intervention specialists, health educators, etc.

The 7,400 respondents represent an average of the number of health professionals trained by the CBA and PTC grantees during the years 2010 and 2011. The data collection is necessary to assess and evaluate the performance of the grantees in delivering training and to standardize training registration processes across the two training programs; the PTC program and the CBA provider program, and multiple grantees funded by each program. The HPAT allows CDC grantees to use a single instrument when partnering with other Health and Human Services (HHS) funded training programs.

The HPAT also collects information from the training participants regarding their: (1) Occupations, professions, and functional roles; (2) principal employment settings; (3) location of their work settings; and (4) programmatic and population foci of their work. This data collection provides CDC with information to determine whether the training grantees are reaching their target audiences in terms of provider type, the types of organizations in which participants work, the focus of their work and the population groups and geographic areas served; the data collection is also used to triage and assign CBA provider requests.

There are no costs to respondents other than their time.

ESTIMATES OF ANNUALIZED BURDEN

Type of respondent	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Healthcare Professionals	Health Professional Application for Training (HPAT).	7,400	1	5/60	617
Total		7,400		5/60	617

Dated: March 15, 2013.

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. 2013–06497 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–13–12QR]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Monitoring and Reporting System For DELTA FOCUS Awardees—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Intimate Partner Violence (IPV) is a serious, preventable public health problem that affects millions of Americans and results in serious consequences for victims, families, and communities. IPV occurs between two people in a close relationship. The term ''intimate partner'' describes physical, sexual, or psychological harm by a current or former partner or spouse. IPV can impact health in many ways, including long-term health problems, emotional impacts, and links to negative health behaviors. IPV exists along a continuum from a single episode of violence to ongoing battering; many victims do not report IPV to police, friends, or family.

The purpose of the DELTA FOCUS (Domestic Violence Prevention Enhancement and Leadership Through Alliances, Focusing on Outcomes for Communities United with States) program is to promote the prevention of IPV through the implementation and evaluation of strategies that create a foundation for the development of practice-based evidence. By emphasizing primary prevention, this program will support comprehensive and coordinated approaches to IPV prevention. The strategies will address the structural determinants of health at the outer layers (societal and community) of the social ecological model (SEM) that coordinate and align with existing prevention strategies at the inner layers of the SEM. This program addresses the ''Healthy People 2020'' focus area(s) of Injury and Violence Prevention and Social Determinants of Health.

CDC seeks OMB approval to collect information electronically from awardees funded under the DELTA FOCUS cooperative agreement program. Information will be collected from DELTA FOCUS awardees through an electronic Performance Management Information System (PMIS). Information collected through the PMIS will be used to inform performance monitoring, program evaluation, responding to requests from the National Center for Injury Prevention and Control, Department of Health and Human Services, White House, Congress, and other sources. DELTA FOCUS awardees will use the information collection to manage and coordinate their activities and to improve their efforts to prevent IPV.

Anticipated respondents are a maximum of 10 awardees for the DELTA FOCUS (Domestic Violence Prevention Enhancement and Leadership Through Alliances, Focusing on Outcomes for Communities United with States) All respondents will be state and territorial domestic violence coalitions. Estimated burden for the first-time population of the PMIS is fifteen hours. Semi-Annual Reporting is estimated at three hours per respondent.

There are no costs to respondents other than their time. Total estimated annual burden hours are 210.

ESTIMATED ANNUALIZED BURDEN TO RESPONDENTS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
State Domestic Violence Coalitions ..	DELTA FOCUS PMIS: Initial population.	10	1	15	150
	DELTA FOCUS PMIS: Semi-annual reporting.	10	2	3	60

Dated: March 15, 2013.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director.

[FR Doc. 2013–06496 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–0650]

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 more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 or send comments to Kimberly Lane, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Prevention Research Centers Program National Evaluation Reporting System—Revision—Division of Population Health, 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. PRCs conduct outcomes-oriented health promotion and disease prevention research on a broad range of topics using a multi-disciplinary and community-based approach. 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.

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 requests OMB approval to continue conducting the annual web-based survey and the annual interview. Changes to be implemented include (1) changing the platform of the web-based survey, (2) reducing the number of questions asked on each instrument, and (3) revising some questions for clarity or to reflect the current needs and priorities of the program. The proposed changes will result in a net decrease in burden to respondents.

OMB approval is requested for a three-year period with a start date of June 1, 2013. There are no costs to respondents other than their time. The total estimated burden hours are 204.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
PRC Program	Survey	37	1	5
	Telephone Interview	37	1	0.5

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director.

[FR Doc. 2013–06493 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panels (SEP): Initial review

The meeting announced below concerns Epi-Centers for the Prevention of Healthcare-Associated Infections, Antimicrobial Resistance and Adverse Events, Funding Opportunity Announcement (FOA) CK11–0010301SUPP13, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 1:00 p.m.–4:00 p.m., May 8, 2013 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Epi-Centers for the Prevention of Healthcare-Associated Infections, Antimicrobial Resistance and Adverse Events, FOA CK11–0010301SUPP13''.

Contact Person for More Information: Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road NE., Mailstop E60, Atlanta, Georgia 30333, Telephone: (404) 718–8833.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dana Redford,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–06436 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee to the Director (ACD), Centers for Disease Control and Prevention—Health Disparities Subcommittee (HDS)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned subcommittee:

Time and Date: 9:00 a.m.–4:45 p.m. EDT, April 24, 2013.

Place: CDC, Building 19, Rooms 245 and 246, 1600 Clifton Road NE., Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 20 people. The public is welcome to participate during the public comment, which is tentatively scheduled from 4:30 to 4:40 p.m. This meeting is also available by teleconference. Please dial (877) 496–4855 and enter code 4363556.

Purpose: The Subcommittee will provide advice to the CDC Director through the ACD on strategic and other health disparities and health equity issues and provide guidance on opportunities for CDC.

Matters To Be Discussed: The Health Disparities Subcommittee members will discuss CDC's health equity work in the environmental health and developmental

disabilities areas, as well as discuss health equity recommendations to the CDC ACD.

The agenda is subject to change as priorities dictate.

Contact Person for More Information: Leandris Liburd, Ph.D., M.P.H., M.A., Designated Federal Officer, Health Disparities Subcommittee, Advisory Committee to the Director, CDC, 1600 Clifton Road NE., M/S K–77, Atlanta, Georgia 30333 Telephone (770) 488–8200, Email: *LEL1@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dana Redford,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 2013–06431 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, Office of Infectious Diseases (BSC, OID)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), announces the following meeting of the aforementioned committee:

Time and Date: 2:00 p.m.–3:00 p.m., April 18, 2013.

Place: Teleconference.

Status: The meeting is open to the public; the toll free dial in number is 1–877–951–7311 with a pass code of 6420598.

Purpose: The BSC, OID, provides advice and guidance to the Secretary, Department of Health and Human Services; the Director, CDC; the Director, OID; and the Directors of the National Center for Immunization and Respiratory Diseases, the National Center for Emerging and Zoonotic Infectious Diseases, and the National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, CDC, in the following areas: strategies, goals, and priorities for programs; research within the national centers; and overall strategic direction and focus of OID and the national centers.

Matters To Be Discussed: The purpose of the meeting is to discuss the potential for forming an infectious disease laboratory working group under the BSC, OID.

The agenda and any supplemental material will be available at *www.cdc.gov/oid/BSC.html* after April 1.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Robin Moseley, M.A.T., Designated Federal Officer, OID, CDC, 1600 Clifton Road NE., Mailstop D10, Atlanta, Georgia 30333, Telephone: (404) 639–4461.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dana Redford,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–06433 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Health Statistics

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), National Center for Health Statistics (NCHS) announces the following meeting of the aforementioned committee:

Times and Dates: 11:00 a.m.–5:30 p.m., May 6, 2013, 8:30 a.m.–1:00 p.m., May 7, 2013

Place: NCHS Headquarters, 3311 Toledo Road, Hyattsville, Maryland 20782.

Status: This meeting is open to the public; however, visitors must be processed in accordance with established federal policies and procedures. For foreign nationals or non-US citizens, pre-approval is required (please contact Althelia Harris, 301–458–4261, *adw1@cdc.gov* or Virginia Cain, *vcain@cdc.gov* at least 10 days in advance for requirements). All visitors are required to present a valid form of picture identification issued by a state, federal or international government. As required by the Federal Property Management Regulations, Title 41, Code of Federal Regulation, Subpart 101–20.301, all persons entering in or on Federal controlled property and their packages, briefcases, and other containers in their immediate possession are subject to being x-rayed and inspected. Federal law prohibits the knowing possession or the causing to be present of firearms, explosives and other dangerous weapons and illegal substances. The meeting room accommodates approximately 100 people.

Purpose: This committee is charged with providing advice and making recommendations to the Secretary, Department of Health and Human Services; the Director, CDC; and the Director, NCHS, regarding the scientific and technical program goals and objectives, strategies, and priorities of NCHS.

Matters To Be Discussed: The agenda will include welcome remarks by the Acting Director, NCHS; the February 5, 2013 ORM Program Review; discussion of revisions to the program review protocol; program updates.

Requests to make oral presentations should be submitted in writing to the contact person listed below. All requests must contain the name, address, telephone number, and organizational affiliation of the presenter.

Written comments should not exceed five single-spaced typed pages in length and must be received by April 22, 2013.

The agenda items are subject to change as priorities dictate.

Contact Person for More Information: Virginia S. Cain, Ph.D., Director of Extramural Research, NCHS/CDC, 3311 Toledo Road, Room 7208, Hyattsville, Maryland 20782, telephone (301) 458–4500, fax (301) 458–4020.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dana Redford

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–06432 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Monitoring and Evaluation of Malaria Control and Elimination Activities, FOA GH13–005, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 11:00 a.m.–3:00 p.m., May 21, 2013 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Monitoring and Evaluation of Malaria Control and Elimination Activities, FOA GH13–005, initial review.''

Contact Person for More Information: Hylan D. Shoob, Ph.D., M.S.P.H., Scientific

Review Officer, CDC, 1600 Clifton Road NE., Mailstop D–72, Atlanta, Georgia 30333, Telephone: (404) 639–4796.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dana Redford,

Acting Director, Management Analysis and Services Office Centers for Disease Control and Prevention.

[FR Doc. 2013–06438 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Strengthening the Monitoring and Evaluation of Programs for the Elimination and Control of Neglected Tropical Diseases in Africa, FOA GH13–002, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 1:00 p.m.–4:30 p.m., May 23, 2013 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Strengthening the Monitoring and Evaluation of Programs for the Elimination and Control of Neglected Tropical Diseases in Africa, FOA GH13–002, initial review.''

Contact Person for More Information: Diana Bartlett, Scientific Review Officer, Office of the Associate Director for Science, Office of Science Quality, CDC, 1600 Clifton Road NE., Mailstop D–72, Atlanta, Georgia 30033, Telephone (404) 639–4938, *zxd5@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dana Redford,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–06437 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Funding Opportunity Announcement, Initial Review

The meeting announced below concerns Indoor Environment of Low-Income Renovated Multifamily Housing in the Western Region of the United States (U01), FOA EH13–001, initial review.

SUMMARY: This document corrects a notice that was published in the **Federal Register** on February 28, 2013 (78 FR 13677). The meeting announcement and matters to be discussed should read as follows:

The meeting announced below concerns Indoor Environment of Low-Income Renovated Multifamily Housing in the Western Region of the United States (U01), FOA EH13–001, initial review.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Indoor Environment of Low-Income Renovated Multifamily Housing in the Western Region of the United States (U01), FOA EH13–001''.

FOR FURTHER INFORMATION CONTACT: J. Felix Rogers, Ph.D., M.P.H., Scientific Review Officer, CDC, 4770 Buford Highway NE., Mailstop F63, Atlanta, Georgia 30341, Telephone: (770) 488–4334.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dana Redford,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2013–06434 Filed 3–20–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–R–218]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement of a previously approved collection; *Title of Information Collection:* Health Insurance Portability and Accountability Act (HIPAA) Standards for Electronic Transactions and Supporting Regulations in 45 CFR Part 162. *Use:* This information collection request has no substantive changes since the last OMB approval in 2008. The adopted transaction standards currently in use for electronic transactions (Version 4010/4010a) are compatible with the ICD–9–CM adopted code set that is used to report diagnoses and hospital inpatient services. However, the ICD–10 codes cannot be used with Version 4010/4010a, because this version does not have a specific qualifier or indicator for reporting ICD–10 codes.

Version 5010 supports the use of the ICD–10 code set by making available a qualifier to indicate that an ICD–10 code is being reported. Like ICD–9, ICD–10 codes are reported in claim and payment transactions, as well as eligibility inquiries and responses and requests for referrals and authorizations. In Version 5010, the number of codes required in any given transaction does not change. It is possible that a fewer

number of codes in a given transaction may be necessary to report the same information reported with ICD–9 codes because ICD–10 codes are more specific. *Form Number:* CMS–R–218 (OCN: 0938–0866). *Frequency:* Occasionally. *Affected Public:* Private Sector (Business or other for-profits, Not-for-profit institutions). *Number of Respondents:* 696,026. *Total Annual Responses:* 696,026. *Total Annual Hours:* 6,960,260. (For policy questions regarding this collection contact Gladys Wheeler at 410–786–0273. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *April 22, 2013.*

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, Email: *OIRA_submission@omb.eop.gov.*

Dated: March 18, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–06534 Filed 3–20–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[CFDA Number: 93.576]

Announcement of the Award of an Urgent Single-Source Grant to the Center for Survivors of Torture in Dallas, TX

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services.

ACTION: Announcement of the award of an urgent single-source grant to the Center for Survivors of Torture to provide mental health services for refugees.

SUMMARY: The Administration for Children and Families (ACF), Office of Refugee Resettlement (ORR) announces the award of an urgent single-source grant in the amount of $250,000 to the Center for Survivors of Torture (CST) in Dallas, TX to ensure incoming refugee populations in Texas have access to mental health services.

DATES: The project period for the award is February 1, 2013 through January 31, 2014.

FOR FURTHER INFORMATION CONTACT: Kenneth Tota, Deputy Director, Office of Refugee Resettlement, 901 D Street SW., Washington, DC 20047. Telephone: 202–401–4858. Email: *kenneth.tota@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: Approximately 45,000 individual refugees reside in the areas covered by the Center for Survivors of Torture. Texas and the surrounding region have a demonstrated history of being a top resettlement location with one of the highest concentrations of refugees in the United States. In the past few years, the Office of Refugee Resettlement (ORR) has seen an increasing need for mental health services associated with the three primary refugee populations from Iraq, Burma and Bhutan who have suffered extreme trauma and torture due to war and genocide in those countries. Refugees from Bhutan have specifically demonstrated a high incidence of suicide upon arrival to the U.S. ORR has been working closely with the Centers for Disease Control (CDC) to assess this situation. The CDC recently published a study recommending enhanced mental health services for incoming refugees from Bhutan.

This fiscal year the program is seeing a significant increase in resettlement of refugees from the Democratic Republic of Congo. The United Nations High Commissioner for Refugees (UNHCR) has determined this group is particularly at risk due to decades of extreme violence in the Democratic Republic of Congo and recent arrivals have shown a compelling need for mental health services upon arrival. Furthermore, CST is the only accredited mental health care provider of specialized refugee mental health treatment services in Texas and the surrounding area.

CST services are critical to meeting refugee mental health needs by providing services such as an initial assessment, counseling to: children, adolescents, adults, couples, and families. Additionally, CST provides group therapy, psychoeducational groups, testing for mental health conditions, and medication management. In addition to these direct services, CST also provides training to other agencies in the area to include schools, health clinics, and social services agencies on refugee mental health issues.

Due to the high number of refugees being resettled in this region, with no other demonstrated provider of expert mental health services to this population, this grant is urgent and critical to those in need of such services. According to the Department of State, Texas is projected to receive the highest number of refugees admitted to the U.S. in FY13. Through this grant ORR will ensure there is no disruption in much needed mental health services to these particularly at risk populations. This urgent grant will support the provision of these much needed mental health services to ensure these refugees are afforded a successful path to self-sufficiency.

Statutory Authority: Section 412 (c)(1)(A)(iii) of the Immigration and Nationality Act, as amended and the Refugee Assistance Extension Act of 1986, Pub. L. 99–605 (8 U.S.C. 1101).

Eskinder Negash,

Director, Office of Refugee Resettlement.

[FR Doc. 2013–06517 Filed 3–20–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Pulmonary-Allergy Drugs 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 March 7, 2013, Pulmonary-Allergy Drugs Advisory Committee meeting due to unanticipated weather conditions.

Name of Committee: Pulmonary-Allergy Drugs 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 April 17, 2013, from 8 a.m. to 5 p.m. This meeting is being rescheduled because of a postponed meeting announced in the **Federal**

Register of December 14, 2012 (77 FR 74486), originally scheduled for March 7, 2013.

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: Cindy Hong, 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: *PADAC@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: The committee will discuss the new drug application (NDA) 204275, for fluticasone furoate and vilanterol dry powder inhaler (proposed trade name BREO ELLIPTA), sponsored by GlaxoSmithKline, for the long-term maintenance treatment of airflow obstruction and for reducing exacerbations in patients with chronic obstructive pulmonary disease.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before April 9, 2013. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations, including those who had previously requested time to speak at the originally scheduled March 7, 2013, Pulmonary-Allergy Drugs 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 April 1, 2013. Any individuals who requested time to speak at the originally scheduled March 7, 2013, Pulmonary-Allergy Drugs Advisory Committee meeting, will need to follow the instructions in this document to request time to speak at the April 17, 2013, Pulmonary-Allergy Drugs Advisory Committee, meeting as any previous requests to speak at the originally scheduled meeting do not convey to this new April 17, 2013, Pulmonary-Allergy Drugs 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 April 2, 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 Cindy Hong at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: March 15, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–06416 Filed 3–20–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Risk Communications 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.

Name of Committee: Risk Communications 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 April 29, 2013, from 8 a.m. to 5 p.m. and on April 30, 2013, from 8 a.m. to 3 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993. 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: Luis G. Bravo, Designated Federal Officer, Risk Communication Staff, Office of Planning, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3274, Silver Spring, MD 20993, 240–402–5274, FAX: 301–847–8609, email: *RCAC@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 April 29 and 30, 2013, the Committee will discuss general factors in risk communication about FDA-regulated products, including how to communicate effectively about FDA's adverse event reporting systems, and messaging in the context of competing communicators.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before April 12, 2013. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. on April 29, 2013, and 10:30 a.m. and 11:30 a.m. on April 30, 2013. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before April 4, 2013. 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 April 5, 2013. Interested persons can also log on to *https://collaboration.fda.gov/rcac/* to see and hear the proceedings.

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 Luis G. Bravo at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: March 15, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–06415 Filed 3–20–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2012–M–1012, FDA–2012–M–1039, FDA–2012–M–1048, FDA–2012–M–1049, FDA–2012–M–1066, FDA–2012–M–1084, FDA–2012–M–1085, FDA–2012–M–1088, FDA–2012–M–1109, FDA–2012–M–1110, FDA–2012–M–1111, FDA–2012–M–1146, FDA–2012–M–1176, FDA–2012–M–1183, and FDA–2012–M–1184]

Medical Devices; Availability of Safety and Effectiveness Summaries for Premarket Approval Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of premarket approval applications (PMAs) that have been approved. This list is intended to inform the public of the availability of safety and effectiveness summaries of approved PMAs through the Internet and the Agency's Division of Dockets Management.

ADDRESSES: Submit written requests for copies of summaries of safety and effectiveness data to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Please cite the appropriate docket number as listed in table 1 of this document when submitting a written request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the summaries of safety and effectiveness.

FOR FURTHER INFORMATION CONTACT: Nicole Wolanski, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1650, Silver Spring, MD 20993–0002, 301–796–6570.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with sections 515(d)(4) and (e)(2) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360e(d)(4) and (e)(2)), notification of an order approving, denying, or withdrawing approval of a PMA will continue to include a notice of opportunity to request review of the order under section 515(g) of the FD&C Act. The 30-day period for requesting reconsideration of an FDA action under § 10.33(b) (21 CFR 10.33(b)) for notices announcing approval of a PMA begins on the day the notice is placed on the Internet. Section 10.33(b) provides that FDA may, for good cause, extend this 30-day period. Reconsideration of a denial or withdrawal of approval of a PMA may be sought only by the applicant; in these cases, the 30-day period will begin when the applicant is notified by FDA in writing of its decision.

The regulations provide that FDA publish a quarterly list of available safety and effectiveness summaries of PMA approvals and denials that were announced during that quarter. The following is a list of approved PMAs for which summaries of safety and effectiveness were placed on the Internet from October 1, 2012, through December 31, 2012. There were no denial actions during this period. The list provides the manufacturer's name, the product's generic name or the trade name, and the approval date.

TABLE 1—LIST OF SAFETY AND EFFECTIVENESS SUMMARIES FOR APPROVED PMAS MADE AVAILABLE FROM OCTOBER 1, 2012, THROUGH DECEMBER 31, 2012

PMA No., Docket No.	Applicant	Trade name	Approval date
P110038, FDA–2012–M–1012	Bolton Medical Inc	Relay® Thoracic Stent-Graft with Plus Delivery System.	September 21, 2012.
P110042, FDA–2012–M–1048	Cameron Health, Inc	Subcutaneous Implantable Defibrillator (S–ICD®) System.	September 28, 2012.
P100003, FDA–2012–M–1039	Globus Medical, Inc	Secure-C Artificial Cervical Disc	September 28, 2012.
P120005, FDA–2012–M–1049	Dexcom, Inc	Dexcom G4 PLATINUM Continuous Glucose Monitoring System.	October 5, 2012.
P120006, FDA–2012–M–1110	TriVascular, Inc	Ovation Abdominal Stent Graft System	October 5, 2012.
P120007, FDA–2012–M–1066	Gen-Probe, Inc	APTIMA® HPV 16 18/45 Genotype Assay.	October 12, 2012.
P110008, FDA–2012–M–1085	Paradigm Spine, LLC	coflex® Interlaminar Technology	October 17, 2012.
P110039, FDA–2012–M–1084	InSightec, Inc	InSightec ExAblate® System	October 18, 2012.
P110021, FDA–2012–M–1088	Edwards Lifesciences, LLC	Edwards SAPIEN™ Transcatheter Heart Valve.	October 19, 2012.
P100040/S008, FDA–2012–M–1109	Medtronic Vascular	Valiant® Thoracic Stent Graft with the Captivia Delivery System.	October 26, 2012.
P100012, FDA–2012–M–1111	NuVasive, Inc	PCM® Cervical Disc System	October 26, 2012.
P120002, FDA–2012–M–1183	Cordis Corporation	S.M.A.R.T.® CONTROL® and S.M.A.R.T.® Vascular Stent Systems..	November 7, 2012
P100022, FDA–2012–M–1146	Cook, Inc	Zilver PTX Drug-Eluting Peripheral Stent.	November 14, 2012.
P100047, FDA–2012–M–1184	HeartWare, Inc	HeartWare® Ventricular Assist System	November 20, 2012.
P120008, FDA–2012–M–1176	Abbott Laboratories	ARCHITECT AFP Assay, ARCHITECT AFP Calibrators and ARCHITECT AFP Controls.	November 28, 2012.

II. Electronic Access

Persons with access to the Internet may obtain the documents at *http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/DeviceApprovalsandClearances/PMAApprovals/default.htm.*

Dated: March 15, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–06429 Filed 3–20–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities; Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1984.

HRSA especially requests comments on: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Information Collection Request Title: Ryan White HIV/AIDS Treatment Extension Act of 2009, Part A Minority AIDS Initiative Report (the *Part A MAI Report*): (OMB No. 0915–0304)—EXTENSION

Abstract: HRSA's HIV/AIDS Bureau (HAB) administers the Ryan White HIV/AIDS Part A Program authorized under Title XXVI of the Public Health Service Act (Ryan White HIV/AIDS Treatment Extension Act of 2009). Part A provides emergency relief for areas with substantial need for HIV/AIDS care and support services that are most severely affected by the HIV/AIDS epidemic, including eligible metropolitan areas (EMAs) and Transitional Grant Areas (TGAs). As a component of Part A, the purpose of the Minority AIDS Initiative (MAI) Supplement is to improve access to high quality HIV care, services, and outcomes for individuals in disproportionately impacted communities of color who are living with HIV disease, including African Americans, Latinos, Native Americans, Asian Americans, Native Hawaiians, and Pacific Islanders (Section 2693(b)(2)(A) of the Public Health Service (PHS) Act). Since the purpose of the Part A MAI is to expand access to medical, health, and social support services for disproportionately impacted racial/ethnic minority populations living with HIV/AIDS, it is important that HRSA is able to report on minorities served by the Part A MAI.

The *Part A MAI Report* is a data collection instrument in which grantees report on the number and characteristics of clients served and services provided. The *Part A MAI Report,* first approved for use in March 2006, is designed to collect performance data from Part A grantees. The report has two parts: (1) A web-based data entry application that collects standardized quantitative and qualitative information and (2) an accompanying narrative report. Grantees

submit two *Part A MAI Reports* annually: The *Part A MAI Plan* (*Plan*) and the *Part A MAI Year-End Annual Report* (*Annual Report*). The *Plan* and *Annual Report* components of the report are linked to minimize the reporting burden and include drop-down menu responses; fields for reporting budget, expenditure, and aggregated client level data; and open-ended responses for describing client or service-level outcomes. Together, the *Plan* and *Annual Report* components collect information from grantees on MAI-funded services, expenditure patterns, the number and demographics of clients served, and client-level outcomes.

The MAI *Plan* Narrative that accompanies the *Plan* web forms provides: (1) An explanation of the data submitted in the *Plan* web forms; (2) a summary of the *Plan,* including the plan and timeline for disbursing funds, monitoring service delivery, and implementing any service-related capacity development or technical assistance activities; and (3) the plan and timeline for documenting client-level outcome measures. In addition, if the EMA/TGA revised any planned services, allocation amounts, or target communities after their grant application was submitted, the changes must be highlighted and explained. The accompanying MAI *Annual Report* Narrative describes: (1) Progress towards achieving specific goals and objectives identified in the grantee's approved MAI Plan for that fiscal year and in linking MAI services/activities to Part A and other Ryan White Program services; (2) achievements in relation to client-level health outcomes; (3) summary of challenges or barriers at the provider or grantee levels, the strategies and/or action steps implemented to address them, and lessons learned; and (4) discussion of MAI technical assistance needs identified by the EMA/TGA.

This information is needed to monitor and assess: (1) Changes in the type and amount of HIV/AIDS health care and related services being provided to each disproportionately impacted community of color; (2) the aggregate number of persons receiving HIV/AIDS services within each racial and ethnic community; and (3) the impact of Part A MAI-funded services in terms of client-level and service-level health outcomes. This information also is used to plan new technical assistance and capacity development activities, and influence the HRSA policy and program management functions. The data provided to HRSA does not contain individual or personally identifiable information. No changes have been made to the *Part A MAI Report.*

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

The annual estimate of burden is as follows:

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Part A MAI Report	53	2	106	5	530

Note: Data collection system enhancements have resulted in a shortened response burden (from 6 to 5 total hours per response) for respondents since the previous OMB approval request.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

Deadline: Comments on this Information Collection Request must be received within 60 days of this notice.

Dated: March 14, 2013.

Bahar Niakan,

Director, Division of Policy and Information Coordination.

[FR Doc. 2013–06528 Filed 3–20–13; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Health Resources and Services Administration (HRSA) will submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB). Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. To request a copy of the clearance requests submitted to OMB for review, email *paperwork@hrsa.gov* or call the HRSA Reports Clearance Office at (301) 443–1984.

Information Collection Request Title: Organ and Tissue Donor and Recipient Life Stories Form (OMB No. 0915–xxxx)—NEW

Abstract: HRSA's Division of Transplantation (DoT) is the primary entity in the Department of Health and Human Services (HHS) responsible for the Organ Transplant Program established under the National Organ Transplant Act (Pub. L. 98–507, codified at sections 371–377D of the Public Health Service (PHS) Act). Section 377A of the PHS Act authorizes the Secretary of HHS to establish a public education program to increase awareness about organ donation and the need to provide for an adequate rate of such donations. In brief, DoT's responsibilities are two-fold: (1) To provide oversight and guidance to the national organ transplant system in the U.S. including monitoring the Organ Procurement and Transplantation Network and the Scientific Registry of Transplant Recipients, and (2) to implement a program of public and professional education and outreach aimed at increasing the number of organ donors

in this country. Many preventable deaths occur each year because of a staggering imbalance between the supply and demand for donor organs. As of March 2013, the national transplant waiting list exceeded 117,000. In 2011, the total number of deceased and living organ donors was only 14,145. These donors enabled 28,538 patients to receive a transplant while 6,693 died waiting. Without successful interventions to increase donation, the disparity between need and supply is likely to be substantially exacerbated, resulting in more unnecessary deaths.

Organdonor.gov is DoT's primary mechanism for providing the public with information about organ donation. Among the most visited pages on organdonor.gov are the donor and recipient life stories which in a recent evaluation study were shown to raise interest on the topic and, more important, persuade people to register as organ donors. To expand this component of organdonor.gov, DoT proposes to develop an application to give organ recipients, living donors, and donor families the opportunity to voluntarily submit their stories to DoT via a standardized online form. The online form will be posted on organdonor.gov and will collect demographic and contact information, the individual's donation/transplant story up to 500 words, a high resolution photo, and a signed authorization. The standardized, electronic form will increase HRSA staff's ability to process those stories more efficiently. In addition to enabling story submission, the online application process will make the donor and recipient life stories posted on the site searchable by the public to enhance public viewing and understanding of the organ donation process. Submission of a story and completion of the form is voluntary. Overall, this application has the potential to strengthen DoT's outreach efforts and increase organ donation registration in the United States.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

The annual estimate of burden is as follows:

Form name	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Donation/Transplantation Life Story Submission Form	100	1	100	0.68	68
Total	100	1	100	0.68	68

ADDRESSES: Submit your comments to the desk officer for HRSA, either by email to *OIRA_submission@omb.eop.gov* or by fax to 202–395–5806. Please direct all correspondence to the ''attention of the desk officer for HRSA.''

Deadline: Comments on this ICR should be received within 30 days of this notice.

Dated: March 14, 2013.

Bahar Niakan,

Director, Division of Policy and Information Coordination.

[FR Doc. 2013–06531 Filed 3–20–13; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Rural Health Information Technology Network Development Grant

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice of non-competitive replacement award to Grace Community Health Center.

SUMMARY: The Health Resources and Services Administration (HRSA) is issuing a non-competitive replacement award under the Rural Health Information Technology Network Development Grant (RHITND) to Grace Community Health Center in order to continue the effective use of grant funds to achieve the original goals of the project. Grace Community Health Center is familiar with the project activities and will continue to follow the goals and objectives outlined in the grant. The project director will remain the same, and Grace Community Health Center has the facilities and resources necessary to support successful performance of the project.

SUPPLEMENTARY INFORMATION:

Former Grantee of Record: Knox Hospital Corporation.

Original Period of Grant Support: September 1, 2011, to August 31, 2014.

Replacement Awardee: Grace Community Health Center.

Amount of Replacement Award: $520,000.

Period of Replacement Award: The period of support for this award is March 1, 2013, to August 31, 2014.

Authority: Section 330A (f) of the Public Health Service Act, as amended, 42 U.S.C .254c (f).

Catalog of Federal Domestic Assistance Number: 93.912.

Justification for the Exception to Competition: Knox County Hospital Corporation is relinquishing its fiduciary responsibilities for the Rural Health Information Technology Network Development (RHITND) Grant to the Grace Community Health Center, Inc. This is a non-competitive replacement award. As a current network partner, Grace Community Health Center is familiar and actively involved with the project activities and will continue to follow the goals and objectives outlined in the grant. Grace Community Health Center has the facilities and resources to support the successful implementation of the RHITND program, understands its responsibilities under the replacement award, and agrees to administer the grant award consistent with the original project scope.

FOR FURTHER INFORMATION CONTACT: Marcia Green, Public Health Analyst, Office of Rural Health Policy, Health Resources and Services Administration, Room 5A–05, 5600 Fishers Lane, Rockville, Maryland 20857; (301) 443–0076; email *mgreen@hrsa.gov.*

Dated: March 14, 2013.

Mary K. Wakefield,

Administrator .

[FR Doc. 2013–06420 Filed 3–20–13; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ZHD1 DSR–H (NJ)

Date: April 8, 2013.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Marita R. Hopmann, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6911, *hopmannm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06477 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Heart, Lung, and Blood Advisory Council.

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: March 29, 2013.

Time: 1:30 p.m. to 3:30 p.m.

Agenda: To discuss budget implications on current and recommended grant awards.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892 (Telephone Conference Call).

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.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

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: March 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06474 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ZHD1 DSR–Z (MR) 1.

Date: April 16, 2013.

Time: 11:30 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call)

Contact Person: Peter Zelazowski, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6902, *peter.zelazowski@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06475 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel Sensors and Mobile Devices for Health Monitoring.

Date: April 11–12, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Ellen K Schwartz, EDD Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8055B, Bethesda, MD 20892–8329, 301–594–1215, *schwarel@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: March 18, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06501 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Adverse Pregnancy Outcomes and Cardiovascular Disease Risk Factors

Date: April 16, 2013.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: William J Johnson, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892–7924, 301–435–0725, *johnsonwj@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: March 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06473 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Special Emphasis Panel; Multi-site Clinical Trial

Date: April 24, 2013.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Tamizchelvi Thyagarajan, Ph.D., Scientific Review Officer, National Institute of Nursing Research, National Institutes of Health, Bethesda, MD 20892, (301) 594–0343, *tamizchelvi.thyagarajan@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: March 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06468 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Blueprint Neurotherapeutics Review.

Date: April 25, 2013.

Time: 9:00 a.m. to 12:00 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: William C. Benzing, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS, NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–0660, *benzingw@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: March 15, 2013.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06469 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Special Emphasis Panel, April 5, 2013, 09:00 a.m.—4:00 p.m., 5635 Fishers Lane, Room- 508, Rockville, MD, 20852 which was published in the **Federal Register** on February 12, 2013, 78 FR9933.

This notice is being amended to change the meeting format from a face to face meeting to a teleconference. Also the meeting time has been changed to 11:00 a.m. to 1:00 p.m. on April 5, 2013. The meeting is closed to the public.

Dated: March 18, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06500 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Cancellation of Meeting

Notice is hereby given of the cancellation of the Center for Scientific Review Special Emphasis Panel, March 22, 2013, 3:00 p.m. to March 22, 2013, 4:30 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on March 4, 2013, 78 FR 14099.

The meeting is cancelled due to the reassignment of applications.

Dated: March 15, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06471 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Glial Cell Biology.

Date: April 17, 2013.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Geoffrey G Schofield, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040–A, MSC 7850, Bethesda, MD 20892, 301–435–1235, *geoffreys@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 15, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06472 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; George M. O'Brien Urology Cooperative Research Centers (U54).

Date: April 16–17, 2013.

Time: 8:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Elena Sanovich, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 750, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, 301–594–8886, *sanoviche@mail.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Translational Research.

Date: May 9, 2013.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–2542, (301) 594–8898, *barnardm@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: March 15, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06470 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ZHD1 RRG–K (DW)

Date: April 16–17, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Anne Krey, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6908, *ak41o@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–06476 Filed 3–20–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4103–DR; Docket ID FEMA–2013–0001]

Eastern Band of Cherokee Indians; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Eastern Band of Cherokee Indians (FEMA–4103–DR), dated March 1, 2013, and related determinations.

DATES: *Effective Date:* March 1, 2013.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 1, 2013, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage to the lands associated with the Eastern Band of Cherokee Indians resulting from severe storms, flooding, landslides, and mudslides during the period of January 14–17, 2013, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (the ''Stafford Act''). Therefore, I declare that such a major disaster exists for the Eastern Band of Cherokee Indians and associated lands.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance and Hazard Mitigation for the Eastern Band of Cherokee Indians and associated lands. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael Bolch, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas have been designated as adversely affected by this major disaster:

Eastern Band of Cherokee Indians and associated lands for Public Assistance.

The Eastern Band of Cherokee Indians is eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2013–06484 Filed 3–20–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4104–DR; Docket ID FEMA–2013–0001]

Navajo Nation; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the Navajo Nation (FEMA–4104–DR), dated March 5, 2013, and related determinations.

DATES: *Effective Date:* March 5, 2013.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated March 5, 2013, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage to the lands associated with the Navajo Nation resulting from a severe freeze during the period of December 15, 2012 to January 21, 2013, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (the ''Stafford Act''). Therefore, I declare that such a major disaster exists for the Navajo Nation and associated lands.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide assistance for emergency protective measures and utilities (Categories B and F) under the Public Assistance program and Hazard Mitigation for the Navajo Nation and associated lands. Consistent with the requirement that Federal assistance is supplemental, any Federal

funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Mark A. Neveau, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas have been designated as adversely affected by this major disaster:

The Navajo Nation and associated lands for emergency protective measures and utilities (Categories B and F) under the Public Assistance program.

The Navajo Nation is eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2013–06485 Filed 3–20–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2534–13; DHS Docket No. USCIS–2011–0014]

RIN 1615–ZB21

Filing Procedures for Employment Authorization and Automatic Extension of Existing Employment Authorization Documents for Liberians Eligible for Deferred Enforced Departure

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: On March 15, 2013, President Obama issued a memorandum to the Secretary of Homeland Security Janet Napolitano directing her to extend for an additional 18 months the deferred enforced departure (DED) of certain Liberians and to provide for work authorization during that period. The DED extension runs from April 1, 2013, through September 30, 2014. This notice provides instructions for eligible Liberians on how to apply for the full 18-month extension of employment authorization. Finally, this notice provides instructions for DED-eligible Liberians on how to apply for permission to travel outside the United States during the 18-month DED period.

USCIS will issue new employment authorization documents (EADs) with a September 30, 2014 expiration date to Liberians whose DED has been extended under the Presidential Memorandum of March 15, 2013, and who apply for EADs under this extension. Given the timeframes involved with processing EAD applications, DHS recognizes that not all DED-eligible Liberians will receive new EADs before their current EADs expire on March 31, 2013. Accordingly, this notice also automatically extends for 6 months (through September 30, 2013) the validity of DED-related EADs that have an expiration date of March 31, 2013 and explains how Liberians covered under DED and their employers may determine which EADs are automatically extended and their impact on Employment Eligibility Verification (Form I–9) and E-Verify processes.

DATES: The 6-month automatic extension of employment authorization for Liberians who are covered under DED, including the extension of their EADs as specified in this notice, is effective on April 1, 2013. This automatic extension expires on September 30, 2013. The 18-month extension of DED is valid through September 30, 2014.

FOR FURTHER INFORMATION CONTACT:

- For further information on DED, including guidance on the application process for EADs and additional information on eligibility, please visit the Temporary Protected Status (TPS) Web page at *http://www.USCIS.gov/tps* and choose ''Temporary Protected Status & Deferred Enforced Departure'' from the menu on the left. You can find specific information about DED for Liberia by selecting ''DED Granted Country: Liberia'' from the menu on the left of the TPS or DED Web page. From the Liberian page, you can select the Liberian DED Questions & Answers from the menu on the right for further information.
- You can also contact the DED Operations Program Manager at the Status and Family Branch, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529–2060; or by phone at (202) 272–1533 (this is not a toll-free number). **Note:** The phone number provided here is solely for questions regarding this DED notice. It is not for individual case status inquiries.
- Applicants seeking information about the status of their individual cases can check Case Status Online available at the USCIS Web site at *http://www.USCIS.gov,* or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).
- Further information will also be available at local USCIS offices upon publication of this notice.

SUPPLEMENTARY INFORMATION:

Presidential Memorandum Extending DED for Certain Liberians

Pursuant to his constitutional authority to conduct the foreign relations of the United States, President Obama has directed that Liberian nationals (and eligible persons without nationality who last resided in Liberia) who are physically present in the United States, have continuously resided in the United States since October 1, 2002, and who remain eligible for DED through March 31, 2013 be provided DED for an additional 18-month period. *See Presidential Memorandum—Deferred Enforced Departure for Liberians,* March 15, 2013 (''Presidential Memorandum'') at *http://m.whitehouse.gov/the-press-office/2013/03/15/presidential-memorandum-deferred-enforced-departure-liberians.* Only individuals who held TPS under the former Liberia TPS designation as of September 30, 2007 are eligible for DED, provided they have continued to meet all other eligibility criteria established by the President. The President also directed the Secretary of Homeland Security (Secretary) to implement the necessary steps to authorize employment authorization for eligible Liberians for 18 months from April 1, 2013 through September 30, 2014.

Employment Authorization and Filing Requirements

How will I know if I am eligible for employment authorization under the Presidential Memorandum that extended DED for certain Liberians for 18 months?

The DED extension and the procedures for employment authorization in this notice apply to Liberian nationals (and persons without nationality who last habitually resided in Liberia) who:

- Are physically present in the United States;
- Have continuously resided in the United States since October 1, 2002; and
- Are under a grant of DED through March 31, 2013.

The above eligibility criteria are described in the Presidential Memorandum. Only individuals who held TPS under the former Liberia TPS designation as of September 30, 2007 are eligible for DED, provided they have continued to meet all other eligibility criteria established by the President. This DED extension does not include any individual:

- Who would be ineligible for TPS for the reasons provided in section 244(c)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. 1254a(c)(2)(B);
- Whose removal the Secretary determines is in the interest of the United States;
- Whose presence or activities in the United States the Secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the United States;
- Who has voluntarily returned to Liberia or his or her country of last habitual residence outside the United States;
- Who was deported, excluded, or removed prior to March 15, 2013; or
- Who is subject to extradition.

What will I need to file if I am covered by DED and would like to have evidence of employment authorization?

If you are covered under DED for Liberia, and would like evidence of your employment authorization during the 18-month extension of DED, you must apply for an EAD by filing an Application for Employment Authorization (Form I–765). USCIS will begin accepting these applications on March 21, 2013. If you have a DED-related EAD that is valid through March 31, 2013, you must file an Application for Employment Authorization (Form I–765) as soon as possible to avoid gaps in work authorization. Please carefully follow the Application for Employment Authorization (Form I–765) instructions when completing the application for an EAD. When filing the Application for Employment Authorization (Form I–765), you must:

- Indicate that you are eligible for DED by putting ''(a)(11)'' in response to Question 16 on Form I–765;
- Include a copy of your last Notice of Action (Form I–797) showing that you were approved for TPS as of September 30, 2007, if such copy is available. Please note that evidence of TPS as of September 30, 2007 is necessary to show that you were covered under the previous DED for Liberia through March 31, 2013; and
- Submit the fee for the Application for Employment Authorization (Form I–765).

The regulations require individuals covered under DED who request an EAD to pay the fee prescribed in 8 CFR 103.7(b)(1)(i)(HH) for the Application for Employment Authorization (Form I–765). *See also* 8 CFR 274a.12(a)(11) (employment authorized for DED-covered aliens); 8 CFR 274a.13(a) (requirement to file EAD application if EAD desired). If you are unable to pay the fee, you may apply for an application fee waiver by completing a Request for Fee Waiver (Form I–912) or submitting a personal letter requesting a fee waiver, and providing satisfactory supporting documentation.

How will I know if I will need to obtain biometrics?

If biometrics are required to produce the secure EAD, you will be notified by USCIS and scheduled for an appointment at a USCIS Application Support Center.

Where do I submit my completed Application for Employment Authorization (Form I–765)?

Please submit your completed Application for Employment Authorization (Form I–765) and supporting documentation to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If...	Mail to...
You are applying through the U.S. Postal Service.	USCIS, Attn: DED Liberia, P.O. Box 6943, Chicago, IL 60680–6943.
You are using a non-U.S. Postal Service delivery service.	USCIS, Attn: DED Liberia, 131 S. Dearborn 3rd Floor, Chicago, IL 60603–5517.

Can I file my Application for Employment Authorization (Form I–765) electronically?

No. Electronic filing is not available for filing Form I–765 based on DED.

Extension of Employment Authorization and EADs

May I request an interim EAD at my local office?

No. Local USCIS offices will not issue interim EADs to individuals eligible for DED under the Presidential Memorandum.

Am I eligible to receive an automatic 6-month extension of my current EAD from April 1, 2013 through September 30, 2013?

You are eligible for an automatic 6-month extension of your EAD if you are a national of Liberia (or person having no nationality who last habitually resided in Liberia), you are currently covered by DED through March 31, 2013, and you are within the class of persons approved for DED by the President.

This automatic extension covers EADs issued on the Employment Authorization Document (Form I–766) bearing an expiration date of March 31, 2013. These EADs must also bear the notation ''A–11'' on the face of the card under ''Category.''

When hired, what documentation may I show to my employer as proof of employment authorization and identity when completing Employment Eligibility Verification, Form I–9?

You can find a list of acceptable document choices on the ''Lists of Acceptable Documents'' for Employment Eligibility Verification (Form I–9). You can find additional detailed information on the USCIS I–9 Central Web page at *http://www.USCIS.gov/I-9Central.* Employers are required to verify the identity and employment authorization of all new employees by using Employment Eligibility Verification (Form I–9). Within 3 days of hire, an employee must present proof of identity and employment authorization to his or her employer.

You may present any document from List A (reflecting both your identity and employment authorization), or one document from List B (reflecting identity) together with one document from List C (reflecting employment authorization). An EAD is an acceptable document under List A. Employers may not reject a document based upon a future expiration date.

If you received a 6-month automatic extension of your EAD by virtue of this **Federal Register** notice, you may choose to present your automatically extended EAD, as described above, to your employer as proof of identity and employment authorization for Employment Eligibility Verification (Form I–9) through September 30, 2013 (see the subsection below titled ''*How do my employer and I complete Employment Eligibility Verification (Form I–9) using an automatically extended EAD for a new job?*'' for further information). To minimize confusion over this extension at the time of hire, you may also show your employer a copy of this **Federal Register** notice regarding the automatic extension of employment authorization through September 30, 2013. As an alternative to presenting your automatically extended EAD, you may choose to present any other acceptable document from List A, or List B plus List C.

What documentation may I show my employer if I am already employed but my current DED-related EAD is set to expire?

Even though EADs with an expiration date of March 31, 2013 that state ''A–11'' under ''Category'' have been automatically extended for 6 months by virtue of this **Federal Register** notice, your employer will need to ask you about your continued employment authorization once March 31, 2013 is reached to meet its responsibilities for Employment Eligibility Verification (Form I–9). However, your employer does not need a new document to reverify your employment authorization until September 30, 2013, the expiration date of the automatic extension. Instead, you and your employer must make corrections to the employment authorization expiration dates in Section 1 and Section 2 of Employment Eligibility Verification (Form I–9) (see the subsection below titled, ''*What corrections should my current employer and I make to Employment Eligibility Verification (Form I–9) if my EAD has been automatically extended?''* for further information). In addition, you may also show this **Federal Register** notice to your employer to avoid confusion about what to do for *Employment Eligibility Verification* (Form I–9).

By September 30, 2013, the expiration date of the automatic extension, your employer must reverify your employment authorization. You must present any document from List A or any document form list C on Employment Eligibility Verification (Form I–9) to reverify employment authorization. Your employer is required to reverify on Employment Eligibility Verification (Form I–9) the employment authorization of current employees no later than the expiration of a DED-related EAD. Your employer should use either Section 3 of a new Employment Eligibility Verification (Form I–9) originally completed for the employee or, if this section has already been completed or if the version of Employment Eligibility Verification (Form I–9) is no longer valid, complete Section 3 of a new Employment Eligibility Verification (Form I–9) using the most current version. Note that your employer may not specify which List A or List C document employees must present.

What happens after September 30, 2013 for purposes of employment authorization?

After September 30, 2013, employers may not accept the EADs that this **Federal Register** notice automatically extended. However, before that time, USCIS will issue new EADs to eligible individuals covered under DED who request an EAD. These new EADs will have an expiration date of September 30, 2014 and can be presented to your employer as proof of employment authorization and identity. The EAD will bear the notation ''A–11'' on the face of the card under ''Category.'' Alternatively, you may choose to present any other legally acceptable document or combination of documents listed on Employment Eligibility Verification (Form I–9).

How do I and my employer complete Employment Eligibility Verification (Form I–9) using an automatically extended EAD for a new job?

When using an automatically extended EAD to fill out Employment Eligibility Verification (Form I–9) for a new job prior to September 30, 2013, you and your employer should do the following:

(1) For Section 1, you should:

a. Check ''An alien authorized to work'';

b. Write your alien number (USCIS number or A-number) in the first space (your EAD or other document from DHS will have your USCIS number or A-number printed on it; the USCIS Number is the same as your A-number without the A prefix); and

c. Write the automatic extension date (September 30, 2013) in the second space.

(2) For Section 2, employers should record the:

a. Document title;

b. Document number; and

c. Automatically extended EAD expiration date (September 30, 2013).

No later than September 30, 2013, when the automatic extension of EADs expires, employers must reverify the employee's employment authorization in Section 3 of Employment Eligibility Verification (Form I–9).

What corrections should my current employer and I make to Employment Eligibility Verification (Form I–9) if my EAD has been automatically extended?

If you are an existing employee who presented a DED-related EAD that was valid when you first started your job, but that EAD has now been automatically extended, you and your employer should correct your previously completed *Employment Eligibility Verification* (Form I–9) as follows:

(1) For Section 1, you should:

a. Draw a line through the expiration date in the second space;

b. Write ''September 30, 2013'' above the previous date;

c. Write ''DED Ext.'' in the margin of Section 1; and

d. Initial and date the correction in the margin of Section 1.

(2) For Section 2, employers should:

a. Draw a line through the expiration date written in Section 2;

b. Write ''September 30, 2013'' above the previous date;

c. Write ''DED Ext.'' in the margin of Section 2; and

d. Initial and date the correction in the margin of Section 2.

No later than September 30, 2013, when the automatic extension of EADs expires, employers must reverify the employee's employment authorization in Section 3 of Employment Eligibility Verification (Form I–9).

If I am an employer enrolled in E-Verify, what do I do when I receive a ''Work Authorization Documents Expiring'' alert for an automatically extended EAD?

If you are an employer who participates in E-Verify, you will receive a ''Work Authorization Documents Expiring'' case alert when an individual covered under DED has an EAD that is about to expire. Usually, this message is an alert to complete Section 3 of Employment Eligibility Verification (Form I–9) to reverify an employee's employment authorization. For existing employees with DED-related EADs that have been automatically extended, employers should dismiss this alert by clicking the red ''X'' in the ''dismiss alert'' column and follow the instructions above explaining how to

correct Employment Eligibility Verification (Form I–9). By September 30, 2013, employment authorization must be reverified in Section 3. You should never use E-Verify for reverification.

Can my employer require that I produce any other documentation to prove my status, such as proof of my Liberian citizenship?

No. When completing Employment Eligibility Verification (Form I–9), including reverifying employment authorization, employers must accept any documentation that appears on the ''Lists of Acceptable Documents'' for Employment Eligibility Verification (Form I–9) and that reasonably appears to be genuine and that relates to you. Employers may not request documentation that does not appear on the ''Lists of Acceptable Documents.'' Therefore, employers may not request proof of Liberian citizenship when completing Employment Eligibility Verification (Form I–9) for new hires or reverifying the employment authorization of current employees. If presented with EADs that are unexpired on their face or that have been automatically extended, employers should accept such EADs as valid List A documents so long as the EADs reasonably appear to be genuine and to relate to the employee. See below for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin.

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call the USCIS Form I–9 Customer Support at 888–464–4218 (TDD for the hearing impaired is at 877–875–6028). For questions about avoiding discrimination during the employment eligibility verification process, employers may also call the U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) Employer Hotline at 800–255–8155 (TDD for the hearing impaired is at 800–237–2515), which offers language interpretation in numerous languages.

Note to Employees

For general questions about the employment eligibility verification process, employees may call the USCIS National Customer Service Center at 800–375–5283 (TDD for the hearing impaired is at 800–767–1833); calls are accepted in English and Spanish. Employees or applicants may also call the OSC Worker Information Hotline at 800–255–7688 (TDD for the hearing impaired is at 800–237–2515) for information regarding employment discrimination based upon citizenship, immigration status, or national origin, or for information regarding discrimination related to Employment Eligibility Verification (Form I–9) and E-Verify. The OSC Worker Information Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents acceptable for Employment Eligibility Verification (Form I–9) completion if the documentation reasonably appears to be genuine and to relate to the employee. Employers may not require extra or additional documentation beyond what is required for Employment Eligibility Verification (Form I–9) completion. Further, employers participating in E-Verify who receive an E-Verify initial mismatch (''tentative nonconfirmation'' or ''TNC'') on employees must inform employees of the mismatch and give such employees an opportunity to challenge the mismatch.

Employers are prohibited from taking adverse action against such employees based on the initial mismatch unless and until E-Verify returns a final nonconfirmation. For example, employers must allow employees challenging their mismatches to continue to work without any delay in start date or training and without any change in hours or pay, while the final E-Verify determination remains pending. Additional information is available on the OSC Web site at *http://www.Justice.gov/crt/about/osc* and the USCIS Web site at *http://www.DHS.gov/E-Verify.*

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

While Federal government agencies must follow the guidelines laid out by the Federal government, state and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, state, or local government benefit, you may need to provide the government agency with documents that show you are covered under DED and/or show you are authorized to work based on DED. Examples are:

(1) Your expired EAD that has been automatically extended, or your EAD that has not expired;

(2) A copy of this **Federal Register** notice if your EAD is automatically extended under this notice;

(3) A copy of your past Application for Temporary Protected Status Notice of Action (Form I–797), if you received one from USCIS, coupled with a copy of the Presidential Memorandum extending DED for Liberians; and

(4) If there is an automatic extension of work authorization, a copy of the fact sheet from the USCIS DED Web page that provides information on the automatic extension.

Check with the government agency regarding which document(s) the agency will accept. You may also provide the agency with a copy of this notice.

Some benefit-granting agencies use the USCIS Systematic Alien Verification for Entitlements Program (SAVE) to verify the current immigration status of applicants for public benefits. If such an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted upon or will act upon a SAVE verification and you do not believe the response is correct, you may make an InfoPass appointment for an in-person interview at a local USCIS office. Detailed information on how to make corrections, make an appointment, or submit a written request can be found at the SAVE Web site at *http://www.USCIS.gov/save*, then by choosing ''How to Correct Your Records'' from the menu on the right.

Travel Authorization and Advance Parole

Individuals covered under DED who would like to travel outside of the United States must apply for and receive advance parole by filing an Application for Travel Document (Form I–131) with required fee before departing from the United States. *See* 8 CFR 223.2(a). DHS has the discretion to determine whether to grant advance parole and cannot guarantee advance parole in all cases. In addition, possession of an advance parole

document does not guarantee that you will be permitted to reenter the United States, as that is a decision that will be made by an immigration officer at the port of entry upon your return. If you seek advance parole to travel to Liberia or to your country of last habitual residence outside the United States, you will risk being found ineligible to re-enter the United States under DED because the Presidential Memorandum excludes persons ''who have voluntarily returned to Liberia or his or her country of last habitual residence outside the United States.''

You may submit your completed Application for Travel Document (Form I–131) with your Application for Employment Authorization (Form I–765). If you choose to file an Application for Travel Document (Form I–131) separately, please submit the application along with supporting documentation that you qualify for DED to the proper address in Table 2.

TABLE 2—MAILING ADDRESSES

If...	Mail to...
You are applying through the U.S. Postal Service.	USCIS, Attn: DED Liberia, P.O. Box 6943, Chicago, IL 60680–6943.
You are using a non-U.S. Postal Service delivery service.	USCIS, Attn: DED Liberia, 131 S. Dearborn 3rd Floor, Chicago, IL 60603–5517.

If you have a pending or approved Application for Employment Authorization (Form I–765), please submit the Notice of Action (Form I–797) along with your Application for Travel Document (Form I–131) and supporting documentation.

Alejandro N. Mayorkas,

Director, U.S. Citizenship and Immigration Services.

[FR Doc. 2013–06519 Filed 3–20–13; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–SM–2013–N068; FXFR13350700640–134–FF07J00000]

North Slope Federal Subsistence Regional Advisory Council Meeting

AGENCY: Forest Service, Agriculture; Fish and Wildlife Service, Interior.

ACTION: Notice of meeting (teleconference).

SUMMARY: This notice informs the public that the North Slope Federal Subsistence Regional Advisory Council (Council) will hold a public meeting by teleconference on April 16, 2013. The public is invited to participate and to provide oral testimony. The purpose of the Council is to provide recommendations and information to the Federal Subsistence Board, to review policies and management plans, and to provide a public forum for subsistence issues.

DATES: The teleconference will take place on April 16, 2013, at 9 a.m. For how to participate, please see **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, by U.S. mail c/o U.S. Fish and Wildlife Service, Attention: Kathleen M. O'Reilly-Doyle, Office of Subsistence Management, 1011 East Tudor Road, Anchorage, AK 99503; by telephone at (907) 786–3888; or via email at *subsistence@fws.gov.* For questions specific to National Forest System lands, please contact Steve Kessler, Subsistence Program Leader, by U.S. mail at USDA, Forest Service, 161 East 1st Avenue, Door 8, Anchorage, AK 99503; by telephone at (907) 743–9461; or via email at *skessler@fs.fed.us.*

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., the North Slope Federal Subsistence Regional Advisory Council will meet to review the draft Tribal Consultation Implementation Guidelines, the rural determination process, and customary and traditional use determinations, and to form other recommendations on fish and wildlife issues.

This meeting is a follow-up to the Council's February 26, 2013, meeting, which made recommendations on changes to the regulations for the subsistence taking of wildlife to the Federal Subsistence Board and to address subsistence issues concerning the region. To participate, call toll free 1–866–560–5984. When prompted, enter the following passcode: 12960066.

Authority: 16 U.S.C. 3, 472, 551, 668dd, 3101–3126; 18 U.S.C. 3551–3586; 43 U.S.C. 1733.

Dated: March 13, 2013.

Kathleen M. O'Reilly-Doyle,

Acting, Assistant Regional Director, U.S. Fish and Wildlife Service, Acting Chair, Federal Subsistence Board.

Dated: March 15, 2013.

Steve Kessler,

Subsistence Program Leader, USDA—Forest Service.

[FR Doc. 2013–06492 Filed 3–20–13; 8:45 am]

BILLING CODE 3410–11–P; 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Class III Gaming Compact.

SUMMARY: This notice publishes approval of the agreement between the Northern Cheyenne Tribe and the State of Montana concerning Class III Gaming (Compact).

DATES: *Effective Date:* March 21, 2013.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710(d)(3)(B), the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. On January 23, 2013, the Compact was submitted for review and approval. The Compact defines Indian lands to include the Tongue River Reservoir Lands and extends the term of the Compact for 20 years from the date of this notice or 15 years from the date Class III gaming is conducted on the Tongue River Reservoir Lands.

Dated: March 8, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2013–06444 Filed 3–20–13; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Amended Gaming Compact.

SUMMARY: This notice publishes the approval of the Amended Gaming Compact between the Sisseton-Wahpeton Sioux Tribe and the State of North Dakota; the Amended Gaming Compact between the Spirit Lake Nation and the State of North Dakota; the Amended Gaming Compact between the Standing Rock Sioux Tribe and the State of North Dakota; the Amended Gaming Compact between the Three Affiliated Tribes of the Fort Berthold Reservation and the State of North Dakota; and the Amended Gaming Compact between the Turtle Mountain Band of Chippewa Indians and the State of North Dakota.

DATES: *Effective Date:* March 21, 2013.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA) Public Law 100–497, 25 U.S.C. 2701(d)(3)(B), the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. On January 24, 2013, the State of North Dakota (State) and five Tribes, the Sisseton-Wahpeton Oyate Tribe of the Lake Traverse Reservation, the Spirit Lake Tribe, the Standing Rock Sioux Tribe of North and South Dakota, the Three Affiliated Tribes of the Fort Berthold Reservation and the Turtle Mountain Band of Chippewa Indians of North Dakota, (Tribes) submitted Amended Class III Tribal-State Compacts for review and approval. The Compacts expand Class III gaming on tribal trust lands and waters within the exterior boundaries of the Tribes' reservations, which are in compliance with the IGRA. The term of the Compacts runs for 10 years from the date of this notice.

Dated: March 12, 2013.

Lawrence S. Roberts,

Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2013–06446 Filed 3–20–13; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Class III Gaming Compact.

SUMMARY: This notice publishes the approval of the Class III Tribal-State Gaming Compact between the Pyramid Lake Paiute Tribe and the State of Nevada (Extension).

DATES: *Effective Date:* March 21, 2013.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. On January 11, 2013, the Pyramid Lake Paiute Tribe and the State of Nevada submitted an Extension for review and approval. The extension changes the term from a 1 year period to a 2 year period.

Dated: March 12, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2013–06447 Filed 3–20–13; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–AKR–CAKR–12504; PPAKAKROR4; PPMPRLE1Y.LS0000]

Notice of Open Public Meetings for the National Park Service Alaska Region's Subsistence Resource Commission Program for Calendar Year 2013

AGENCY: National Park Service (NPS), Interior.

ACTION: Meeting notice.

SUMMARY: As required by the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770), the NPS is hereby giving notice that the Cape Krusenstern National Monument Subsistence Resource Commission (SRC) will hold meetings to develop and continue work on NPS subsistence program recommendations and other related subsistence management issues. The NPS SRC program is authorized under Title VIII, Section 808 of the Alaska National Interest Lands Conservation Act, Public Law 96–487.

Cape Krusenstern National Monument SRC Meeting Date and Location: The Cape Krusenstern National Park SRC will meet from 9:00 a.m. to 5:00 p.m. on Tuesday, April 30 to Wednesday, May 1, 2013, at the National Park Service Northwest Arctic Heritage Center, (907) 442–3890, in Kotzebue, AK. SRC meeting locations and dates may change based on inclement weather or exceptional circumstances. If the meeting date and location are changed, the Superintendent will issue a press release and use local newspapers and radio stations to announce the meeting.

Cape Krusenstern National Monument SRC Proposed Meeting Agenda: The proposed meeting agenda includes the following:

1. Call to Order—Confirm Quorum
2. Welcome and Introductions
3. Review and Adoption of Agenda
4. Approval of Minutes
5. Superintendent's Welcome and Review of the Commission Purpose
6. Commission Membership Status
7. SRC Chair and SRC Members' Reports
8. Superintendent's Report
9. Old Business
   a. Update on National Park Service Local Hire Program
   b. Update on Department of the Interior Tribal Consultation Policies
   c. Human/Wildlife Conflict
   d. Status of Musk Ox Hunt
10. New Business
   a. Red Dog Road Study Update
   b. Marine Resources (Seals/Walrus)
11. Federal Subsistence Board Update
12. Alaska Boards of Fish and Game Update
13. National Park Service Reports
   a. Ranger Update
   b. Resource Management Update
   c. Subsistence Manager's Report
14. Public and Other Agency Comments
15. Work Session
16. Set Tentative Date and Location for Next Subsistence Resource Commission Meeting
17. Adjourn Meeting

FOR FURTHER INFORMATION CONTACT DESIGNATED FEDERAL OFFICIAL: Frank Hays, Superintendent, or Willie Goodwin, Subsistence Manager, at (907) 442–3890 or Clarence Summers, Subsistence Manager, at (907) 644–3603. If you are interested in applying for Cape Krusenstern National Monument SRC membership, contact the Superintendent at Cape Krusenstern National Monument, P.O. Box 1029, Kotzebue, AK 99752, or visit the monument's Web site at: *http://www.nps.gov/cakr/contacts.htm.*

SUPPLEMENTARY INFORMATION: These meetings are open to the public and will have time allocated for public testimony. The public is welcome to present written or oral comments to the

SRC. The meetings will be recorded and meeting minutes will be available upon request from the superintendent for public inspection approximately six weeks after the meeting. Before including your address, telephone 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: March 7, 2013.

Debora Cooper,

Associate Regional Director, Resources and Subsistence, Alaska Region.

[FR Doc. 2013–06422 Filed 3–20–13; 8:45 am]

BILLING CODE 4312–EF–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–12440; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before February 23, 2013. Pursuant to section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by April 5, 2013. 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: February 21, 2013.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

ALASKA

Kodiak Island Borough-Census Area

Cape Alitak Petroglyphs District, Address Restricted, Akhiok, 13000139

CALIFORNIA

Nevada County

Empire Mine Historic District, Address Restricted, Grass Valley, 13000140

Placer County

Burns, Irene, House, (Auburn, CA MPS) 405 Linden Ave., Auburn, 13000141

Tuolumne County

Leighton Encampment, Roughly 12 mi. SW of Pinecrest, Pinecrest, 13000142

DISTRICT OF COLUMBIA

District of Columbia

Langston, John Mercer, School, (Public School Buildings of Washington, DC MPS) 43 P St. NW., Washington, 13000143

Slater, John Fox, Elementary School, (Public School Buildings of Washington, DC MPS) 45 P St. NW., Washington, 13000144

FLORIDA

Pinellas County

McKeage, John & Florence, House, 209 Park St. S., St. Petersburg, 13000145

INDIANA

Marion County

Old Lawrence Town Hall, 4510 Franklin Rd., Lawrence, 13000146

IOWA

Dubuque County

Memorial Building, 340 1st Ave. E., Dyersville, 13000148

Polk County

Fitch, F.W., Company Historic District, 300–306 15th & 1510–1526 Walnut Sts., Des Moines, 13000147

KANSAS

Graham County

Keith, Harry, Barn, (Agriculture-Related Resources of Kansas MPS) 200th Ave. & M Rd., Penokee, 13000149

Logan County

Oakley High School Stadium, (New Deal-Era Resources of Kansas MPS) 118 W. 7th St., Oakley, 13000150

Morton County

Point of Rocks—Middle Spring Santa Fe Trail Historic District, (Santa Fe Trail MPS) 2.5 mi. S. of KS 51 & 2 mi. W. of KS 27, Elkhart, 13000151

MONTANA

Carbon County

Kose Hall, 216 Broadway Ave., Belfry, 13000152

Yellowstone County

Babcock Theatre Building, 114–124 N. 28th & 2808–2812 2nd Aves., Billings, 13000153

NEW HAMPSHIRE

Grafton County

Camp Ossipee, (Squam MPS) 11 & 13 Porter Rd., Holderness, 13000154

Rockingham County

Kensington Town House, 95 Amesbury Rd., Kensington, 13000155

In the interest of preservation, a three day comment period is requested for the following resource:

NEW HAMPSHIRE

Strafford County

Woodbury Mill,
1 Dover St., Dover, 13000156

[FR Doc. 2013–06449 Filed 3–20–13; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–865]

Certain Balloon Dissection Devices and Products Containing Same; Commission Determination Not To Review an Initial Determination Granting a Joint Motion To Correct the Named Respondents and Terminate the Investigation Based on a Consent Order Stipulation; Issuance of Consent Order

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. 3) of the administrative law judge (''ALJ'') granting a joint motion to correct the named respondents and terminate the above-captioned investigation based on a consent order stipulation. The Commission has issued the subject consent order.

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 January 31, 2013 based on a complaint filed on behalf of Covidien LP of Mansfield, Massachusetts (''Covidien'') on December 21, 2012. 78 FR 6838 (January 31, 2013). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the sale for importation, the importation, or sale in the United States after importation of certain balloon dissection devices and products containing same by reason of infringement of certain claims of U.S. Patent No. 6,312,442 (''the '442 patent''). The notice of investigation named as respondents Pajunk Medizintechnik GmbH of Geisingen, Germany; Pajunk Medizintechnologie GmbH of Geisingen, Germany; and Pajunk Medical Systems LP of Norcross, Georgia.

On February 8, 2013, complainant Covidien and respondents Pajunk GmbH Medizintechnologie and Pajunk Medical Systems LP filed a motion to (1) correct the named respondents; (2) stay the procedural schedule; and (3) terminate the investigation on the basis of a consent order stipulation and consent order. The motion seeks to correct the named respondents by terminating ''Pajunk Medizintechnik GmbH'' because it does not exist as a legal entity and correcting named respondent ''Pajunk Medizintechnologie GmbH'' to its proper name, ''Pajunk GmbH Medizintechnogie.'' On February 11, 2013, the Commission investigative attorney filed a response in support of the motion.

On February 12, 2013, the ALJ issued Order No. 3, granting the motion. The parts of the order correcting the named respondents and terminating the investigation on the basis of a consent order stipulation constitute an ID. The ALJ stated that there is no indication that termination based on the consent order stipulation would have an adverse impact on the public interest. No petitions for review were filed.

Having considered the ID and the relevant portions of the record, the Commission has determined not to review the ID and to issue the subject consent order.

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)).

By order of the Commission.

Issued: March 15, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–06445 Filed 3–20–13; 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—Open Mobile Alliance

Notice is hereby given that, on February 21, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Open Mobile Alliance (''OMA'') 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, the following members have been added as parties to this venture: Aisle411, Inc., Palo Alto, CA; Applied Communication Sciences, Red Bank, NJ; CallUp net Ltd., Rosh Haayin, ISRAEL; Cybage Software Private Limited, Vadgaon Sheri, Pune, INDIA; DGIST Daegu Gyeongbuk Institute of Science & Technology, Dalseong-Gun, Daegu, REPUBLIC OF KOREA; InvisiTrack, Inc., Annapolis, MD; KWISA, Gangnam-gu, Seoul, REPUBLIC OF KOREA; Layer 7 Technologies, Vancouver, British Columbia, CANADA; Masang Soft., Inc., SeochGu, Seoul, REPUBLIC OF KOREA; Sensinode Ltd., Oulu, FINLAND; and Seven Networks International Oy, Espoo, FINLAND.

The following members have been withdrawn as parties to this venture: DAO Lab Ltd., Shatin, N.T., HONG–KONG CHINA; Dynamic Motion Technologies, Ipoh, Perak, MALAYSIA; Emtrace Technologies, Inc., Gangnam-Gu, Seoul, REPUBLIC OF KOREA; Flextronics (China) Electronics Technology Co., Ltd., Haidian District, Beijing, PEOPLE'S REPUBLIC OF CHINA; Hand Cell Phone, Chattanooga, TN; Insprit, Seoul, REPUBLIC OF KOREA; KT Corp., Seocho-dong, Seocho-gu, Seoul, REPUBLIC OF KOREA; Mobile Tag SAS, Paris, FRANCE; mquadr.at software engineering & consulting GmbH, Vienna, AUSTRIA; NeoMedia Technologies, Inc., Atlanta, GA; Neustar Inc., Sterling, VA; NVIDIA Development UK Ltd., Bristol, UNITED KINGDOM; Polaris Wireless, Mountain View, CA; RealNetworks, Inc., Seattle, WA; SeeRoo Information Co., Ltd., Songpa-gu, Seoul, REBUPLIC OF KOREA; Simartis Telecom SRL, Bucharest, ROMANIA; Smartontech Co., Ltd., Ebene, Mauritius, DENMARK; Songdo Telecom, Inc., Yeonsu-gu, Incheon, REPUBLIC OF KOREA; Synchronica plc, Lonsdale Gardens, Royal Tunbridge Wells, UNITED KINGDOM; Tekelec, Morrisville, NC; and Verimatrix, Inc., San Diego, CA.

The following members have changed their names: Motorola Mobility Inc. to Motorola Mobility LLC, Schaumburg, IL; SK Telecom to SK Planet, Seoul; REPUBLIC OF KOREA; Sony Ericsson Mobile Communications, AB to Sony Mobile Communications AB, Stockholm, SWEDEN; and mobilkom austria AG to Telekom Austria AG, Wien, AUSTRIA.

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 OMA intends to file additional written notifications disclosing all changes in membership.

On March 18, 1998, OMA 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 December 31, 1998 (63 FR 72333).

The last notification was filed with the Department on February 27, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on March 15, 2012 (FR 77 15395).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–06518 Filed 3–20–13; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Global Climate and Energy Project

Notice is hereby given that, on February 22, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''),

Global Climate and Energy Project (''GCEP'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its nature and objectives. 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, the members of GCEP have amended the agreement between them to update the list of project research that has been authorized by the members and to extend the termination of GCEP, which currently will terminate August 31, 2015.

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 GCEP intends to file additional written notifications disclosing all changes in membership.

On March 12, 2003, GCEP 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 4, 2003 (68 FR 16552).

The last notification was filed with the Department on February 17, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on March 23, 2012 (77 FR 17095).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–06525 Filed 3–20–13; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Interchangeable Virtual Instruments Foundation, Inc.

Notice is hereby given that, on February 22, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Interchangeable Virtual Instruments Foundation, Inc. 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, DRS Sustainment Systems, St. Louis, MO, has withdrawn 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 Interchangeable Virtual Instruments Foundation, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 29, 2001, Interchangeable Virtual Instruments Foundation, Inc. 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 July 30, 2001 (66 FR 39336).

The last notification was filed with the Department on December 6, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 2, 2013 (78 FR 117).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–06523 Filed 3–20–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—PXI Systems Alliance, Inc.

Notice is hereby given that, on February 22, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), PXI Systems Alliance, Inc. 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, C&H Technologies, Inc., Round Rock, TX; and VI Service Network, Shanghai, PEOPLE'S REPUBLIC OF CHINA, have been added as parties to this venture.

Also, LeCroy Corporation, Chestnut Ridge, NY; and Dow-Key Microwave, Ventura, CA, 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 PXI Systems Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On November 22, 2000, PXI Systems Alliance, Inc. 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 March 8, 2001 (66 FR 13971).

The last notification was filed with the Department on December 6, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 2, 2013 (78 FR 117).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–06520 Filed 3–20–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—DVD Copy Control Association

Notice is hereby given that, on February 20, 2013, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), DVD Copy Control Association (''DVD CCA'') 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, Optis Co., Ltd., Gyeonggi-do, REPUBLIC OF KOREA, has been added as a party to this venture.

Also, Advanced Driver Information Technology, Aichi-Ken, JAPAN; Cirrus Logic, Inc. Fremont, CA; Everbest Technology Development Ltd., North Point, HONG KONG–CHINA; and National Semiconductor Corp., Santa Clara, CA, have withdrawn as parties to this venture.

In addition, Arvato Digital Services GmbH has changed its name to Arvato Entertainment Europe GmbH, Gutersloh, GERMANY; and Hyundai Digital Technology Co., Ltd. has changed its name to JB Amusement Co., Ltd., Kyoungki-do, REPUBLIC OF KOREA.

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 DVD CCA intends to file additional written notifications disclosing all changes in membership.

On April 11, 2001, DVD CCA 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 August 3, 2001 (66 FR 40727).

The last notification was filed with the Department on December 3, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on January 2, 2013 (78 FR 118).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2013–06522 Filed 3–20–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2012–0015]

Kiewit Power Constructors Co. et al.; Application for a Permanent Variance and Request for Comments

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of an application for a permanent variance and request for comments.

SUMMARY: Since 1973, the Occupational Safety and Health Administration (OSHA) has granted permanent variances to a number of chimney-construction companies from the provisions of the OSHA standards that regulate boatswain's chairs and hoist towers, specifically paragraph (o)(3) of 29 CFR 1926.452 and paragraphs (c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16) of 29 CFR 1926.552. These variances use temporary personnel-hoisting systems to transport workers to and from worksites in a personnel cage while constructing tapered chimneys using formwork techniques and procedures. Recently, the Agency received applications from 15 employers for a variance addressing chimney and chimney-related construction that, like the previous variances, propose to use temporary personnel-hoisting systems to transport workers to and from worksites in a personnel cage. These variance applications, however, included conditions that address construction of chimneys and chimney-related structures using temporary hoisting systems and procedures in association with two different methods of construction (i.e., formwork and slip-form construction) and two different structural configurations (i.e., tapered and straight-barreled). OSHA consolidated these variance applications into a single application for publication in this **Federal Register** notice. OSHA invites the public to submit comments on this variance application to assist the Agency in determining whether to grant the companies a permanent variance based on the conditions specified in this application.

DATES: Submit comments and requests for a hearing (postmarked, sent, or received) by April 22, 2013.

ADDRESSES: *Electronic.* Submit comments and requests for a hearing electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments, and clearly indicate the docket number in the submission (OSHA–2012–0015).

Facsimile. OSHA allows facsimile transmission of comments that are 10 pages or fewer in length (including attachments), as well as hearing requests. Send these comments and requests to the OSHA Docket Office at (202) 693–1648; OSHA does not require hard copies of comments or hearing requests.

Instead of transmitting facsimile copies of attachments that supplement their comments (e.g., studies and journal articles), commenters may submit these attachments, in triplicate hard copy, to the OSHA Docket Office, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210. These attachments must clearly identify the sender's name, date, subject, and docket number (i.e., OSHA–2012–0015) so that the Agency can attach them to the appropriate comments.

Regular mail, express delivery, hand delivery, and messenger (courier) service. Submit comments and any additional material (e.g., studies and journal articles), as well as hearing requests, to the OSHA Docket Office, Docket No. OSHA–2012–0015, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210; telephone: (202) 693–2350 (OSHA's TTY number is (877) 889–5627). Contact the OSHA Docket Office for information about security procedures concerning the delivery of materials by express delivery, hand delivery, and messenger service. The hours of operation for the OSHA Docket Office and Department of Labor are 8:15 a.m. to 4:45 p.m., e.t.

Instructions. All submissions must include the Agency name and the OSHA docket number (i.e., OSHA Docket No. OSHA–2012–0015). OSHA will place comments and other material, including any personal information, in the public docket without revision, and these comments and material will be available online at *http://www.regulations.gov.* Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

Docket. To read or download comments or other material in the docket, go to *http://www.regulations.gov* or to the OSHA Docket Office at the address above. The electronic docket for this variance application established at *http://www.regulations.gov* lists most of the documents in the docket; however, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

General information and press inquiries. Frank Meilinger, Director, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1999.

Technical information. Stefan Weisz, Office of Technical Programs and Coordination Activities, Room N–3655, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–2110; fax: (202) 693–1644.

SUPPLEMENTARY INFORMATION:

*Copies of this **Federal Register** notice.* Electronic copies of this **Federal Register** rule are available at *http://www.regulations.gov.* This **Federal Register** notice, as well as news releases and other relevant information, also are available at OSHA's Web page at *http://www.osha.gov.*

According to 29 CFR 1905.15, hearing requests must include: (1) A short and plain statement detailing how the proposed generic variance would affect the requesting party; (2) a specification of any statement or representation in the variance application that the commenter denies, and a concise summary of the evidence adduced in support of each denial; and (3) any views or arguments on any issue of fact or law presented in the variance application.

I. Notice of Application

Fifteen companies (or applicants) submitted applications for a permanent variance under Section 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655) and 29 CFR 1905.11 (''Variances and other relief under section 6(d)'') (see Document ID Nos. OSHA–2012–0015–0001 to –0015 [1]). The applicants construct, renovate, repair, maintain, inspect, and demolish tall chimneys and similar structures made of concrete, brick, and steel. This work, which occurs throughout the United States, requires the applicants to transport employees and construction tools and materials to and from elevated worksites located inside and outside these structures. The following list provides specific information about each applicant, including the company name and location:

Avalotis Corp., 400 Jones Street, Verona, PA 15147.

Bowen Engineering Corporation (merged with Mid-Atlantic Boiler & Chimney, Inc. (formerly Alberici Mid-Atlantic, LLC)), 8802 N. Meridian St., Indianapolis, IN 46260.

Commonwealth Dynamics, Inc., 95 Court Street, Portsmouth, NH 03801.

Gibraltar Chimney International, LLC, 92 Cooper Ave., Tonawanda, NY 14150.

Hamon Custodis, Inc. (formerly Custodis Construction Co., Inc., then Custodis Cuttrell, Inc.), 58 East Main Street, Somerville, NJ 08876.

Hoffmann, Inc., 6001 49th Street South, Muscatine, IA 52761.

International Chimney Corporation, 55 South Long Street, Williamsville, NY 14221.

Karrena International Chimney, 57 South Long Street, Williamsville, NY 14221.

Kiewit Power Constructors Co., 9401 Renner Blvd., Lenexa, KS 66219.

Matrix SME, Inc. (formerly Matrix Service Industrial Contractors, Inc.), 1510 Chester Pike, Suite 500, Eddystone, PA 19022.

NAES Power Contractors (formerly American Boiler and Chimney Company), 167 Anderson Rd., Cranberry Township, PA 16066.

Pullman Power, LLC (formerly M. W. Kellogg Co., then Pullman Power Products Corporation), 6501 E. Commerce Avenue, Suite 200, Kansas City, MO 64120.

R and P Industrial Chimney Co., Inc., 244 Industrial Parkway, Nicholasville, KY 40356.

T.E. Ibberson, 828 5th St. South, Hopkins, MN 55343.

TIC-The Industrial Company, 9780 Mt. Pyramid Ct., Suite 100, Englewood, CO 80112.

The applicants seek a permanent variance from paragraphs (c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16) of 29 CFR 1926.552 that regulate hoist towers. These paragraphs specify the following requirements:

- (c)(1)—Construction requirements for hoist towers outside a structure;
- (c)(2)—Construction requirements for hoist towers inside a structure;
- (c)(3)—Anchoring a hoist tower to a structure;
- (c)(4)—Hoistway doors or gates;
- (c)(8)—Electrically interlocking entrance doors or gates to the hoistway and cars;
- (c)(13)—Emergency stop switch located in the car;
- (c)(14)(i)—Using a minimum of two wire ropes for drum hoisting; and
- (c)(16)—Material and component requirements for construction of personnel hoists.

The applicants contend that the permanent variance would provide their employees with a place of employment that is at least as safe and healthful as they would receive under the existing provisions.

The places of employment affected by this variance application are the present and future projects where the applicants construct tapered chimneys and small-diameter, straight-barreled chimneys and chimney-related structures using formwork techniques and procedures, and straight-barreled chimneys and chimney-related structures of any diameter using slip-form techniques and procedures, when such construction involves the use of temporary personnel hoisting systems. These projects would be in states under federal authority, as well as State-Plan states that have safety and health plans approved by OSHA under Section 18 of the Occupational Safety and Health (OSH) Act (29 U.S.C. 667) and 29 CFR part 1952 (''Approved State Plans for Enforcement of State Standards''). Each applicant certifies that it provided the employee representative of the affected employees [2] with a copy of its variance application. Each applicant also certifies that it notified its employees of the variance application by posting a copy of the application at locations where it normally posts notices to its employees, and by other appropriate means. In addition, each applicant attests that it informed its employees and their representative of their right to petition the Assistant Secretary of Labor for Occupational Safety and Health for a hearing on the variance application.

If granted, the permanent variance would permit the employers to operate temporary hoisting systems to raise and lower workers to and from elevated worksites on (1) small-diameter, straight-barreled chimneys and chimney-related structures, and tapered chimneys, constructed using formwork techniques and procedures, and (2) chimneys and chimney-related structures of any diameter constructed using slip-form techniques and procedures. This variance application also will provide consistent variance conditions across the employers named in this application.

II. Multi-State Variance

The applicants state that they perform chimney and other related construction work in a number of states and territories that operate OSHA-approved safety and health programs under Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*). Twenty-seven states and territories have OSHA-approved safety and health programs.[3] The applicants also state that they perform chimney and other related construction work in a number of states and territories that operate OSHA-approved safety and health programs. As part of this variance process, the Directorate of Cooperative and State Programs will notify the State-Plan states and territories of this variance application and advise them that unless they object, OSHA will assume the state's position regarding this application is the same as its position regarding prior variance applications involving chimney construction.

In this regard, 17 State-Plan states and one territory have standards identical to the Federal OSHA standards: Alaska, Arizona, Hawaii, Indiana, Iowa, Kentucky, Maryland, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Vermont, Virginia, and Wyoming. However, Hawaii and Iowa previously declined to accept the terms of variances for chimney-related

[1] In Docket No. OSHA–2012–0015 for this variance application.

[2] ''Affected employees'' are employees affected by the permanent variance should OSHA grant it.

[3] Four State-Plan states (Connecticut, Illinois, New Jersey, and New York) and one territory (Virgin Islands) limit their occupational safety and health authority to public-sector employers only. State-Plan states and territories that exercise their occupational safety and health authority over both public-sector and private-sector employers are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

construction work granted previously by Federal OSHA. Kentucky stated that its statutory law requires affected employers to apply to the state for a state variance. South Carolina noted that, for the South Carolina Commissioner of Labor to accept a Federal OSHA grant of a variance, employers must file the grant at the Commissioner's office in Columbia, South Carolina. Employers must comply with any special variance procedures required by these states prior to initiating chimney-related construction work addressing the conditions specified by this variance application.

Four states (California, Michigan, Utah, and Washington) have different requirements for chimney-related construction work than Federal OSHA standards. Michigan noted that its standards are not identical to the OSHA standards and those employers electing to use a variance in that state must comply with several provisions in the Michigan standards not addressed in the OSHA standards. Utah also imposed specific additional requirements in the past when Federal OSHA granted similar variances for chimney-related construction work. California and Washington declined to accept the terms of variances for chimney-related construction work granted by Federal OSHA in the past. Employers must be prepared to apply separately to these states for a variance from chimney-related construction work addressing the conditions specified by this variance application.

The remaining states and territories with OSHA-approved state plans (Connecticut, Illinois, New Jersey, New York, and the Virgin Islands) cover only public-sector workers and have no authority over the private-sector workers addressed in this variance application (i.e., that authority continues to reside with Federal OSHA).

III. Supplementary Information

A. Background

Since 1973, the Agency has granted permanent variances to a number of chimney-construction companies from the provisions of the OSHA standards that regulate boatswain's chairs and hoist towers, specifically, paragraph (o)(3) of 29 CFR 1926.452 and paragraphs (c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16) of 29 CFR 1926.552.[4] The National Stack and Chimney Safety and Health Advisory Committee reports [5] that four of its member companies (i.e., Pullman Power, Hamon Custodis, International Chimney Corp, and Commonwealth Constructors) using temporary personnel-hoisting systems in accordance with the conditions of the present permanent variances for chimney-related construction work had no recordable injuries or fatalities (as reported on the OSHA 300 Forms [6]) for over the past seven years.

The alternative conditions described in the previous variances are similar to the alternative conditions proposed in this variance application. However, the alternative conditions described in the previous variances applied only to tapered chimneys constructed using formwork techniques and procedures. However, the alternative conditions specified in this variance application would apply to tapered chimneys constructed using formwork techniques and procedures, as well as small-diameter, straight-barreled chimneys and chimney-related structures constructed using formwork techniques and procedures and straight-barreled chimneys and chimney-related structures of any diameter constructed using slip-form techniques and procedures.

B. Kiewit Variance Application

On February 8, 2007, OSHA published a variance application submitted by Kiewit Power Constructors Co. (Kiewit; see 72 FR 6002). This publication included an interim order that permitted Kiewit to use a rope-guided hoist system to transport employees to elevated worksites when it complies with the conditions specified in the variance application. One of the conditions specified in the publication limited the application and interim order to tapered chimneys, which was the basis for previous variance grants made by OSHA to other chimney-construction companies (see subsection A (Background) of this section for a discussion of previously granted chimney variances). Kiewit notified OSHA on February 23, 2007, that it required a permanent variance to perform work on small-diameter, straight-barreled chimneys built using conventional formwork techniques and procedures and straight-barreled chimneys of any diameter built using slip-form construction techniques and procedures, as well as tapered chimneys constructed using formwork techniques and procedures. Kiewit submitted a revised variance application addressing these conditions to OSHA on March 1, 2007 (see Document ID No. OSHA–2012–0015–0015).

According to its March 1, 2007, variance application, Kiewit was seeking a variance from the provisions of OSHA standards that regulate boatswain's chairs and hoist towers for the construction of small-diameter, straight-barreled chimneys constructed using formwork techniques and procedures, and chimneys of any diameter constructed using slip-form techniques and procedures. Regarding small-diameter, straight-barreled chimneys constructed using formwork techniques and procedures, Kiewit contended that the extreme height and limited space inside these chimneys make it infeasible to attach a hoist tower to the interior walls of the chimneys during construction. In some cases, it also is infeasible to use a personnel cage in small-diameter, straight-barreled chimneys. Under these conditions, Kiewit proposed to adopt alternative measures of complying with the relevant boatswain's-chair and personnel-platform requirements.

With respect to straight-barreled chimneys constructed using slip-form techniques and procedures, Kiewit asserted that the unique techniques and procedures involved in slip-form construction make it difficult and unsafe to attach a hoist tower to both the interior and exterior walls of a chimney during construction. Slip-form construction is an alternative to using formwork techniques and procedures to shape concrete structures, including chimney walls. When using slip-form techniques and procedures to construct chimney walls, Kiewit pours concrete into forms attached to a platform that moves slowly up climbing rods imbedded in the previously poured concrete wall or a mast secured to the interior floor of the structure. Kiewit's employees operate the platform, pour the fresh concrete, inspect the formed concrete, and perform other tasks both inside and outside the chimney from a work deck on the platform, as well as from scaffolds hung from the platform. As a result of this progressive construction process, the concrete wall immediately below the platform for a distance of 20 to 30 feet is insufficiently cured to safely attach a hoist tower to the wall. Consequently, during slip-form construction, it is difficult to safely attach a hoist tower either inside or outside the chimney wall for the

[4] See 38 FR 8545 (April 3, 1973), 44 FR 51352 (August 31, 1979), 50 FR 20145 (May 14, 1985), 50 FR 40627 (October 4, 1985), 52 FR 22552 (June 12, 1987), 68 FR 52961 (September 8, 2003), 70 FR 72659 (December 6, 2005), 71 FR 10557 (March 1, 2006), 72 FR 6002 (February 8, 2007), 74 FR 34789 (July 17, 2009), 74 FR 41742 (August 18, 2009), and 75 FR 22424 (April 28, 2010).

[5] Private communication from Mr. John Huchko, Secretary of the National Stack and Chimney Safety and Health Advisory Committee, January 2, 2013.

[6] See 29 CFR part 1904, Recording and Reporting Occupational Injuries and Illnesses.

purpose of transporting employees to elevated worksites, at least for the last 20 to 30 feet of elevation.

Kiewit proposed to use a rope-guided hoist system to raise and lower personnel-transport devices.[7] This system would consist of a hoist engine, located and controlled outside the chimney, to power the rope-guided hoist system. The system also would consist of a wire rope that: Spools off the hoist drum into the interior of the chimney; passes to a footblock that redirects the rope from the horizontal to the vertical plane; goes from the footblock through the overhead sheaves above the elevated platform at the cathead; and finally drops to the bottom landing of the chimney where it connects to the personnel or material transport.[8] The cathead, which is a superstructure at the top of a derrick, supports the overhead sheaves. The overhead sheaves (and the vertical span of the hoist system) move upward with the derrick as chimney construction progresses. Two guide ropes, suspended from the cathead, eliminate swaying and rotation of the load (including a cage). If the hoist rope breaks, safety clamps activate and grip the guide ropes to prevent the load from falling. Kiewit would use a headache ball, located on the hoist rope directly above the load, to counterbalance the rope's weight between the cathead sheaves and the footblock.

Kiewit proposed to implement additional conditions to improve employee safety, including:

- Attaching the wire rope to the personnel cage using a keyed-screwpin shackle or positive-locking link;
- Adding limit switches to the hoist system to prevent overtravel by the personnel-transport or material-transport devices;
- Providing the safety factors and other precautions required for personnel hoists as specified by the pertinent provisions of 29 CFR 1926.552(c), including canopies and shields to protect employees located in a personnel cage from material that may fall during hoisting and other overhead activities;
- Providing falling-object protection for personnel platforms as specified by 29 CFR 1926.451(h)(1);
- Conducting tests and inspections of the hoist system as required by 29 CFR 1926.20(b)(2) and 1926.552(c)(15);
- Establishing an accident-prevention program that conforms to 29 CFR 1926.20(b)(3);
- Ensuring that employees who use a personnel platform or boatswain's chair wear full-body harnesses and lanyards, and that they attach the lanyards to independent lifelines during the entire period of vertical transit; and
- Securing the lifelines (used with a personnel platform or boatswain's chair) to the rigging at the top of the chimney and to a weight at the bottom of the chimney to provide maximum stability to the lifelines.

Paragraph (c) of 29 CFR 1926.552 specifies the requirements for enclosed hoist systems used to transport personnel from one elevation to another. This paragraph ensures that employers transport employees safely to and from elevated work platforms by mechanical means during the construction, alteration, repair, maintenance, or demolition of structures such as chimneys. However, this paragraph does not provide specific safety requirements for hoisting personnel to and from elevated work platforms and scaffolds used in straight-barreled chimneys constructed using formwork or slip-form techniques and procedures, which require frequent relocation of, and adjustment to, work platforms and scaffolds. Kiewit contended in its variance application that the great height and limited space of small-diameter, straight-barreled chimneys built using formwork techniques and procedures make it infeasible to attach a hoist tower to the interior walls of these chimneys during construction. With respect to slip-form chimneys, Kiewit asserted that, because of the progressive process involved in constructing slip-form chimneys, the concrete wall immediately below the work platform for a distance of 20 to 30 feet is insufficiently cured to safely attach a hoist tower. Consequently, Kiewit cannot attach a hoist tower securely to either the inside or outside of the chimney wall for the purpose of transporting employees to the work platform, at least for the last 20 to 30 feet of elevation.

Paragraph (c)(1) of 29 CFR 1926.552 requires employers to enclose hoist towers on the side or sides used for entrance to, and exit from, the chimney; these enclosures must extend the full height of the hoist tower. Paragraph (c)(2) specifies that employers must enclose all four sides of a hoist tower. This enclosure also must extend the full height of the tower. Again, Kiewit argued that these paragraphs are inapplicable because constructing hoist towers inside small-diameter, straight-barreled chimneys is infeasible, while attaching hoist towers to either the inside or outside walls of slip-form chimneys is impossible, at least for the last 20 or 30 feet of elevation.

As an alternative to complying with the hoist-tower requirements of 29 CFR 1926.552(c)(1) and (c)(2), Kiewit proposed to use the rope-guided hoist system described previously in this preamble to transport its employees to and from elevated work platforms and scaffolds. Use of this hoist system would eliminate the need for Kiewit to comply with other provisions of 29 CFR 1926.552(c) that specify requirements for hoist towers. Therefore, Kiewit requested a permanent variance from these other provisions, as follows:

- (c)(3)—Anchoring the hoist tower to a structure;
- (c)(4)—Hoistway doors or gates;
- (c)(8)—Electrically interlocking entrance doors or gates that prevent hoist movement when the doors or gates are open;
- (c)(13)—Emergency stop switch located in the car;
- (c)(14)(i)—Using a minimum of two wire ropes for drum-type hoisting; and
- (c)(16)—Construction specifications for personnel hoists, including materials, assembly, structural integrity, and safety devices.

C. The Current Variance Application

The conditions proposed in the current variance application differ somewhat from the conditions included in the most recent permanent variance granted by OSHA for chimney construction, which was to Avalotis Corp. (Avalotis; 75 FR 22424). The following table provides a brief summary of the differences between the conditions in the Avalotis variance and the conditions described in the current variance application.

[7] Throughout the document, ''rope'' refers only to wire rope.

[8] While Kiewit proposed to use temporary personnel hoisting systems solely to transport employees with the tools and materials necessary to do their work (i.e., Kiewit would not use these systems to transport only materials or tools in the absence of employees), it would attach a hopper or concrete bucket to the empty cage to raise or lower material to the worksite.

Conditions in the Avalotis variance	Conditions in the current variance application	Differences in conditions
1. Scope of the Permanent Variance.	1. Scope	Broadens the scope to include work on straight-barreled chimneys and chimney-related structures; does not limit the scope to tapered chimneys, which was the limitation imposed by the Avalotis variance.
2. Replacing a Personnel Cage With a Personnel Platform or a Boatswain's Chair.	2. Application	New condition; addresses the application of the variance, and specifies a number of best practices and other requirements employers must meet for the variance to apply. Also provides the option of replacing a personnel cage with a personnel platform or a boatswain's chair for the construction of tapered chimneys only.
3. Definitions	3. Definitions	New condition; defines 29 key terms, usually technical terms, used in the variance to standardize and clarify the meaning of these terms.
4. Qualified Competent Person	4. Qualified and Competent Person(s).	Corrects the inadvertent use of the combined terms ''qualified'' and ''competent'' person(s) into ''qualified competent person.''
5. Hoist Machine	5. Hoist Machine	Updates the requirements for the design and use of hoist machines based on guidance provided by ANSI A10.22–2007.
6. Methods of Operation	6. Methods of Operation	Expands and clarifies the training requirements for both the operators of the hoist machine and the employees who ride in the cage. The proposed condition adopts several provisions of ANSI A10.22–2007.
7. Hoist Rope	7. Hoist Rope	Revises the safety factor used for the hoist rope and updates the requirements for rope lay based on guidance provided by ANSI A10.22–2007.
8. Footblock	8. Footblock	Revises the safety factor for rated workloads and updates the requirements for the design and use of footblocks based on guidance provided by ANSI A10.22–2007.
9. Cathead and Sheave	9. Cathead and Sheaves	Revises the requirements for the design and use of catheads and sheaves based on guidance provided by ANSI A10.22–2007.
10. Guide Ropes	10. Guide Ropes	Revises the requirements for the design and use of guide ropes based on guidance provided by ANSI A10.22–2007.
11. Personnel Cage	11. Personnel Cage	Revises the requirements for the design and use of personnel cages based on guidance provided by ANSI A10.22–2007.
12. Safety Clamps	12. Safety Clamps	Minor revisions and clarification of terms used.
13. Overhead Protection	13. Overhead Protection	Contains a new requirement, in performance-based language, providing overhead protection for workers accessing the bottom landing.
14. Emergency-Escape Device	14. Emergency-Escape Device	Minor revisions and clarification of terms used.
15. Personnel Platforms	15. Personnel Platforms and Boatswain's Chairs.	Contains new provisions for the use of a personnel platform or a boatswain's chair by requiring compliance with the applicable portions of 29 CFR 1926.1431 and 1926.452(o)(3).
16. Protecting Workers From Fall and Shearing Hazards.	16. Protecting Workers from Fall and Shearing Hazards.	Minor revisions.
17. Exclusion Zone	17. Exclusion Zone	Specifies new requirements for establishing an exclusion zone.
18. Inspections, Tests, and Accident Prevention.	18. Inspections, Tests, and Accident Prevention.	Expands and describe the inspection, test, and accident-prevention requirements.
19. Welding	19. Welding	Adds definition for ''qualified'' welder.
20. OSHA Notification	20. OSHA Notification	Revises the requirements for, and description of, employers' duty to notify OSHA of events and conditions associated with their hoisting operations.

The remainder of this subsection provides additional detail about the conditions proposed in this variance application and distinguishes, as appropriate, between these proposed conditions and the conditions in the Avalotis variance.[9]

1. Proposed Condition 1: Scope

Several important revisions occur in the first condition covering the scope of the variance application. Proposed Condition 1(a) of the variance application broadens the scope of the former variance to include work on small-diameter, straight-barreled chimneys and chimney-related structures constructed using formwork techniques and procedures, and to straight-barreled chimneys and chimney-related structures of any diameter constructed using slip-form techniques and procedures. The variance application, therefore, does not limit the scope to tapered chimneys, which was the limitation imposed by the former variance, nor does it limit the scope to chimneys. OSHA believes that the employers can apply the conditions specified in the variance application safely to structures that have a configuration similar to that of chimneys (i.e., ''chimney-related structures''), including silos, towers, and other circular structures, because the hazards associated with these structures (e.g., falls, impacts, falling objects) are the same as the hazards associated with straight-barreled chimneys. Therefore, it is not the name of the structure, but its configuration (i.e., straight or tapered, and barrel shaped), that determines whether it would be within the scope of the variance.

Further, proposed Condition 1(a) clarifies that the variance would apply to ''construction,'' which includes construction, renovation, repair, maintenance, inspection, and demolition of chimney-related structures. The variance would not apply to work that falls under OSHA's general industry standards at 29 CFR part 1910. The variance would only apply to work that falls under OSHA's

[9] The discussion below will refer to the Avalotis variance and its conditions using the terms ''former'' and ''formerly.''

construction standards at 29 CFR part 1926. Various letters of interpretation and directives establish the factors that determine whether maintenance work falls under general industry or construction standards. Generally, work that replaces a structure or component with an identical structure or component is under the general industry standards, while construction standards cover work that improves a structure or component. Additionally, scale and complexity of the work are factors. Work involving repair, removal, or replacement of large structures (e.g., when replacing a steel beam in a building), or work involving complex steps, tools, or equipment (e.g., when replacing a section of limestone cladding on a building), is construction work. See OSHA's November 18, 2003, letter of interpretation to Raymond V. Knobbs (available at *http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24789)* for more information about how to determine if general industry or construction standards cover specific work. Some simple maintenance work on chimney-related structures may fall under general industry standards and, thus, be outside the scope of this variance.

Subparagraphs (1)(a)(i) and (1)(a)(ii) of proposed Condition 1 expand on former Conditions 1(b)(i) and 1(b)(ii) by clarifying what material employers can hoist. These subparagraphs make clear that the ''temporary hoisting systems'' may not transport construction materials concurrently with personnel. Proposed Condition 2(c) under ''Application'' further clarifies this hoisting requirement.

The variance application does not provide a specific dimension or measurement for small-diameter chimneys and chimney-related structures constructed in a straight-barreled configuration using formwork techniques and procedures. Instead, as noted in proposed Condition 1(b), the variance application bases what constitutes a small diameter on a demonstration by the employer that it is infeasible to erect a hoist tower either inside or outside the structure. Therefore, an employer constructing a straight-barreled chimney or chimney-related structure using formwork techniques and procedures could not apply the conditions, including the temporary personnel-hoisting systems, specified in the variance to these chimneys and chimney-related structures unless the employer demonstrates that it is infeasible to construct a hoist tower to raise and lower workers, equipment, and materials to worksites either inside or outside the chimney or chimney-related structure.[10]

The variance application modifies former Condition 1(c), which addressed personnel platforms and boatswain's chairs, by introducing new Condition 2(g). The variance application did not include requirements for personnel platforms and boatswain's chairs because employers have alternate equipment (reflecting advances in technology) available to accomplish tasks that previously required personnel platforms or boatswain's chairs raised and lowered by a hoist system. However, proposed Condition 2(g) provides the option of replacing a personnel cage with a personnel platform or a boatswain's chair for the construction of tapered chimneys only. OSHA would still enforce the provisions in §§ 1926.452(o) and .1431(s), and other applicable standards, when employers use personnel platforms and boatswain's chairs on straight-barreled and slip-form chimneys.

Proposed Condition 2(d) leaves intact the remainder of former Condition 1(c). Except for the requirements specified for hoist towers by 29 CFR 1926.552(c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16), the proposed and former conditions require employers to comply fully with the applicable provisions of 29 CFR parts 1910 and 1926.

2. Proposed Condition 2: Application

Proposed Condition 2 addresses the application of the variance, and specifies a number of best practices and other requirements employers must meet for the variance to apply. For example, proposed Condition 2(a) states a general applicability requirement:

> The employer must use a hoist system equipped with a dedicated personnel-transport device (i.e., a personnel cage) as specified in this variance to raise or lower its workers and/or other construction-related tools, equipment, and supplies between the bottom landing of a chimney-related structure and an elevated work location while performing construction inside and outside the structure.

Proposed Condition 2(b) ensures the proper design and operation of the hoist system, while proposed Condition 2(c) regulates the transportation of materials and proper use of material-transport devices so as to ensure employee safety.

As noted above in the discussion of proposed Condition 1, proposed Condition 2(d) leaves intact the remainder of former Condition 1(c), which states that the variance conditions cover only specific requirements for hoist towers, and that employers must comply with all other applicable requirements of 29 CFR parts 1910 and 1926. If an employer is not complying with a condition specified by the variance, the Agency will implement the citation policy described in OSHA's Field Operations Manual (Directive Number: CPL 02–00–150), Chapter 3, Inspection Procedures (Section I: Variances). The citation policy states:

> 1. *No Citation Issued.* An employer granted a variance will not be subject to citation if the observed condition is in compliance with an existing variance issued to that employer.
>
> 2. *Citations.* In the event that an employer is not in compliance with the requirement(s) of the issued variance, a violation of the applicable standard shall be cited with a reference in the citation to the variance provision that has not been met.

Regarding the second provision of this policy (i.e., ''Citations''), if OSHA finds that an employer is not complying with a variance condition, and the variance condition is not based directly on one of the hoist-tower standards from which OSHA granted the variance (e.g., the condition is based on a consensus standard or best-work practice not specified by an OSHA standard), OSHA will cite the non-compliance as a violation only of the variance provision. Under no circumstances will OSHA cite non-compliance with a variance condition as a violation of both an applicable standard and the variance condition.

Proposed Condition 2(e), not found in the former variance, allows the employer flexibility in the event compliance with a variance condition is infeasible.[11] In such a case, the employer may use an alternative that provides equivalent or improved protection to workers. The employer must demonstrate that compliance with the variance conditions is infeasible and that the alternative is as equivalent to the protection afforded by the variance condition.

Proposed Condition 2(f), the final provision under ''Applications,''

[10] Note that the infeasibility demonstration is separate for work conducted inside or outside the chimney or chimney-related structure. Accordingly, applying the conditions of the variance to work conducted inside a chimney or chimney-related structure would require a demonstration by the employer that it is infeasible to construct a hoist tower inside the chimney or chimney-related structure, while a separate infeasibility demonstration would be necessary for applying the conditions of the variance to work conducted outside a chimney or chimney-related structure.

[11] See OSHA's Field Operations Manuel (FOM) Chapter VIII.E, available at *http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.*

ensures that workers can understand the required communications. This proposed condition requires that employers communicate with workers in a language the workers understand; communications includes any training and signs required by the variance. OSHA considers this proposed condition, not found in the former variance, for employee safety and health in that it is critical that employees understand the hazards associated with personnel-hoisting operations, and the means the employer is using to protect them from these hazards.

The variance application modified Condition 2 of the former variance, entitled ''2. Replacing a Personnel Cage with a Personnel Platform or a Boatswain's Chair.'' Accordingly, proposed Condition 2(g) permits employers to use personnel platforms and boatswain's chairs when using formwork techniques to construct tapered chimneys and small-diameter, straight-barreled chimneys and chimney-related structures, but only under specific, limited conditions. Employers may use personnel platforms and boatswain's chairs only when they demonstrate that it is infeasible to use personnel cages because of space limitations in a tapered chimney or a small-diameter, straight-barreled chimney or chimney-related structure. Under these circumstances, employers would have to use personnel platforms unless space limitations necessitate the use of boatswain's chairs. When replacing a personnel cage with a personnel platform or boatswain's chair, employers would have to follow the requirements of 29 CFR 1926.1431(b) through .1431(s) and 1926.452(o)(3), respectively.

3. Proposed Condition 3: Definitions

Proposed Condition 3 defines 29 key terms, usually technical terms, used in the variance to standardize and clarify the meaning of these terms. This proposed condition was not part of the former variance, but OSHA believes that defining these terms will enhance employer understanding of, and subsequent compliance with, the variance conditions, thereby ensuring that employees receive the requisite level of protection afforded to them by the variance.

4. Proposed Condition 4: Qualified and Competent Person(s)

Proposed Condition 4 addresses the requirements of qualified and competent person(s). In the former variance, OSHA inadvertently combined these terms into ''qualified competent person.'' The terms ''qualified person'' and ''competent person'' have separate definitions in OSHA's construction standards, and this proposed condition uses these terms consistent with their meaning in the construction standards. Although an employee or contract worker can be both a qualified person and competent person, they usually are not. Indeed, § 1926.32(f) defines ''competent person'' as ''one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.'' In contrast, § 1926.32(m) defines ''qualified person'' as ''one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his ability to solve or resolve problems relating to the subject matter, the work, or the project.'' The provisions of proposed Condition 4 distinguish the two terms. Unlike former Condition 3(a)(i), this proposed condition allows for the use of more than one competent and/or qualified person to perform the various tasks. This condition would enable employers to distribute the workload evenly among available personnel and not rely on having available a single individual with expertise in the various tasks.

Proposed Condition 4(a)(ii) emphasizes that, operationally, a competent person (not a ''qualified competent person'' as in former Condition 3(a)(ii)) must be present. Proposed Condition 4(b) requires that a qualified person (not a ''qualified competent person'' as in former Condition 3(b)) must design and maintain the cathead. Finally, proposed Condition 4(c) specifies that the employer must train the competent and qualified persons in the applicable variance provisions. This proposed condition, which is not in the former variance, will ensure that competent persons and qualified persons assigned responsibilities under the variance have the knowledge necessary to perform their tasks effectively under the conditions specified by the variance.

5. Proposed Condition 5: Hoist Machine

Proposed Condition 5 (formerly Condition 4) addresses the requirements of a hoist machine. Proposed Condition 5(a)(i) removes the distinction of ''a portable personnel hoist'' and, instead, designates the hoist machine as a hoist system. Moreover, proposed Condition 5(a)(ii) adds language to ensure the proper use and maintenance of the hoist machine.

Proposed Conditions 5(b) through 5(e), which address raising or lowering a transport, power source, constant-pressure control switch, and line-speed indicator remain as before, with the exception of the former Condition 4(d)(ii) (Constant-pressure control switch), which is substantively addressed in proposed Condition 5(s), Overhead Protection. Note: Employers should consider adopting as a best practice ANSI's A10.22–2007 (at 4.2(2)), which specifies that employers are not to use chains, as well as belts, as drive components between the power source and the winding drum.

Proposed Condition 5(f), Overspeed, is a new condition adapted from ANSI A10.22. It will alert the hoist operator in the event the personnel cage travels at excess speed, thereby preventing speed-related accidents and associated worker injury. The text of proposed Condition 5(g), Braking systems, remains the same as the text of former Condition 4(f). Note that ANSI A10.22–2007 (at Section 4.6) provides additional guidelines for braking systems that employers should consider following.

Proposed Condition 5(h), Slack-rope protection (formerly Condition 4(g), Slack-rope switch), differs somewhat from the former condition by requiring hoist design features that will prevent a slack rope condition. The proposed condition will limit stress on the rope caused by snaps, thereby preventing premature rope failure.

Proposed Condition 5(i), Frame, formerly Condition 4(h), varies slightly from the former condition by ensuring that the frame of the hoist machine meets design specifications, thereby improving hoist machine safety. Proposed Condition 5(j), Stability, formerly Condition 4(i), also is a slight redraft of the former condition. The proposed condition requires employers to secure hoist machines in accordance with design specifications, which will ensure the stability of the hoist machine during operation.

Proposed Condition 5(k), Location, formerly Condition 4(j), is a slight variation of the former condition in that it adds the term ''winding'' for clarification. The footnote in the proposed condition defining the term ''fleet angle'' duplicates a footnote in the former condition.

Proposed Condition 5(l), Drum and flange diameter, formerly Condition 4(k), remains the same as the former condition, while proposed Condition 5(m), Spooling of the rope, formerly Condition 4(l), differs somewhat from the former condition by allowing

employers to store the rope on the drum closer than two inches from the flange when the hoist machine is not in use. The two-inch gap is necessary when the hoist is in operation to prevent the rope from leaving the drum, causing hoisting accidents. However, employers may store the rope closer than two inches from the flange when transporting or storing the drum, which OSHA believes does not endanger employees.

Proposed Condition 5(n) is a new condition that requires employers to secure the rope firmly to the drum. This proposed condition prevents inadvertent unwinding of rope in the event an operator lowers the hoist load beyond its lowest point of travel by requiring employers to ensure that the hoist end of the rope is secured mechanically to the hoist drum.

Proposed Condition 5(o), Electrical system, formerly Condition 4(m), retains the text of the former condition, which reduces the risk of electric shock. Proposed Condition 5(p), Grounding, is a new condition adopted from ANSI A10.22. The proposed condition also will reduce the risk of electric shock.

Proposed Condition 5(q), Limit switches, formerly Condition 4(n), revised the former condition by removing references to boatswain's chair and personnel platform consistent with the scope of the variance application, and by differentiating personnel hoisting from material hoisting.

A new proposed condition, Condition 5(r), ensures proper guarding of the hoist machine. A note added to the proposed condition clarifies that when employers limit access to the hoist drum to only authorized personnel (usually the hoist operator), OSHA will consider the drum as guarded under this condition. This new condition will prevent inadvertent operation of the hoist machine, which could endanger employees involved in the hoisting operations.

As indicated above under the discussion of proposed Conditions 5(b) through 5(e), proposed Condition 5(s), Overhead protection, is an adaptation of former Condition 4(d)(ii). The proposed condition will protect the hoist operator and the hoist machine from falling or moving objects.

6. Proposed Condition 6: Methods of Operation

Proposed Condition 6 (formerly Condition 5), addresses methods of operation. This proposed condition expands and clarifies the training requirements for both the operators of the hoist machine and the employees who ride in the cage. The proposed condition adopts several provisions of ANSI A10.22–2007.

Proposed Condition 6(a)(i) requires employers to ensure that hoist operators and their supervisors receive effective training in the safe operation of hoist machines, and document the training. Proposed Conditions 6(a)(ii) and 6(a)(iii) require that only trained and authorized workers operate the hoist; address the timing of the documented training for each worker that uses the cage for transportation; and specify the frequency of all required training. Proposed Conditions 6(a)(i), (ii), and (iii), which the application based on former Conditions 5(a)(i) and 5(a)(ii), will ensure the safe use of the hoist machine and cage.

Proposed Condition 6(b) is a new condition that requires employers to use a job-hazard analyses (JHA) to provide enhanced jobsite safety by identifying safety hazards at the worksite not covered explicitly by the proposed conditions. OSHA publication 3071, entitled ''Job Hazard Analysis'' defines JHA as follows:

> A job hazard analysis is a technique that focuses on job tasks as a way to identify hazards before they occur. It focuses on the relationship between the worker, the task, the tools, and the work environment. Ideally, after uncontrolled hazards are identified, steps will be taken to eliminate or reduce them to an acceptable risk-level.

Proposed Condition 6(b) requires that employers conduct one or more JHAs for the operation of the temporary personnel hoist system. The proposed condition also requires employers to review these analyses with the workers exposed to any hazards discovered.

Proposed Condition 6(c), Speed limitations, formerly Condition 5(b), differs from the former condition in that it revises hoist speed requirements. To prevent overtravel accidents, proposed Condition 6(c)(i) adds a requirement to slow the hoist speed at extremes of hoist travel, as well as an overspeed allowance from ANSI A10.22–2007. A note in this proposed condition contains the requirement from former Condition 5(b)(iii) that specifies limits on hoist speed when hoisting material only, again to prevent accidents related to overtravel. Proposed Condition 6(c)(ii) retains the speed limitation in former Condition 5(b)(ii) of 100 feet per minute for personnel platforms and boatswain's chairs when used to transport workers. The slower speed for these devices (compared to personnel cages) is necessary because of the impact and shearing hazards present when workers are using these devices (see discussion below for proposed Condition 16).

Proposed Condition 6(d), Communication, redrafted former Condition 5(c) to clarify the requirement for communication equipment by replacing the term ''voice-mediated intercommunication system'' with the term ''electronic voice-communication system (such as two-way radio)'' to allow employers flexibility in selecting this type of equipment. In addition, as with the former condition, the proposed condition requires that employers maintain at all times communication between the hoist operator and the workers located in a moving personnel cage. OSHA notes that a ''failure of communication'' requiring employers to stop hoisting specified by proposed Condition 6(d)(ii) includes lack of clarity in communication, as well as equipment failure. Accordingly, the proposed condition requires clear and unambiguous communication at all times, thereby ensuring continuous employee protection in the event of procedural or equipment failures.

7. Proposed Condition 7: Hoist Rope

Proposed Condition 7 (formerly 6), addresses the hoist rope. Although proposed Conditions 7(a) and (c) remain the same as former Conditions 6(a) and (c), revisions to the remaining proposed conditions focus on making the requirements consistent with other OSHA standards (e.g., 1926.552(c)(14)(iii)), and adopting updated safety requirements specified by ANSI A10.22–2007. For example, proposed Condition 7(b), Safety factor, increases the safety factor of the rope from 8 to 8.9 times the total suspended load as opposed to ''safe workload'' specified by former Condition 6(b). To clarify the load calculation, the proposed conditions added the parenthetical phrase, ''(including weight of the suspended rope).'' New proposed 7(d), adopted from the ANSI standard, addresses rope lay; this new condition will prevent rope rotation and kinking, thereby reducing stress on the rope and ensuring smooth hoisting operations. Except for minor editorial revisions, the text of proposed Condition 7(e), Inspection, removal, and replacement of hoist ropes, remains the same as the text of former Condition 6(d); this proposed provision will prevent the employer from using hoist ropes that could fail during hoisting operations.

Revisions made to former Condition 6(e) by proposed Condition 7(f), Attachments, provide alternative requirements similar to those in ANSI A10.22–2007. OSHA believes these alternatives will provide safer means of positively connecting and securing the hoist rope to the personnel cage than

provided by the former condition, thus preventing accidents involving connection failure.

The text of provisions (i) through (iv) of proposed Condition 7(g), Wire-rope fastenings, remains much the same as former Condition 6(f)), with only minor editorial revisions. However, proposed Condition 7(g) includes three new provisions, (7(g)(v) through 7(g)(vii), that specify how and when to tighten and retighten clip fastenings. These new provisions should compensate for decreases in rope diameter caused by repeated application of the load and, thus, serve to maintain proper torque on the rope and improve rope integrity. Additionally, the variance application added two new requirements: Proposed Condition 7(h), Rotation-resistant ropes and swivels, and proposed Condition 7(i), Rope protection. These added conditions should increase worker safety by preventing rope damage and improving rope integrity. The proposed conditions also are consistent with provisions in ANSI A10.22–2007, which requires barricading the hoisting rope between the hoisting machine and the footblock, thereby preventing the rope from making abrasive contact with the ground and providing falling-object protection when appropriate.

Since employers are free to exceed the requirements of the proposed conditions (with respect to safety and health protection), employers may use extra-extra-improved plow steel as the rope grade. Note also that ANSI A10.22–2007 (at Section 6) provides additional guidelines for hoist rope that employers should consider following.

8. Proposed Condition 8: Footblock

Proposed Condition 8 (formerly Condition 7) addresses the footblock on hoist machines. Proposed Condition 8(a)(i) revised the safety factor found in the former condition from 4 to 5 times the applied workload [12] to be consistent with the safety factor of the cathead (see proposed Condition 9). Provisions (a)(iii) and (iv) of proposed Condition 8 vary from provisions of former Condition 7(a)(iii) and 7(a)(iv) to be more performance oriented and more consistent with alternatives presented in ANSI A10.22–2007. These revisions will ensure that the moving wire rope effectively and safely accommodates turning from the horizontal to vertical axes as required by the direction of rope travel. While proposed Conditions 8(b) and 8(c) remain the same as former Condition 7(b) and 7(c), the variance application has a new condition, 8(d), that allows a properly mounted sheave as a footblock substitute, consistent with the ANSI standard and proposed Condition 9, Cathead and Sheave. Allowing a sheave substitute also will serve to ensure that the moving wire rope effectively and safely accommodates turning from horizontal to vertical axes as required by the direction of rope travel.

9. Proposed Condition 9: Cathead and Sheaves

Proposed Condition 9 (formerly Condition 8) addresses catheads and sheaves. Proposed Condition 9(a) revises former Condition 8(a) to allow use of aluminum for the cathead because of its light weight, provided the employer complies with the cathead design drawings. Proposed Condition 9(b) remains the same as former Condition 8(b). OSHA believes that following the design drawings, along with the requirements specified by proposed Condition 9(e) (see below), will assure the safety of the cathead. Provisions (c) and (d) of proposed Condition 10 remain as in former Condition 9. However, the proposed conditions consists of three new conditions, (e) through (g), based on the ANSI A10.22–2007 standard. Proposed Condition 9(e), Design basis, requires that the design of steel catheads conform to the American Institute of Steel Construction (AISC), and that aluminum catheads follow the Aluminum Association's design manual. Both types of catheads must have a safety factor of 5 for the maximum intended working load (equivalent to the total intended suspended load) for personnel and material hoisting. This proposed provision will ensure the structural integrity and safety of the cathead up to workloads 5 times the maximum intended working load of the cathead.

Provision (f)(i) of proposed Condition 9, Clearance, requires adequate clearance between the bottom of cathead and the cable attachment at the top of the hoist cage to eliminate the risk of contact between the cathead and the cage if operation of the upper limit switch stops the cage. The second provision of this proposed paragraph (proposed subparagraph (f)(ii)) specifies that the cage must travel without obstruction along the full length of the guide ropes. Both of these provisions will improve safety by reducing stress on the guide ropes that would occur should the cage come into contact with the cathead or other obstruction. Finally, proposed Condition 9(g), Sheave substitute, allows a properly mounted construction block as a substitute for a sheave, which serves to ensure that the moving wire rope effectively and safely accommodates turning from the horizontal to vertical axes as required by the direction of rope travel; this proposed condition also refers to proposed Condition 8(d), which addresses sheave substitutes.

10. Proposed Condition 10: Guide Ropes

Proposed Condition 10 (formerly Condition 9) addresses guide ropes. This proposed condition contains several revisions made for clarification and precision. For example, proposed Condition 10(a) added the term ''securely'' before the phrase ''two guide ropes to the cathead'' and the phrase ''or to overhead supports designed for the purpose of accepting the guide ropes'' at the end of this proposed provision. The term ''securely'' ensures that guide ropes remain affixed to the cathead or overhead support during hoisting operations, while the added phrase addressing overhead supports acknowledges that hoist machines often use overhead supports other than catheads to secure guide ropes. Also, proposed Condition 10(a)(ii) references 29 CFR 1926.552(c)(17)(iv) to ensure that steel wire rope is free of damage or defects at all times.[13] In addition, proposed Condition 10(b) added the phrase ''During the hoisting of personnel'' to clarify when the requirement applies to hoisting operations, while proposed Condition 10(c) replaced the verb ''to rig'' with the verb ''to install'' to clarify the meaning of the term. Note that ANSI A10.22–2007 (at Section 9.2) provides additional guidelines for alignment tension that employers should consider following.

11. Proposed Condition 11: Personnel Cage

Proposed Condition 11 (formerly Condition 10) addresses personnel cages. There are several revisions to the former condition. Proposed Condition

[12] The applied workload is equivalent to the total suspended load.

[13] Section 1926.552(c)(17)(iv) reads as follows:

Wire rope shall be taken out of service when any of the following conditions exist:

(a) In running ropes, six randomly distributed broken wires in one lay or three broken wires in one strand in one lay;

(b) Wear of one-third the original diameter of outside individual wires. Kinking, crushing, bird caging, or any other damage resulting in distortion of the rope structure;

(c) Evidence of any heat damage from any cause;

(d) Reductions from nominal diameter of more than three-sixty-fourths inch for diameters to and including three-fourths inch, one-sixteenth inch for diameters seven-eighths inch to 1⅛ inches inclusive, three-thirty-seconds inch for diameters 1¼ to 1½ inches inclusive; [or]

(e) In standing ropes, more than two broken wires in one lay in sections beyond end connections or more than one broken wire at an end connection.

11(a) removes the requirement that the cage be made of steel, relying on the performance-based language ''capable of supporting a load that is eight (8) times its rated load capacity.'' This revision will provide employers with flexibility with regard to the materials used to construct personnel cages, while ensuring worker safety. The proposed provision also raises the safety factor from 4 to 8 to improve worker protection; this revision is consistent with ANSI A10.22–2007.

Former Conditions 10(a)(v) and 12(a) were inconsistent regarding the thickness of the roof of the personnel cage: Former Condition 10(a)(v) required that the roof be constructed of one-eighth (1/8) inch aluminum or equivalent material, while former Condition 12(a) specified that the roof be constructed of three-sixteenth (3/16) inch steel plate or equivalent material. Proposed Condition 11(a)(v) requires that the roof of the personnel cage be constructed of three-sixteenths (3/16) inch steel plate or equivalent material, the most protective of the required thicknesses. This proposed provision also requires that the roof slope to the outside of the personnel cage to ensure that falling objects do not remain on the cage and add to the weight of the load.

The revision to proposed Condition 11(a)(vi) clarifies that employers cannot use rails or hard protrusions when their presence creates an impact hazard. This clarification should increase worker safety by reducing impact hazards should workers lose their balance because of cage movement.

Proposed Condition 11(b) revised the former term ''overhead weight'' to the commonly used term ''overhaul weight'' for clarification. To improve worker safety, proposed Condition 11(e) added a design requirement that the rated load capacity of the cage be at least 250 pounds for each occupant, or the actual weight if an occupant exceeds 250 pounds. With this added design requirement increasing the safety of the personnel cages, the second provision of this proposed condition revised the former phrase ''Hoist no more than four (4) occupants at any one time'' to ''Hoist at any one time no more than the number of occupants for which the cage is designed'' to allow flexibility in the number of employees who can occupy a cage simultaneously during use.

Proposed Condition 11(f) clarifies the worker-notification requirement of former Condition 10(f). Accordingly, the proposed condition added a new requirement in proposed provision 11(f)(ii) to notify workers of the number of occupants the cage can accommodate, while proposed provision 11(f)(iii) revised the former phrase ''The reduced rated load for the specific job'' to ''Any reduction in rated load capacity (in pounds) if applicable (due to change in conditions of the specific job).'' These revisions will serve as an additional check to prevent overloading the personnel cage.

Proposed Condition 11(g), Static drop tests, updated the reference to the ANSI A10.22 standard to the latest, 2007, edition. Also, to be consistent with this new edition, proposed Condition 11(g)(ii) limited the former test criteria (i.e., the initial test criterion included in former Condition 10(g)(ii) of 125% of the maximum rated load of the personnel cage, and subsequent drop tests at no less than 100% of its maximum rated load) to the updated test criteria; these updated criteria require employers to use the rated load of the personnel cage during testing to avoid causing unnecessary damage to the cage.

Proposed Condition 11(h) is a new provision that prevents the cage from catching on the platform at the top landing or on intermediate platforms. OSHA believes this proposed condition will decrease stress on the hoist rope and prevent impact injuries among employees who use the cage.

12. Proposed Condition 12: Safety Clamps

Proposed Condition 12 (formerly Condition 11) addresses safety clamps, with only a few revisions to the former condition. For clarity, proposed Condition 12(a)(ii) revised the term ''when in use'' to ''when the cage is in motion.'' Proposed Condition 12(c) added the phrase ''The employer must ensure'' to former Condition 11(c) to place the burden of proving compliance on the employer. In addition, proposed Condition 12(c)(i) updates the ANSI reference in former Condition 11(c)(i) to ANSI standard A10.22–2007.

13. Proposed Condition 13: Overhead Protection

The requirements of paragraphs (a) and (b) of former Condition 12, Overhead Protection, specified the requirements for constructing sloped roofs for personnel cages. Proposed Condition 11, Personnel Cage, now covers these requirements under proposed subparagraph 11(a)(v). Therefore, proposed Condition 13 contains a new requirement, in performance-based language, providing overhead protection for workers accessing the bottom landing. OSHA believes this proposed provision will increase the safety of employees working around the bottom landing during hoist operations.

14. Proposed Condition 14: Emergency Escape Devices

Proposed Condition 14 (formerly Condition 13) continues to address emergency escape devices with minor revisions. Accordingly, proposed Condition 14(a) adds the phrase ''For workers using a personnel cage'' as a preface to the provision to clarify the proposed requirement. In addition, the training provision, proposed Condition 14(c), references proposed Condition 6(a)(iii), which addresses the timing of training (e.g., before initial use, and periodically thereafter).

15. Proposed Condition 15: Personnel Platforms and Boatswain's Chairs

Proposed Condition 15 replaces and updates former Condition 14 (Personnel Platforms) by addressing the hazards and required safeguarding methods associated with the use of personnel platforms and boatswain's chairs. Accordingly, when meeting the criteria specified in proposed Condition 2(g), employers may use personnel platforms and boatswain's chairs only when they demonstrate that it is infeasible to use personnel cages because of space limitations in a tapered chimney or a small-diameter, straight-barreled chimney or chimney-related structure. In these situations, employers would have to use personnel platforms unless space limitations require the use of boatswain's chairs. When replacing a personnel cage with a personnel platform or boatswain's chair, employers would have to follow the applicable requirements of 29 CFR 1926.1431(b) through .1431(s) and 1926.452(o)(3) respectively.

16. Proposed Condition 16: Protecting Workers From Fall and Shearing Hazards

Proposed Condition 2(g) provides the option of replacing a personnel cage with a personnel platform or a boatswain's chair when using formwork techniques for the construction of tapered chimneys and small-diameter, straight-barreled chimneys and chimney-related structures when the employer demonstrates that it is infeasible because of space limitations to use a personnel cage to transport workers to and from elevated worksites. Therefore, proposed Condition 16 continues to address shearing hazards because these hazards are present when workers use personnel platforms and boatswain's chairs under the limitations specified by proposed Condition 2(g). This proposed condition also redrafted

the fall-hazard provisions of former Condition 15 (Protecting Workers from Fall and Shearing Hazards) to address fall hazards associated with both the hoist areas and the cage, with references to relevant requirements of 29 CFR part 1926. OSHA believes these proposed revisions cover fall hazards more thoroughly than the former condition, thereby increasing worker protection from these hazards.

17. Proposed Condition 17: Exclusion Zone

Proposed Condition 17 (formerly Condition 16), which covers exclusion zones, made substantial revisions to the former condition. Accordingly, the proposed condition specifies requirements for establishing an exclusion zone; these requirements were not part of the former condition. OSHA believes that these proposed requirements will improve worker safety by ensuring that unauthorized persons do not enter the zone, thereby reducing their risk of injury from being struck by the hoisting equipment, falling objects, and the personnel cage.

Proposed condition 17(d) is a new provision that clarifies when workers can enter the exclusion zone during operations involving a material-transport device. This proposed provision will reduce worker exposure to the hazards associated with these operations, including impact and crushing hazards from the hoisting equipment and material-transport device.

18. Proposed Condition 18: Inspections, Tests, and Accident Prevention

Paragraphs (a) and (b) of proposed Condition 18 expand the inspection, test, and accident-prevention requirements of former Condition 17 by specifying that employers: Conduct frequent and regular (at least weekly) inspections of the hoist system and the area around the hoist system; inspect the hoist system prior to reuse following periods of idleness lasting more than one week; and remove hoisting equipment from service when a competent person determines that the equipment is unsafe. These proposed revisions will ensure that hoisting systems are safe for worker use. Proposed paragraph (c) adds a requirement that employers document tests, inspections, and corrective actions. This proposed requirement will provide employers with information needed to schedule tests and inspections, and to determine the actions taken to correct defects in hoisting equipment prior to returning it to service.

19. Proposed Condition 19: Welding

Proposed Condition 19 (formerly Condition 18) revised paragraph (a) of the former condition by defining the term ''qualified'' to mean a welder who meets the requirements of the American Welding Society, specifically, the qualification requirements of American Welding Society (AWS) D1.1 Structural Welding Code—Steel, or AWS D1.2 Structural Welding Code—Aluminum, as applicable. Specifying the qualifications for welders will improve worker safety by providing assurance that those who weld components of hoisting systems possess the skills necessary to perform this work, and will do so competently and in a manner that maintains the operational integrity and safety of the systems.

20. Proposed Condition 20: OSHA Notification

Proposed Condition 20 (Condition 19 in the former variance) addresses the duty of employers to notify OSHA of events and conditions associated with their hoisting operations. Paragraphs (a) and (b) of the proposed condition made substantial revisions to paragraph (a) of the former condition, including: (1) Specifying the legal test (due diligence) that OSHA will apply to these proposed notification requirements; (2) identifying the Office of Technical Programs and Coordination Activities (OTPCA) at national OSHA headquarters (not the nearest OSHA area office) or the appropriate State-Plan office as the offices to receive notification and the required information (i.e., the location of the operation and the date the operation will begin); (3) providing contact information (i.e., telephone and facsimile numbers, and email address) for OTPCA; and (4) requiring employers to notify OTPCA or the appropriate State-Plan office at least 15 days prior to beginning any emergency operation or short-notice project using the conditions specified by the variance of the location and date of the operation or project or, if such an operation will occur in less than 15 days, then as soon as possible after the employer knows when the operation will begin.

Former paragraph (b) addressed notification requirements when the employer ceases to do business or transfers the activities covered by the variance to a successor company. Paragraphs (c) and (d) of the proposed condition expand on the former requirements by: (1) Reiterating the legal test (due diligence) that OSHA will apply to these proposed notification requirements; (2) specifying that employers notify OTPCA of any changes in the location and address of the main office for managing the activities covered by the variance; and (3) stipulating that OSHA must approve the transfer of the variance to a successor company.

OSHA believes that the revisions made to former Condition 19 by the proposed condition will expedite receipt of information by it and State-Plan states regarding the initiation and location of hoisting operations covered by the variance, and will clarify that the proposed notification requirements would apply to emergency operations and short-term projects. Accordingly, these revisions will improve worker safety by ensuring that OSHA and State-Plan states have complete and accurate information about the chimney-construction activities covered by the variance so that these agencies can carefully monitor employer compliance with the conditions specified by the variance. While proposed Condition 20 now clearly notifies employers of the legal test they must meet in complying with the requirements of this condition, OSHA notes that it will not issue a citation if an employer's violation of Condition 20 does not immediately affect worker safety or health; in these circumstances, OSHA may, however, issue a notice of de minimis violation.

Requiring employers to notify OTPCA of any changes in the location and address of their main offices will allow OSHA to communicate effectively with employers regarding the status of the variance. Stipulating that an employer must have OSHA's approval to transfer a variance to a successor company provides assurance that the successor company has the resources, and agrees, to comply with the conditions of the variance. OSHA believes this proposed requirement is necessary to ensure the safety of workers involved in performing the operations covered by the variance.

IV. Specific Conditions of the Variance Application

As noted previously in this preamble, since 1973, the Agency has granted a number of permanent variances from the tackle requirements provided for boatswain's chairs by 29 CFR 1926.452(o)(3) and the requirements for hoist towers specified by paragraphs (c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16) of 29 CFR 1926.552. In view of the Agency's history with the variances granted for chimney construction, OSHA preliminarily determined that the alternative conditions specified by the application will protect employees at

least as effectively as the requirements of paragraphs (c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16) of 29 CFR 1926.552. Therefore, pursuant to the provisions of 29 CFR 1905.11(c), OSHA is notifying the public of this variance application for chimney-related construction that uses temporary hoisting systems to transport workers to and from worksites in a personnel cage. The variance application consists of the following conditions:

1. Scope

(a) This permanent variance applies to chimney-related construction, including work on chimneys, chimney linings, stacks, and chimney-related structures such as silos, towers, and similar structures, specifically tapered chimneys and small-diameter, straight-barreled chimneys and chimney-related structures constructed using formwork techniques and procedures, and straight-barreled chimneys and chimney-related structures of any diameter constructed using slip-form techniques and procedures, when such construction involves the use of temporary personnel hoisting systems (hereafter referred to as ''hoist system'') for the transportation of:

(i) Personnel to and from the bottom landing of a chimney or chimney-related structure to working elevations inside or outside of the chimney or structure using a personnel cage during construction work subject to 29 CFR part 1926 including construction, renovation, repair, maintenance, inspection, and demolition; or

(ii) Materials, but not concurrently with hoisting of personnel, through attachment of a hopper, material basket, concrete bucket, or other appropriate rigging to the hoist system to raise and lower all other materials inside or outside a chimney or chimney-related structure. See also Condition 2(c)(ii) below.

(b) The employer may apply this permanent variance to small diameter, straight-barreled chimneys or chimney-related structures only after demonstrating that it is infeasible to erect a hoist tower either inside or outside the structure.

2. Application

(a) The employer must use a hoist system equipped with a dedicated personnel-transport device (i.e., a personnel cage) as specified in this variance to raise or lower its workers and/or other construction-related tools, equipment, and supplies between the bottom landing of a chimney or chimney-related structure and an elevated work location while performing construction inside and outside the chimney or structure.

(b) Prior to initial use of the hoist system, the employer must have all drawings containing designs and construction details showing the integration of the hoist system with the construction method in use (such as a slip-form system) sealed by a professional engineer registered in the United States. A professional engineer registered in the United States also must approve any modifications to these drawings.[14]

(c) When using a hoist system, the employer must:

(i) Use the personnel cages raised and lowered by the hoist system solely to transport workers with the tools and small supplies necessary to do their work (e.g., fasteners, paint, caulk);

(ii) Attach a dedicated material-transport device directly to the hoist rope solely to raise and lower all other materials and tools; and

(iii) Attach the material-transport device directly to the hoisting hook and never to the personnel cage.

(d) Except for the requirements specified by 29 CFR 1926.552(c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16), the employer must comply fully with all other applicable provisions of 29 CFR parts 1910 and 1926.

(e) When an employer demonstrates that it is infeasible to comply with these conditions, the employer may use other devices or methods to comply, but only when the employer clearly demonstrates that these devices and methods provide its workers with protection that is at least equivalent to the protection afforded to them by the conditions of this variance.

(f) The employer must convey any communication, written or verbal, required by this variance in a language that each worker can understand.

(g) *For tapered chimneys, and for small-diameter, straight-barreled chimneys and chimney-related structures, constructed using formwork techniques and procedure only—replacing a personnel cage with a personnel platform or a boatswain's chair.* The following provisions apply only to construction involving tapered chimneys:

(i) *Personnel platform.* Before using a personnel platform, an employer must:

(A) Demonstrate that available space makes it infeasible to use a personnel cage for transporting employees;

(B) Limit use of a personnel platform to elevations above the last work location that the personnel cage can reach; and

(C) Use a personnel platform in accordance with requirements specified by 29 CFR 1926.1431(s), unless the employer can demonstrate that the structural arrangement of the chimney precludes such use.

(ii) *Boatswain's chair.* Before using a boatswain's chair, an employer must:

(A) Demonstrate that available space makes it infeasible to use a personnel platform for transporting employees;

(B) Limit use of a boatswain's chair to elevations above the last work location that the personnel platform can reach; and

(C) Use a boatswain's chair in accordance with block-and-tackle requirements specified by 29 CFR 1926.452(o)(3), unless the employer can demonstrate that the structural arrangement of the chimney precludes such use.

3. Definitions

The following definitions shall apply to this permanent variance. These definitions do not necessarily apply in other contexts.

(a) *Alteration*—any change or addition to the equipment other than ordinary repairs or replacements.*

(b) *Authorized person*—a person approved or assigned by the employer to perform a specific type of duty or duties or to be at a specific location or locations at the jobsite.[15]

(c) *Barricaded*—confined by a barrier or marked off limits to access.*

(d) *Base-mounted drum hoist*—a drum hoist fastened to, and supported by, a designed steel frame with mounting attachments for securing to a foundation.*

(e) *Broken rope principle*—the principle by which, if the main support rope fails, the lack of tension will cause the safety clamps attached to the personnel cage to grip the guide ropes and stop it within 18 inches (457.2mm) (maximum) of travel from the activation point.*

(f) *Cage*—an enclosed load-carrying unit or car, including its platform, frame, enclosure, and gate, in which personnel are transported.*

(g) *Cathead*—the structure directly supporting the overhead sheaves.*

(h) *Competent person*—one who is capable of identifying existing and

[14] Any reference to ''design'' or ''designed'' in these conditions means that a professional engineer registered in the United States must approve the design.

[15] See 29 CFR 1926.32(d).

*ANSI/ASSE kindly permitted OSHA to use the definition of this term from Section 3 of its A10.22–2007 standard, *Safety Requirements for Rope-Guided and Non-guided Workers' Hoists.* In some cases, OSHA made slight editorial revisions to the text of the definition for clarity.

predictable hazards in the surroundings or working conditions that are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.[16]

(i) *Deadman control*—a constant pressure, hand-operated or foot-operated control designed so that, when released, it automatically returns to a neutral or deactivated position and stops movement of the hoist drum.*

(j) *Design factor*—the ratio of the failure load to the maximum designed working load. (Also referred to as ''Safety Factor'' or ''Factor of Safety.'')*

(k) *Exclusion zone*—a clearly designated zone around the bottom landing of the hoist system designed to restrict the zone to authorized persons only.

(l) *Footblock*—a wire-rope block mounted at or near the bottom of a structure for the purpose of changing the direction of the hoisting rope from approximately horizontal to approximately vertical.*

(m) *Hoist* (verb)—to raise, lower, or otherwise move a load in the air.

(n) *Hoist* (noun)—same as ''hoist machine.''

(o) *Hoist area*—the area (including, but not limited to, the area directly beneath the load) in which it is reasonably foreseeable that partially or completely suspended materials could fall in the event of an accident.

(p) *Hoist-way*—a clearly designated walkway or path used to provide safe access to and from personnel cages.

(q) *Hoist machine*—a mechanical device for lifting and lowering loads by winding a line onto or off a drum.

(r) *Hoist system*—a collection of mechanical devices and support equipment assembled and used in combination for lifting and lowering loads, including personnel cages.

(s) *Job hazard analysis*—an evaluation of the tasks or operations involving the use of hoist systems performed to identify potential hazards and to determine the necessary controls.

(t) *Lifeline*—an independently suspended line used for attaching the employee's safety harness lanyard, usually by means of a rope grab, as part of the fall-arrest system.*

(u) *Line run*—a condition whereby the free end of the hoistline may be overhauled by the deadweight of the downline portion of the hoistline on the footblock side of the cathead.*

(v) *Non-guided workman's hoist (worker's hoist)*—a hoist involving the transportation of a person in a boatswain's chair, or equivalent, not attached to fixed guide ropes.* (**Note:** While the conditions of this variance do not use this term directly, ANSI A10.22–2007, referenced under Condition 11, uses the term.)

(w) *Qualified person*—one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his ability to solve or resolve problems relating to the subject matter, the work, or the project.[17]

(x) *Rope*—wire rope, unless otherwise specified.*

(y) *Rotation-resistant rope*—a wire rope consisting of an inner layer of strand laid in one direction covered by a layer of strand laid in the opposite direction. This has the effect of counteracting torque by reducing the tendency of the finished rope to rotate.*

(z) *Safety clamp*—a fall-arresting device (or rope-grab) designed to grip the lifeline and prevent the person being transported in a boatswain's chair, or equivalent, from falling.*

(aa) *Static drop test*—a test performed by suspending the cage in a fixed position with a quick-release device or equivalent method separating the cage from the hoistline. The quick-release device is tripped allowing the cage to freefall until the safety clamps (cage) activate and stop the cage.*

(bb) *Total suspended load*—the combined weight of any and all objects and persons in transport, including the weight of the suspended rope.

(cc) *Weatherproof*—constructed or protected so that exposure to the weather will not interfere with successful operations.*

4. Qualified and Competent Person(s)

(a) The employer must:

(i) Provide one or more competent and/or qualified person(s), as specified in paragraphs (f) and (m) of 29 CFR 1926.32, who is/are responsible for ensuring that the installation, maintenance, and inspection of the hoist system comply with the conditions specified herein, and with the applicable requirements of 29 CFR part 1926 (''Safety and Health Regulations for Construction''); and

(ii) Ensure that a competent person(s) is present at ground-level to assist in an emergency whenever the hoist system is raising or lowering workers.

(b) The employer must use a qualified person to design, and a competent person to maintain, the cathead described under Condition 9 (''Cathead and Sheave'') below.

(c) The employer must train each competent person and each qualified person regarding the conditions of this variance and the requirements of 29 CFR part 1926 that are applicable to their respective roles.

5. Hoist Machine

(a) *Type of hoist.* The employer must:

(i) Designate the hoist machine as a hoist system; and

(ii) Use and maintain the hoist machine in accordance with the manufacturer's instructions. When the manufacturer's instructions are not available, the employer must ensure that a qualified person develops written instructions, and that these instructions are available on-site.

(b) *Raising or lowering a transport.* The employer must ensure that:

(i) The hoist machine includes a base-mounted drum hoist designed to control line-speed;

(ii) When lowering an empty or occupied transport, the drive components are engaged continuously (i.e., ''powered down'' or not ''freewheeling'');

(iii) The drive system is interconnected, on a continuous basis, through a torque converter, mechanical coupling, or an equivalent coupling (e.g., electronic controller, fluid clutches, and hydraulic drives);

(iv) The braking mechanism is applied automatically when the transmission is in the neutral position and a forward-reverse coupling or shifting transmission is being used; and

(v) No belts are used between the power source and the winding drum.

(c*) Power source.* The employer must power the hoist machine by an air, electric, hydraulic, or internal-combustion drive mechanism.

(d) *Constant-pressure control switch.* The employer must equip the hoist machine with a hand-operated or a foot-operated constant-pressure control switch (i.e., a ''deadman control switch'') that deactivates the engine and stops the hoist rotation immediately upon release by the hoist operator.

(e) *Line-speed indicator.* The employer must:

(i) Equip the hoist machine with a line-speed indicator maintained in working order; and

(ii) Ensure that the line-speed indicator is in clear view of the hoist operator during hoisting operations.

(f) *Overspeed.* The employer must equip the hoist machine with an audible or visual overspeed indicating alarm that will activate before the line-speed exceeds 275 feet per minute (includes 10% overspeed allowance) when transporting personnel.

[16] See 29 CFR 1926.32(f).

[17] See 29 CFR 1926.32(m).

(g) *Braking systems.* The employer must equip the hoist machine with at least two (2) independent braking systems (i.e., one automatic and one manual) applied on the winding side of the clutch or couplings, with each braking system being capable of stopping and holding 150 percent of the maximum rated line load.

(h) *Slack-rope protection.* The employer must equip the hoist machine with a slack-rope device to prevent rotation of the winding drum under slack-rope conditions, or a slack-rope circuit that stops or limits the hoist speed to a creep speed when there is no tension on the load line.

(i) *Frame.* The employer must ensure that the frame of the hoist machine is a self-supporting, rigid, steel structure, and that holding brackets for anchor lines and legs for anchor bolts are integral components of the frame in accordance with the applicable design drawings.

(j) *Stability.* The employer must secure hoist machines in position to prevent movement, shifting, or dislodgement in accordance with the applicable design drawings.

(k) *Location.* The employer must:

(i) Locate the hoist machine far enough from the footblock to obtain the correct fleet angle for proper winding or spooling of the cable on the drum; and

(ii) Ensure that the fleet angle remains between one-half degree (½°) and one and one-half degrees (1½°) for smooth drums, and between one-half degree (½°) and two degrees (2°) for grooved drums, with the lead sheave centered on the drum.[18]

(l) *Drum and flange diameter.* The employer must:

(i) Provide a winding drum for the hoist that is at least 30 times the nominal diameter of the rope used for hoisting; and

(ii) Ensure that the winding drum has a flange diameter that is at least one and one-half (1½) times the winding-drum diameter.

(m) *Spooling of the rope.* The employer must never spool the rope closer than two (2) inches (5.1 cm) from the outer edge of the winding-drum flange when the hoist is in operation.

(n) *Minimum rope turns on drum.* The employer must ensure that the drum has three turns of rope when the hoist load is at the lowest point of travel, and that the hoist end of the rope is mechanically secured to the hoist drum per manufacturer's instructions.

(o) *Electrical system.* The employer must ensure that all electrical equipment is weatherproof.

(p) *Grounding.* The employer must ensure that the hoisting machine is grounded at all times in accordance with the requirements of 29 CFR 1926.404(f).

(q) *Limit switches.*

(i) When the employer uses a hoist system with a personnel cage, the employer must equip the hoist system with limit switches and related equipment that automatically prevent overtravel of the transport device at the top of the supporting structure and at the bottom of the hoist-way or lowest landing level.

(ii) When the employer uses a hoist system with a material-transport device, the employer must equip the hoist system with limit switches and related equipment that automatically prevents overtravel of material-transport devices at the top of the support structure.

(r) *Guarding.* The employer must guard effectively all exposed moving parts such as gears, projecting screws, setscrews, chains, cables, belts, chain sprockets, and reciprocating or rotating parts, that might constitute a hazard under normal operating conditions. (**Note:** OSHA considers a hoist drum that has access limited to authorized persons as guarded.)

(s) *Overhead Protection.* The employer must provide a shelter or enclosure to protect the hoist operator, hoist machine, and associated controls from falling or moving objects.

6. Methods of Operation

(a) *Worker qualifications and training.* The employer must:

(i) Ensure that each personnel-hoist operator and each of their supervisors have effective and documented training in the safe operation of hoist machines covered by this variance.

(ii) Ensure that only a trained and authorized person operates the hoist machine.

(iii) Provide effective and documented instruction, before initial use, to each worker who uses a personnel cage for transportation regarding the safe use of the personnel cage and its emergency systems. The employer must repeat the instruction periodically and as necessary (e.g., after making changes to the personnel cage that affect its operation).

(b) *Use of job hazard analyses (JHAs).* The employer must:

(i) Complete one or more JHAs for the operation of the hoist system; and

(ii) Review, periodically and as necessary (e.g., after making changes to the hoist machine that affect its operation), the contents of the JHA with affected personnel.

(c) *Speed limitations.* The employer must not operate the hoist at a speed in excess of:

(i) 250 feet per minute[19] or the design speed of the hoist system, whichever is lower, when using a personnel cage to transport workers, and slow the hoist appropriately at the extremes of hoist travel. (**Note:** The employer may use a line-speed that is consistent with the design limitations of the hoist system when hoisting material (i.e., using a dedicated material-transport device) on the hoist system); and

(ii) 100 feet per minute when a personnel platform or boatswain's chair is being used to transport workers.

(d) *Communication.* The employer must:

(i) Use an electronic voice-communication system (such as two-way radio) at all times, for communication between the hoist operator and the workers located in a moving personnel cage, personnel platform, or boatswain's chair;

(ii) Stop hoisting if there is (a) a failure of communication, or (b) activation of a stop signal from the workers in the personnel cage, personnel platform, or boatswain's chair; resume hoisting only when a supervisor determines that it is safe to do so.

7. Hoist Rope

(a) *Grade.* The employer must use a wire rope for the hoist system (i.e., ''hoist rope'') that consists of extra-improved plow steel, an equivalent grade of non-rotating rope, or a regular lay rope with a suitable swivel mechanism.

(b) *Safety factor.* For personnel hoisting, the employer must maintain a safety factor of at least eight and nine-tenth (8.9) times the total suspended load throughout the entire length of hoist rope (including the weight of the suspended rope).

(c) *Size.* The employer must use a hoist rope that is at least one-half (½) inch in diameter.

(d) *Rope lay.* Except when using rotation-resistant rope, the employer must use preformed regular-lay rope. The direction of exterior lay (right or left) must match the drum termination and winding characteristics.

(e) *Inspection, removal, and replacement.* The employer must:

[18] This provision adopts the definition of, and specifications for, fleet angle from *Cranes and Derricks,* H. I. Shapiro, et al. (eds.); New York: McGraw-Hill; 3rd ed., 1999, page 592. Accordingly, the fleet angle is ''[t]he angle the rope leading onto a [winding] drum makes with the line perpendicular to the drum rotating axis when the lead rope is making a wrap against the flange.''

[19] When including 10% overspeed, the maximum hoist speed must not exceed 275 feet per minute.

(i) Thoroughly inspect the hoist rope before the start of each job, and on completing a new set-up;

(ii) Maintain the proper diameter-to-diameter ratios between the hoist rope and the footblock and the sheave by inspecting the wire rope regularly (see Conditions 8(c) and 9(d), below); and

(iii) Remove and replace the wire rope with new wire rope when any condition specified by 29 CFR 1926.552(a)(3) occurs.

(f) *Attachments.* The employer must attach the rope to a personnel cage, personnel platform, or boatswain's chair using a positive connection such as:

(i) A screw-pin shackle with the pin secured from rotation or loosening by mousing to the shackle body;

(ii) A bolt-type shackle, nut, and cotter pin; or

(iii) A positive-locking link.

(g) *Wire-rope fastenings.* When the employer uses clip fastenings (e.g., U-bolt wire-rope clips) with wire ropes, the employer must:

(i) Use Table H–20 of 29 CFR 1926.251 to determine the number and spacing of clips;

(ii) Use at least three (3) drop-forged clips at each fastening;

(iii) Install the clips with the ''U'' of the clips on the dead end of the rope and the live end resting in the clip saddle;

(iv) Space the clips so that the distance between them is a minimum of six (6) times the diameter of the rope.

(v) Tighten the clips evenly in accordance with the manufacturer's specification;

(vi) Following initial application of the load to the rope, retighten the clip nuts to the specified torque to compensate for any decrease in rope diameter caused by the load; and

(vii) Retighten the rope clip nuts periodically to compensate for any further decrease in rope diameter during usage.

(h) *Rotation-resistant ropes and swivels.* The employer must not use a swivel anywhere in the system when using rotation-resistant ropes unless approved by the wire-rope manufacturer.

(i) *Rope protection.* The employer must:

(i) Barricade the hoisting rope between the hoisting machine and the footblock;

(ii) Protect the hoisting rope from abrasive contact with the ground; and

(iii) When the hoisting rope is subject to falling material or debris, protect it from such hazards.

8. Footblock

(a) *Type of footblock.* Except as provided in paragraph (d) of this condition, the employer must use a footblock:

(i) Consisting of construction-type rope blocks of solid single-piece bail with a safety factor of at least five (5), or an equivalent block with roller bearings;

(ii) Designed for the applied loading, size, and type of wire rope used for hoisting;

(iii) Designed for returning the rope to the sheave groove after a slack-rope condition, or equipped with a guard that contains the wire rope within the sheave groove;

(iv) Attached to the base according to the design drawings, with the anchorage being capable of sustaining at least eight (8) times the resultant force of the horizontal and vertical loads transmitted by the hoisting rope; and

(v) Designed and installed so that it turns the moving wire rope to and from the horizontal or vertical direction as required by the direction of rope travel.

(b) *Directional change.* The employer must ensure that the angle of change in the hoist rope from the horizontal to the vertical direction at the footblock is approximately 90° (degrees).

(c) *Diameter.* The employer must ensure that the line diameter of the footblock sheave is at least 24 times the diameter of the hoist rope.

(d) *Sheave substitute.* The employer may substitute a properly mounted sheave, as specified in Condition 9 below (''Cathead and Sheaves''), for the footblock described in this condition.

9. Cathead and Sheaves

(a) *Sheave support.* The employer must use a cathead (i.e., ''overhead support'') constructed of steel or aluminum that consists of a wide-flange beam, or two (2) channel sections securely bolted back-to-back, according to the design drawings, to prevent spreading.

(b) *Installation.* The employer must ensure that:

(i) All sheaves revolve on shafts that rotate on bearings; and

(ii) The bearings are mounted securely to maintain the proper bearing position at all times.

(c) *Rope guides.* The employer must provide each sheave with appropriate rope guides to prevent the hoist rope from leaving the sheave grooves when the rope vibrates or swings abnormally.

(d) *Diameter.* The employer must use a sheave with a line diameter that is at least 24 times the diameter of the hoist rope.

(e) *Design basis.* The employer must ensure that:

(i) The design of the cathead assembly conforms to the American Institute of Steel Construction (AISC) *Manual of Steel Construction* or the Aluminum Association's *Aluminum Design Manual,* whichever manual is appropriate to the material used; and

(ii) The cathead has a safety factor of at least five (5) for personnel and material hoisting.

(f) *Clearance.* The employer must provide:

(i) Adequate clearance so that there will be no contact between the bottom of cathead and the cable attachment at the top of the hoist cage; and

(ii) A path free of obstruction (clear travel) along the full length of the guide ropes.

(g) *Sheave substitute.* The employer may substitute construction blocks, of the type described in Condition 8(a)(i) above, for the top sheaves. (NOTE: See also Condition 8(d) above.)

10. Guide Ropes

(a) *Number and construction.* The employer must:

(i) Securely affix two (2) guide ropes to the cathead or to overhead supports designed for the purpose of accepting the guide ropes; and

(ii) Ensure that the guide ropes:

(A) Consist of steel wire rope not less than one-half (½) inch (1.3 cm) in diameter; and

(B) Be free of damage or defect at all times per 29 CFR 1926.552(c)(17)(iv).

(b) *Guide rope fastening and alignment tension.* During the hoisting of personnel, the employer must ensure that one end of each guide rope is fastened securely to the overhead support, and that appropriate tension is applied at the foundation end of the rope.

(c) *Height.* The employer must install the guide ropes along the entire height of hoist travel.

11. Personnel Cage

(a) *Construction.* The employer must ensure that the frame of the personnel cage is capable of supporting a load that is eight (8) times its rated load capacity. The employer also must ensure that the personnel cage has:

(i) A top and sides that are permanently enclosed (except for the entrance and exit);

(ii) A floor securely fastened in place;

(iii) Walls that consist of 14-gauge, one-half (½) inch expanded metal mesh, or an equivalent material;

(iv) Walls that cover the full height of the personnel cage between the floor and the overhead covering;

(v) A sloped roof constructed of at least three-sixteenth (3/16) inch steel plate, or material of equivalent strength and impact resistance, that slopes to the outside of the personnel cage;

(vi) Safe handholds (e.g., rope grips—but not rails or hard protrusions when their presence creates an impact hazard) that accommodate each occupant; and

(vii) Attachment points for workers to secure their personal fall-arrest protection systems.

(b) *Overhaul weight.* The employer must ensure that the personnel cage has an overhaul weight (e.g., a headache ball) to compensate for the weight of the hoist rope between the cathead and footblock. In addition, the employer must:

(i) Ensure that the overhaul weight is capable of preventing line run; and

(ii) Use a means to restrain the movement of the overhaul weight so that the weight does not interfere with safe personnel hoisting.

(c) *Gate.* The employer must ensure that the personnel cage has a gate that:

(i) Guards the full height of the entrance opening; and

(ii) Has a functioning mechanical latch that prevents accidental opening.

(d) *Operating procedures.* The employer must post the procedures for operating the personnel cage conspicuously at the bottom landing.

(e) *Capacity.* The employer must:

(i) Ensure that the rated load capacity of the cage is at least 250 pounds for each occupant so hoisted, or actual weight if the person exceeds 250 pounds; and

(ii) Hoist at any one time no more than the number of occupants for which the cage is designed.

(f) *Worker notification.* The employer must post a sign on each personnel cage notifying workers of the following conditions:

(i) The standard rated load (in pounds), as determined by the initial static drop-test specified by Condition 11(g) (''Static drop-tests'');

(ii) The designated number of occupants for which the cage is designed; and

(iii) Any reduction in rated load capacity (in pounds) if applicable (e.g., due to a change in conditions of the specific job).

(g) *Static drop-tests.* The employer must:

(i) Conduct static drop tests of each personnel cage that comply with the static drop-test procedures provided in Section 13 (''Inspections and Tests'') of American National Standards Institute (ANSI) standard A10.22–2007 (''Safety Requirements for Rope-Guided and Non-Guided Workers' Hoists'');

(ii) Perform the initial and subsequent static drop-tests at the rated load of the personnel cage; and

(iii) Use a personnel cage for raising or lowering workers only when no damage occurred to the components of the cage as a result of the static drop-tests.

(h) *Platform guides.* The employer must provide:

(i) Adequate guards, beveled or cone-shaped attachments, or equivalent devices at the underside of the working platform or on the cage to prevent catching when the cage passes through the platform at the top landing; and

(ii) Sufficient clearance or adequate guarding to prevent catching or snagging when the cage passes through intermediate landings.

12. Safety Clamps

(a) *Fit to the guide ropes.* The employer must:

(i) Fit appropriately designed and constructed safety clamps to the guide ropes; and

(ii) Ensure that the safety clamps do not damage the guide ropes when the cage is in motion.

(b) *Attach to the personnel cage.* The employer must attach safety clamps to each personnel cage for gripping the guide ropes.

(c) *Operation.* The employer must ensure that the safety clamps attached to the personnel cage:

(i) Operate on the ''broken rope principle'';

(ii) Be capable of stopping and holding a personnel cage that is carrying 100 percent of its maximum rated load and traveling at its maximum allowable speed if the hoist rope breaks at the footblock; and

(iii) Use a pre-determined and pre-set clamping force (i.e., the ''spring compression force'') for each hoist system.

(d) *Maintenance.* The employer must keep the safety-clamp assemblies clean and functional at all times.

13. Overhead Protection

The employer must provide overhead protection for workers to access the bottom landing of the hoist system.

14. Emergency-Escape Device

(a) *Location.* For workers using a personnel cage, the employer must provide an emergency-escape device, adequate to allow each worker being hoisted to escape, in at least one of the following locations:

(i) In the personnel cage, provided that the device is long enough to reach the bottom landing from the highest possible escape point; or

(ii) At the bottom landing, provided that a means is available in the personnel cage for an occupant to raise the device to the highest possible escape point.

(b) *Operating instructions.* The employer must ensure that written instructions for operating the emergency-escape device are attached to the device.

(c) *Training.* The employer must provide effective and documented training, as specified by Condition 6(a)(iii) above, to each worker who uses a personnel cage for transportation on how to operate the emergency-escape device so as to effect a safe descent in case of an emergency.

15. Personnel Platforms and Boatswain's Chairs

The employer must:

(a) Comply with the applicable requirements specified by paragraphs (b) through (r) of 29 CFR 1926.1431, Hoisting personnel, when electing to replace the personnel cage with a personnel platform in accordance with Condition 2(g)(i);

(b) Comply with the applicable requirements specified by 29 CFR 1926.1431(s) and 1926.452(o)(3) when electing to replace the personnel cage with a boatswain's chair in accordance with Condition 2(g)(ii).

16. Protecting Workers From Fall and Shearing Hazards

The employer must:

(a) Ensure that the hoist areas meet the requirements of 29 CFR 1926.501(b)(3) for hoist areas;

(b) Protect each worker in a hoist-way area from falling six (6) feet or more to lower levels by using guardrail systems that meet the requirements of 29 CFR 1926.502(b) or personal fall-arrest systems that meet the requirements of 29 CFR 1926.502(d);

(c) Ensure that workers using personnel cages secure their fall-arrest systems to attachment points located inside the cage if the door of the personnel cage needs to be opened for emergency escape; and

(d) Provide safe access to and from personnel cages.

(e) *Shearing hazards.* The employer must:

(i) Provide workers who use personnel platforms or boatswain's chairs with instruction on the shearing hazards posed by the hoist system (e.g., work platforms, scaffolds), and the need to keep their limbs or other body parts clear of these hazards during hoisting operations;

(ii) Provide the instruction on shearing and struck-by hazards:

(A) Before a worker uses a personnel platform or boatswain's chair at the worksite; and

(B) Periodically, and as necessary, thereafter, including whenever a worker

demonstrates a lack of knowledge about the hazards or how to avoid the hazards, a modification occurs to an existing shearing or struck-by hazard, or a new shearing or struck-by hazard develops at the worksite; and

(iii) Attach a readily visible warning to each personnel platform and boatswain's chair notifying workers in a language they understand of potential shearing hazards they may encounter during hoisting operations, and that uses the following (or equivalent) wording:

(A) For personnel platforms: ''Warning—To avoid serious injury, keep your hands, arms, feet, legs, and other parts of your body inside this platform while it is in motion''; and

(B) For boatswain's chairs: ''Warning—To avoid serious injury, do not extend your hands, arms, feet, legs, or other parts your body from the side or to the front of this chair while it is in motion.''

17. Exclusion Zone

The employer must:

(a) Establish a clearly designated exclusion zone around the bottom landing of the hoist system designed to restrict the zone to authorized persons only;

(b) The periphery of the exclusion zone must be:

(i) Designed to keep unauthorized persons out of the zone;

(ii) Well defined by visible boundary demarcation;

(iii) Established with entry and exit points; and

(iv) Posted with readily visible warning signs limiting access.

(c) During personnel hoisting, prohibit any worker from entering the exclusion zone except authorized persons involved in accessing a personnel cage, and then only when the device is at the bottom landing and not in operation (i.e., when the drive components of the hoist machine are disengaged and the braking mechanism is properly applied); and

(d) When hoisting material with the personnel hoist system, prohibit any worker from entering the exclusion zone except to access a material-transport device, and then only when the device is near the bottom landing for the purpose of loading, attaching, landing or tagging the load.

18. Inspections, Tests, and Accident Prevention

(a) The employer must initiate and maintain a program of frequent and regular inspections of the hoist system and associated work areas as required by 29 CFR 1926.20(b)(2) by:

(i) Ensuring that a competent person conducts daily visual checks and weekly inspections of the hoist system, and an inspection before reuse of the system following periods of idleness exceeding one week;

(ii) Ensuring that the competent person conducts tests and inspections of the hoist system in accordance with 29 CFR 1926.552(c)(15);

(iii) Ensuring that a competent person conducts weekly inspections of the work areas associated with the use of the hoist system.

(b) If the competent person determines that the equipment constitutes a safety hazard, the employer must remove the equipment from service and not return the equipment to service until the employer corrects the hazardous condition and has the correction approved by a qualified person.

(c) The employer must maintain at the jobsite, for the duration of the job, records of all tests and inspections of the hoist system, as well as associated corrective actions and repairs.

19. Welding

(a) The employer must ensure that only welders qualified in accordance with the requirements of the American Welding Society weld components of the hoisting system. Accordingly, these welders must meet the qualification requirements of American Welding Society (AWS) D1.1 Structural Welding Code—Steel, or AWS D1.2 Structural Welding Code—Aluminum, as applicable.

(b) The employer must ensure that these welders:

(i) Are familiar with the weld grades, types, and materials specified in the design of the system; and

(ii) Perform the welding tasks in accordance with 29 CFR part 1926, subpart J (''Welding and Cutting'').

20. OSHA Notification

(a) To assist OSHA in administering the conditions of this variance, the employer must exercise due diligence in notifying the Office of Technical Programs and Coordination Activities (OTPCA) at OSHA's national headquarters, or the appropriate State-Plan Office, of:

(i) Any chimney-related construction operation using the conditions specified herein, including the location of the operation and the date the operation will commence, at least 15 calendar days prior to commencing the operation;

(ii) Any emergency operation or short-notice project using the conditions specified herein, and when 15 days are not available before start of work, as soon as possible after the employer knows when the operation will commence. This information must include the location and date of the operation;

(b) The employer can notify OTPCA at OSHA's national headquarters of pending chimney-related construction operations by:

(i) Telephone at 202 639–2110;

(ii) Facsimile at 202 693–1644; or

(iii) Email at *VarianceProgram@dol.gov.*

(c) To assist OSHA in administering the conditions of this variance, the employer must exercise due diligence by informing OTPCA at OSHA's national headquarters as soon as possible after it has knowledge that it will:

(i) Cease to do business;

(ii) Change the location and address of the main office for managing the activities covered by this variance; or

(iii) Transfer the activities covered by this variance to a successor company.

(d) OSHA must approve the transfer of this variance to a successor company.

V. Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC, authorized the preparation of this notice. OSHA is issuing this notice under the authority specified by 29 U.S.C. 655, Secretary of Labor's Order No. 1–2012 (76 FR 3912), and 29 CFR part 1905.

Signed at Washington, DC, on March 18, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013–06509 Filed 3–20–13; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL SCIENCE FOUNDATION

Limited Exemption of the American Recovery and Reinvestment Act With Respect to the Purchase of a Variable Refrigerant Flow System

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: NSF is hereby granting a limited exemption of section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111–5, 123 Stat. 115, 303 (2009), with respect to the purchase of a variable refrigerant flow system that will be used in the renovation of the St. Anthony Falls Laboratory at the University of Minnesota. This system is required in

order to provide the requisite heating and cooling capability in a manner that is consistent with the *U.S. Secretary of the Interior's Standards for Archaeology and Historic Preservation,* taking into account the *U.S. Secretary of the Interior's Standards for the Rehabilitation of Historic Properties.*

DATES: March 18, 2013.

ADDRESSES: National Science Foundation, 4201 Wilson Blvd., Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Mr. Jason Madigan, Division of Grants and Agreements, 703–292–4333.

SUPPLEMENTARY INFORMATION: In accordance with section 1605(c) of the Recovery Act and section 176.80 of Title 2 of the Code of Federal Regulations, the National Science Foundation (NSF) hereby provides notice that on March 15, 2013 the NSF Chief Financial Officer, in accordance with a delegation order from the Director of the agency, granted a limited project exemption of section 1605 of the Recovery Act (Buy American provision) with respect to the variable refrigerant flow (VRF) system that will be used in the renovation of the St. Anthony Falls Laboratory (SAFL). The basis for this exemption is section 1605(b)(2) of the Recovery Act, in that variable refrigerant flow systems of satisfactory quality that meet the specifications required for the renovation of this historic property are not produced by vendors in the United States in sufficient and reasonably available commercial quantities. The total cost of the VRF, estimated as $181,000, represents approximately 2.6 percent of the total $7.1 million Recovery Act award provided for renovation of the SAFL.

I. Background

The Recovery Act appropriated $200 million to NSF for projects to be funded by the Foundation's Academic Research Infrastructure (ARI) program. The renovation of SAFL is one of NSF's ARI projects. Section 1605(a) of the Recovery Act, the Buy American provision, states that none of the funds appropriated by the Act ''may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.''

The St. Anthony Falls Laboratory was built in 1938 with Works Progress Administration funding. It is part of the St. Anthony Falls Historic District, added to the National Register of Historic Places in 1971, and this project is, therefore, being undertaken pursuant to a Programmatic Agreement developed as part of NSF's compliance with Section 106 of the National Historic Preservation Act to preserve the historical integrity of the laboratory building.

The SAFL renovation is being funded under a standard grant awarded to the University of Minnesota (UMN) that began in 2010. The project is currently in the construction phase.

Subsections 1605(b) and (c) of the Recovery Act authorize the head of a Federal department or agency to waive the Buy American provision if the head of the agency finds that: (1) Applying the provision would be inconsistent with the public interest; (2) the relevant goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the inclusion of the goods produced in the United States will increase the cost of the project by more than 25 percent. If the head of the Federal department or agency waives the Buy American provision, then the head of the department or agency is required to publish a detailed justification in the **Federal Register**. Finally, section 1605(d) of the Recovery Act states that the Buy American provision must be applied in a manner consistent with the United States' obligations under international agreements.

II. Finding That Relevant Goods Are Not Produced in the United States in Sufficient and Reasonably Available Quality

The project involves renovations and upgrades to the University of Minnesota's St. Anthony Falls Laboratory (SAFL) facility, a contributing element to the National Register-listed St. Anthony Falls Historic District in Minneapolis, MN. When the project was initially being considered for funding, the design of the proposed improvements was not sufficiently advanced to allow for a full evaluation of their potential impacts on the SAFL facility and the Historic District. Therefore, a Programmatic Agreement (PA) was executed among NSF, the University of Minnesota, the Minnesota State Historic Preservation Office, and the National Park Service to define a process through which the PA signatories and other consulting parties would review the design of the proposed upgrades and renovations, as it was being developed, and, through this review, ensure that the proposed action results in no significant adverse impact to the historic integrity of the SAFL facility and the St. Anthony Falls Historic District. The Agreement states that, ''Insofar as possible, the proposed Project shall be implemented in a manner consistent with the *U.S. Secretary of the Interior's Standards for Archaeology and Historic Preservation,* taking into account the *U.S. Secretary of the Interior's Standards for the Rehabilitation of Historic Properties* ('SOI Rehabilitation Standards').''

Installation of a modern heating, ventilation and air conditioning (HVAC) system is required for the safety and welfare of personnel working in SAFL and for the use of some of the instrumentation within the renovated laboratory. The University of Minnesota and its design consultant engaged an engineering consultant to determine the capabilities of the HVAC system required and how best to accommodate these in a way that best preserves the historical integrity of the laboratory building. The use of a VRF system, rather than a type of HVAC system commonly manufactured in the U.S., has been determined by the Awardee, the University of Minnesota, to be necessary in order to meet the requirements of the Programmatic Agreement. This conclusion is based on design considerations associated with historical preservation, space limitations, energy efficiency, and performance. The University of Minnesota has stated that ''The VRF system [is] necessary to accommodate the extraordinary space limitations of the project, the need to maintain the look and feel of a 1938 WPA [Works Progress Administration] facility, and the need to maximize usable research space.''

The University of Minnesota's architect for this project, Perkins+Will, conducted market research by discussing options with an engineering consultant, and with local vendors of HVAC systems, by Internet search, and by reviewing a prior determination of inapplicability issued by the Department of Energy. The Department of Energy, in a Memorandum of Decision issued by the Assistant Secretary for Energy Efficiency and Renewable Energy on May 24, 2010, that considered the applicability of Section 1605 of the Recovery Act to projects funded by the Office of Energy Efficiency and Renewable Energy, had found that ''Variable Refrigerant Flow Zoning HVAC Systems,'' including ''variable refrigerant flow (VRF) multi-split heat pump (with or without heat recovery) and air conditioning systems,'' are ''not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality,'' and had accordingly made a determination of

inapplicability of Section 1605 in the context of such systems. (See also **Federal Register** Volume 75, Number 119 (Tuesday, June 22, 2010), 35447–35449.)

Perkins+Will concluded that no VRF systems of the required scale were manufactured in the U.S.

In the absence of a domestic supplier that could provide a VRF system that meets or exceeds the design requirements of the SAFL renovation, the University of Minnesota requested that NSF issue a Section 1605 exemption determination with respect to the purchase of a foreign-supplied VRF that will meet the specific design and technical requirements that are necessary for the renovation of SAFL.

NSF's Division of Grants and Agreements (DGA) and other NSF program staff reviewed the University of Minnesota exemption request submittal and determined that sufficient technical information was provided in order for NSF to evaluate the exemption request and to conclude that an exemption is needed and should be granted.

III. Exemption

On March 15, 2013, based on the finding that no domestically produced variable refrigerant flow system meets all of the technical specifications and requirements of the St. Anthony Fall Laboratory renovation project and pursuant to section 1605(b), the NSF Chief Financial Officer, in accordance with a delegation order from the Director of the agency signed on May 27, 2010, granted a limited project exemption of the Recovery Act's Buy American requirements with respect to the procurement of the variable refrigerant flow system.

Dated: March 18, 2013.

Lawrence Rudolph,

General Counsel, National Science Foundation.

Submitted for the National Science Foundation on March 18, 2013,

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2013–06536 Filed 3–20–13; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0012]

[Docket Nos. 50–458, 50–155, 72–043, 50–003, 50–247, 50–286, 50–333, 50–255, 50–293, 50–271, 50–313, 50–368, 50–416, and 50–382]

Entergy Nuclear Operations, Inc.; Entergy Operations, Inc.; Biweekly Notice; Notice of Issuance of Amendment to Facility Operating License; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of issuance of amendment; correction.

SUMMARY: The original ''Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing'' was published in the **Federal Register** on March 20, 2012 (77 FR 16274) and included Big Rock Plant. This notice corrects a notice appearing in the **Federal Register** on January 22, 2013 (78 FR 4475–4476), to include a missing facility operating license number and a missing amendment number. This action is necessary to include the license and amendment number for which the license amendment was issued.

FOR FURTHER INFORMATION CONTACT: Nageswaran Kalyanam, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone (301) 415–1480, email: *kaly.kalyanam@nrc.gov.*

SUPPLEMENTARY INFORMATION: On page 4476, in the first column, line two, is corrected from ''and Waterford—240.'' to ''Waterford—240; and Big Rock—128.''; also, on page 4476, first column, first full paragraph, line four is corrected from ''DPR–20, and DPR–28: The amendments'' to ''DPR–20, DPR–28, and DPR–06: The amendments''.

Dated in Rockville, Maryland, this 14th day of March 2013.

For the Nuclear Regulatory Commission.

Nageswaran Kalyanam,

Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–06510 Filed 3–20–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 04008502; NRC–2009–0036]

Notice of Issuance of Materials License Renewal, Operating License SUA–1341, Uranium One USA, Inc., Willow Creek Uranium In Situ Recovery Project

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is providing notice of issuance of a license renewal for Materials License No. SUA–1341 to Uranium One USA, Inc. (Uranium One) for its Willow Creek Uranium *In Situ* Recovery (ISR) Project in Johnson and Campbell Counties, Wyoming.

ADDRESSES: Please refer to Docket ID NRC–2009–0036 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and are publicly-available, using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2009–0036. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* 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. In addition, for the convenience of the reader, the ADAMS accession numbers are provided in a table in Section II of this notice entitled, *Availability of Documents.*
- *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: Ron C. Linton, Project Manager, Office of Federal and State Materials and Environmental Management Programs,

U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–7777; email: *ron.linton@nrc.gov.*

I. Further Information

The license renewal authorizes Uranium One to continue operations of its project as proposed in its license renewal application, as amended, and to continue to possess uranium source and byproduct material at the Willow Creek ISR Project. Uranium One will be required to operate under the conditions listed in Materials License SUA–1341.

The licensee's request for renewal of its license was previously noticed in the **Federal Register** on February 9, 2009 (74 *FR* 6436), with a notice of an opportunity to request a hearing. The NRC received two requests for a hearing on the license application. After an initial hearing, the Atomic Safety and Licensing Board found that the applicants did not have standing to intervene. In accordance with part 51 of Title 10 of the *Code of Federal Regulations* (10 CFR), an environmental assessment of this action was completed and a finding of no significant impact was published in the **Federal Register** on July 15, 2011 (76 FR 41528); and on January 25, 2013, a supplemental environmental assessment and finding of no significant impact relating to this action was also published in the **Federal Register** (78 FR 5514).

The NRC has found that the renewal application for the source materials license complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the NRC's rules and regulations as set forth in 10 CFR Chapter 1. As required by the Act and 10 CFR 40.32(a)–(e), the NRC staff has found that: (1) The renewal application is for a purpose authorized by the Act; (2) Uranium One is qualified by reason of training and experience to use source material for the purpose it requested; (3) Uranium One's proposed equipment and procedures for use at its Willow Creek Project are adequate to protect public health and minimize danger to life or property; (4) renewal and issuance of Materials License SUA–1341 to Uranium One will not be inimical to the common defense and security or to the health and safety of the public; and (5) after weighing the environmental, economic, technical and other benefits against environmental costs, that the action called for is the renewal of Materials License SUA–1341. The NRC prepared a safety evaluation report (SER) that documents the information that was reviewed and the NRC's conclusions.

II. Availability of Documents

In accordance with 10 CFR 2.390 of the NRC's ''Agency Rules of Practice and Procedure,'' the details with respect to this action, including the SER and accompanying documentation and license, are available electronically in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access ADAMS, which provides text and image files of the NRC's public documents. The ADAMS accession numbers for the documents related to this notice are:

1 License Renewal Application (LRA), May 30, 2008	ML081850689
2 LRA Revision, October 31, 2008	ML083110405
3 LRA Revision, July 17, 2009	ML092110700
4 LRA Revision, November 19, 2010	ML103280266
5 LRA Revision, March 7, 2012	ML120820095
6 LRA Revision, July 10, 2012	ML12206A436
7 Response to Confirmatory Action Letter, September 21, 2012	ML12268A270
8 Final Environmental Assessment for the Renewal of the U.S. Nuclear Regulatory Commission License No. SUA–1341 For Uranium One USA, Inc., Irigaray and Christensen Ranch Projects (Willow Creek Project) Wyoming, July 2011.	ML103270681
9 Supplemental Environmental Assessment License Renewal Application Source Materials License SUA–1341, January 2013.	ML12289A442
10 NRC Safety Evaluation Report, March 2013	ML13015A356
11 Source Materials License, Willow Creek Project, March 2013	ML13015A366

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR's Reference staff at 1–800–397–4209, 301–415–4737, or via email to *pdr.resource@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 7th day of March, 2013.

For the Nuclear Regulatory Commission.

Andrew Persinko,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2013–06543 Filed 3–20–13; 8:45 am]

BILLING CODE 7590–01–P

PRESIDIO TRUST

Notice of Public Meeting

AGENCY: The Presidio Trust.

ACTION: Notice of public meeting.

SUMMARY: In accordance with § 103(c)(6) of the Presidio Trust Act, 16 U.S.C. 460bb appendix, and in accordance with the Presidio Trust's bylaws, notice is hereby given that a public meeting of the Presidio Trust Board of Directors will be held commencing 6:30 p.m. on Tuesday, April 9, 2013, at the Golden Gate Club, 135 Fisher Loop, Presidio of San Francisco, California. The Presidio Trust was created by Congress in 1996 to manage approximately eighty percent of the former U.S. Army base known as the Presidio, in San Francisco, California.

The purposes of this meeting are to take action on the minutes of a previous Board meeting, to provide the Chairperson's report, to provide the Executive Director's report, to provide partners' reports, to provide an update on the Commissary site Request for Concept Proposals, to present proposals for the accessions of two works of public art, and to receive public comment on these and other matters in accordance with the Trust's Public Outreach Policy.

Individuals requiring special accommodation at this meeting, such as needing a sign language interpreter, should contact Mollie Matull at 415.561.5300 prior to April 2, 2013.

Time: The meeting will begin at 6:30 p.m. on Tuesday, April 9, 2013.

ADDRESSES: The meeting will be held at the Golden Gate Club, 135 Fisher Loop, Presidio of San Francisco.

FOR FURTHER INFORMATION CONTACT: Karen Cook, General Counsel, the Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, California 94129–0052, Telephone: 415.561.5300.

Dated: March 11, 2013.

Karen A. Cook,

General Counsel.

[FR Doc. 2013–06494 Filed 3–20–13; 8:45 am]

BILLING CODE 4310–4R–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69147; File No. SR–CBOE–2013–029]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Comply With the Requirements of the National Market System Plan To Address Extraordinary Market Volatility

March 15, 2013.

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 March 4, 2013 Chicago Board Options Exchange, Incorporated (the ''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

The Exchange proposes to amend CBOE Stock Exchange, Inc. (''CBSX'') rules to comply with the National Market System Plan to Address Extraordinary Market Volatility (as amended, the ''Plan''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, on the Commission's Web site (*http://www.sec.gov*), and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 is proposing to amend CBSX rules to conform with the Plan. Specifically, the Exchange is proposing to add CBSX Rule 52.15, ''Special Conditions due to Extraordinary Market Volatility'' and make other administrative changes. CBSX believes these amendments will allow CBSX to appropriately conform to the market-wide requirements under the Plan. CBSX believes similar rule changes will be adopted by other markets in the national market system in a coordinated manner.

In an attempt to address extraordinary market volatility in NMS Stock, and, in particular, events like the severe volatility on May 6, 2010, the Exchange, in conjunction with the other national securities exchanges and the Financial Industry Regulatory Authority, Inc. (collectively, ''Participants'') drafted the Plan pursuant to Rule 608 of Regulation NMS and under the Securities Exchange Act of 1934 (the ''Act'').[3] The Plan is primarily designed to, among other things, address extraordinary market volatility in NMS stocks, protect investors, and promote fair and orderly markets. The Plan provides for market-wide limit up-limit down requirements that prevent trades in individual NMS Stocks from occurring outside of specified price bands, as defined in Section I(N) of the Plan. These requirements would be coupled with trading pauses, as defined in Section I(Y) of the Plan, to accommodate more fundamental price moves (as opposed to erroneous trades or monetary gaps of liquidity).

The Plan was filed on April 5, 2011 by the Participants for publication and comment.[4] The Participants requested the Commission approve the Plan as a one-year pilot. On May 24, 2012, the Participants filed an amendment to the Plan which clarified, among other things, the calculation of the reference price, as defined in Section I(T) of the Plan, potential for order type exemption, and the creation of an Advisory Committee.[5] On May 31, 2012, the Commission approved the Plan, as amended, on a one-year pilot basis.[6]

Under the Plan, Participants are required to adopt certain rules in order to comply. Specifically, Section II(B) requires each Participant to adopt a rule requiring compliance by its members with the provision of the Plan. In addition, Section VI of the Plan sets forth the limit up-limit down requirements of the Plan, and in particular, that all trading centers in NMS Stocks, including both those operated by the Participants and those operated by member of Participants, shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trades at prices that are below the lower price band or above the upper price band for an NMS Stock, consistent with the Plan. Price bands would be calculated by Securities Information Processors (''SIPs'') responsible for consolidation of information for an NMS Stock pursuant to Rule 603(b) of Regulation NMS under the Act. As proposed, and approved, the Plan would be implemented, as a one year pilot program, in two phases.[7] Phase I would become effective immediately and apply to Tier I NMS Stock per Appendix A of the Plan, and Phase II would become effective six months later, or earlier if announced by the SIPs 30 days prior, and would apply to all NMS Stocks.

To comply with the above stated provisions of the Plan, the Exchange is proposing to add CBSX Rule 52.15, ''Special Conditions due to Extraordinary Market Volatility'' and make other administrative conforming changes. As stated above, CBSX believes similar rule changes will be adopted by other markets in the national market system in a coordinated manner.

First, the Exchange is proposing to add CBSX Rule 52.15, ''Special Conditions due to Extraordinary Market Volatility.'' Under the Plan, Section II(B) requires each Participant to adopt a rule requiring compliance by its members with the provision of the Plan. Thus, the Exchange is proposing to add a new CBSX Rule 52.15(c)(1) to add such language. In addition, the proposed rule change would add CBSX Rule 52.15(a) to refer Trading Permit Holders (''TPHs'') to Exchange rules addressing ''Market-wide Trading Halts Due to Extraordinary Market Volatility'' [8] as

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 64547 (May 25, 2011), 76 FR 31647 (June 1, 2011) (File No. 4–631).

[4] *Id.*

[5] *See* Securities and Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631).

[6] *See* Securities and Exchange Act Release No. 67091 (May 31, 2012) 77 FR 33498 (June 6, 2012).

[7] *Id.*

[8] *See* Rule 6.3B.

these trading halts will also occur at the same time as the Plan to accommodate more fundamental price moves. The Exchange is also proposing to add CBSX Rule 52.15(b) which references Exchange Rule 6.3C, ''Individual Stock Trading Pause Due to Extraordinary Market Volatility,'' which is the current individual stock trading halts currently in effect. The Plan seeks to replace these halts, but by including reference to the current halts in the proposed Rule, TPHs will more fully understand which rules are applicable. For more clarity, the Exchange is proposing to add language to newly proposed Rule 52.15(c) to alert TPHs to the gradual phasing of the Plan as it coincides with the Trading Pauses referenced in Rule 52.15. Next, the Exchange is proposing to add language regarding Clearly Erroneous Executions. A new paragraph (i) has been added to CBSX Rule 52.4 to address the Plan.[9] In implementing one rule to alert TPHs to the Plan, the Exchange is proposing to create a roadmap of rules related to the Plan to make it explicit and easy to use how the Plan will be incorporated into the CBSX Rules. By adding the proposed language to CBSX Rule 52.15, CBSX is attempting to eliminate confusion for TPHs.

The Plan also requires policies and procedures including, but are not limited to, specific order handling rules addressing exchange-specific order types to be put in place by each exchange in order to comply. CBSX is proposing to add Rule 52.15(c)(3) to fulfill these requirements. The proposed rule change will address how certain orders will function on CBSX in compliance with the Plan.

CBSX believes the proposed rule change allows CBSX to comply with the Plan because it prevents trades from occurring outside of the price bands as the Plan specifically requires. Specifically, CBSX is proposing to add language to clarify that market orders [10] will execute at prices ''at, or better than, the opposite side of the Price Band.'' If the order, or any portion of that order, would result in an execution outside of the Price Band, then the order will be cancelled. The Exchange believes the proposed changes will comply with the Plan, as required, as it will ensure market orders are not executed at a price that is outside of the applicable Price Band.

CBSX is also adding language to address orders that may be explicitly priced outside the Price Bands.[11] Because the specified price on these orders might also be outside the price bands, CBSX will re-price these orders to be within the price bands. More specifically, an order that is explicitly priced outside of the Price band, will be re-priced by the CBSX System to the corresponding Price Band. To remain consistent, if a Price Band moves and an order resting in the CBSX Book is priced outside of the Price Band, the resting order will also be re-priced to the corresponding Price Band. Language is also being proposed to clarify that re-priced orders will retain the original time price priority. The Exchange believes this proposed change will also prevent orders from executing outside of the Price Bands.

Next, CBSX is adding language to address Immediate-or-Cancel orders. Any Immediate-or-Cancel order will be accepted by the CBSX System, however, such orders may only execute at or within the bands. Consistent with Immediate-or-Cancel orders generally, any unexecuted portion will be cancelled. With the proposed changes, CBSX will be in compliance with the Plan by preventing trades from occurring outside the price bands during a limit state. The Exchange is also proposing to add language to state that any CBSX order priced passively outside of the Price Bands will be accepted by the CBSX System and put in the CBSX book. Such orders will not be executed until the Price Band moves and the order is now at or within the Price Band.

The Exchange is also proposing to add language to describe how the Exchange will route orders. More specifically, the Exchange is proposing to add 52.15(c)(3)(E) to explicitly say that the Exchange shall not route to an away market displaying a quote that is outside of the applicable Price band. The Exchange believes this change will ensure the Exchange will not execute any orders outside of the Price Bands and required by the Plan.

Next, the Exchange is proposing to add language regarding special handling of quotes after the Plan becomes operative. The Exchange is proposing to add language specifically addressing new bids and offers will be cancelled for those quotations are outside of the applicable Price Bands. In addition, any resting quotation in the CBSX book that becomes outside of the Price Bands due to a change in the market will be re-priced to the corresponding Price Band as appropriate. The Exchange believes that this proposed change will further ensure that orders will not be executed outside of the Price Bands as required by the Plan.

Finally, as an administrative change, the Exchange is proposing to add reference to Rule 6.3C, ''Individual Stock Trading Pause Due to Extraordinary Market Volatility'' in CBSX Appendix A to make clear Rule 6.3C applies to CBSX members as well. The Exchange believes this change creates more clarity to TPHs which rules are applicable to them.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[12] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [13] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitation transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [14] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change will comply with the Plan which is intended to reduce the negative impacts of sudden, unanticipated price movements in NMS Stocks, thereby protecting investors and promoting a fair and orderly market. In addition, similar rule changes will be adopted by other markets in the national market system in a coordinated manner promoting the public interest. Creating a more orderly market will promote just and equitable principles of trade by allowing investors to feel more secure in their participation in the national market system. The proposed rule change also incorporates a market-wide plan, which has been approved by the

[9] *See* Securities Exchange Act Release No. 34–68800 (February 7, 2013), 78 FR 9076 (February 21, 2013) (SR–CBOE–2013–012).

[10] *See* Rule 51.8(a) which defines a market order as ''an order to buy or sell a stated number of shares at the best price available on the CBSX system.''

[11] CBSX currently supports various order types that, by their nature, require a specified price (e.g. Limit Orders) or an optional contingency price (e.g. Silent Orders). *See, e.g.,* CBSX Rule 51.8(b) and (10).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] *Id.*

Commission under the Act.[15] Incorporation of such Plan into the CBSX rules allows for explicit compliance under the Act.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[16] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange. The Plan was filed under the Act, and the proposed rule changes merely allow CBSX to comply with the Plan. Therefore, the proposed rule change is allowing the Exchange to have the capacity to carry out the purposes of the Act. In addition, it is requiring CBSX TPHs to comply with the Plan and, thus, the Act.

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 that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes are based on a market-wide plan, and, as such, the Exchange understands other competing exchanges plan to make similar changes. In addition, the proposed changes are being made to establish, maintain, and enforce written policies and procedures that are reasonably specified in the Plan. As such, the proposed changes merely provide protection to investors during periods of extraordinary market volatility.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[17] and Rule 19b–4(f)(6) thereunder.[18] 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.

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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act[19] to determine whether the proposed rule change 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 No. SR–CBOE–2013–029 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–CBOE–2013–029. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2013–029 and should be submitted on or before April 11, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–06480 Filed 3–20–13; 8:45 am]

BILLING CODE 8011–01–P

[15] *See* supra note 6.

[16] 15 U.S.C. 78f(b)(1).

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

[19] 15 U.S.C. 78s(b)(2)(B).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69146; File No. SR–CBOE–2013–027]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Relating to Trading Ahead of Customer Orders and Best Execution and Interpositioning Requirements

March 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 5, 2013, Chicago Board Options Exchange, Incorporated (the ''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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 the Rules of CBOE Stock Exchange, LLC (''CBSX''), CBOE's stock trading facility, by amending the rule related to trading ahead of customer orders and adopting a rule related to best execution and interpositioning requirements. The text of the proposed rule change is provided below.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Chicago Board Options Exchange, Incorporated Rules

* * * * *

CBOE Stock Exchange (CBSX) Rules

* * * * *

Rule 53.2 [Trading Permit Holders Acting As Brokers]*Prohibition Against Trading Ahead of Customer Orders*

(a) [While Holding Unexecuted Market Order. No Trading Permit Holder shall on the CBSX System (1) personally buy or initiate the purchase of any security subject to the rules in these Chapters for his own account or for any account in which he or his TPH organization or any member, partner, officer, or employee is directly or indirectly interested, while such Trading Permit Holder personally holds or has knowledge that his TPH organization or any member, partner, officer or employee holds an unexecuted market order to buy such security in the unit of trading for a customer, or (2) personally sell or initiate the sale of any security subject to the rules in these Chapters for any such account, while he personally holds or has knowledge that his TPH organization or any member, partner, officer or employee holds an unexecuted market order to sell such security in the unit of trading for a customer.]*Except as provided herein, a Trading Permit Holder that accepts and holds an order in an equity security from its own customer or a customer of another broker-dealer without immediately executing the order is prohibited from trading that security on the same side of the market for its own account at a price that would satisfy the customer order, unless it immediately thereafter executes the customer order up to the size and at the same or better price at which it traded for its own account.*

(b) [While Holding Unexecuted Limit Order. No Trading Permit Holder shall on CBSX (1) personally buy or initiate the purchase of any security subject to the rules in these Chapters for any such account, at or below the price at which he personally holds or has knowledge that his TPH organization or any member, partner, officer or employee holds an unexecuted limited price order to buy such security in the unit of trading for a customer, or (2) personally sell or initiate the sale of any security for any such account at or above the price at which he personally holds or has knowledge that his TPH organization or any member, partner, officer or employee holds an unexecuted limited price order to sell such security in the unit of trading for a customer.]*A Trading Permit Holder must have written procedures in place governing the execution and priority of all pending orders that is consistent with the requirements of this Rule and Rule 53.8. A Trading Permit Holder also must ensure that these procedures are consistently applied.*

[(c) Special Contract Exemption. The provisions of this Rule shall not apply to any purchase or sale of a security the delivery of which is to be upon a day other than the day of delivery provided in such unexecuted market or limited price order.]

* * * Interpretations and Policies:

.01 *Large Orders and Institutional Account Exceptions. With respect to orders for customer accounts that meet the definition of an ''institutional account'' (as defined below) or for orders of 10,000 shares or more (unless such orders are less than $100,000 in value), a Trading Permit Holder is permitted to trade a security on the same side of the market for its own account at a price that would satisfy such customer order, provided that the Trading Permit Holder has provided clear and comprehensive written disclosure to such customer at account opening and annually thereafter that:*

(a) discloses that the Trading Permit Holder may trade proprietarily at prices that would satisfy the customer order, and

(b) provides the customer with a meaningful opportunity to opt in to the Rule 53.2 protections with respect to all or any portion of its order.

If the customer does not opt in to the Rule 53.2 protections with respect to all or any portion of its order, the Trading Permit Holder may reasonably conclude that such customer has consented to the Trading Permit Holder trading a security on the same side of the market for its own account at a price that would satisfy the customer's order.

In lieu of providing written disclosure to customers at account opening and annually thereafter, a Trading Permit Holder may provide clear and comprehensive oral disclosure to and obtain consent from the customer on an order-by-order basis, provided that the Trading Permit Holder documents who provided such consent and such consent evidences the customer's understanding of the terms and conditions of the order.

For purposes of this rule, the term ''institutional account'' shall mean the account of:

(A) a bank, savings and loan association, insurance company, or registered investment company;

(B) an investment adviser registered either with the Securities and Exchange Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or

(C) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.

.02 *No-Knowledge Exception. With respect to NMS stocks, as defined in Rule 600 of SEC Regulation NMS, if a Trading Permit Holder implements and utilizes an effective system of internal controls, such as appropriate information barriers, that operate to prevent one trading unit from obtaining knowledge of customer orders held by a separate trading unit, those other trading units trading in a proprietary capacity may continue to trade at prices that would satisfy the customer orders held by the separate trading unit. A Trading Permit Holder that structures its order handling practices in NMS stocks to permit its proprietary and/or market-making desk to trade at prices that would satisfy customer orders held by a separate trading unit must disclose in writing to its customers, at account opening and annually thereafter, a description of the manner in which customer orders are handled by the Trading Permit Holder and the circumstances under which the Trading Permit Holder may trade proprietarily at its proprietary and/or market-making desk at prices that would satisfy the customer order.*

If a Trading Permit Holder intends to rely on this exception by implementing information barriers, those information barriers (i) must provide for the organizational separation of a Trading Permit Holder's customer order trading unit and proprietary trading unit; (ii) must ensure that one trading unit does not exert influence over the other trading unit; (iii) must ensure that information relating to each trading unit's stock positions, trading activities, and clearing and margin arrangements is not improperly shared (except with persons in senior management who are involved in exercising general managerial oversight of one or both entities); (iv) must require each trading unit to maintain separate books and records (and separate financial accounting); (v) must require each trading unit to separately meet all required capital requirements; (vi) must ensure the confidentiality of the trading unit's book as provided by Exchange rules; and (vii) must ensure that any other material, non-public information (e.g. information related to any business transactions between the trading unit and an issuer or any research reports or recommendations issued by the trading unit) is not made improperly available to the other trading unit in any manner that would allow that trading unit to take undue advantage of that information while trading on CBSX. A Trading Permit Holder must submit the proposed information barriers in writing to the Exchange upon request.

.03 *ISO Exception. A Trading Permit Holder shall be exempt from the obligation to execute a customer order in a manner consistent with this Rule with regard to trading for its own account that is the result of an intermarket sweep order routed in compliance with Rule 600(b)(30)(ii) of SEC Regulation NMS (''ISO'') where the customer order is received after the Trading Permit Holder routed the ISO. Where a Trading Permit Holder routes an ISO to facilitate a customer order and that customer has consented to not receiving the better prices obtained by the ISO, the Trading Permit Holder also shall be exempt with respect to any trading for its own account that is the*

result of the ISO with respect to the consenting customer's order.

.04 *Odd Lot and Bona Fide Error Transaction Exceptions. The obligations under this Rule shall not apply to a Trading Permit Holder's proprietary trade that is (1) to offset a customer order that is in an amount less than a normal unit of trading; or (2) to correct a bona fide error. Trading Permit Holders are required to demonstrate and document the basis upon which a transaction meets the bona fide error exception.*

.05 *Minimum Price Improvement Standards. The minimum amount of price improvement necessary for a Trading Permit Holder to execute an order on a proprietary basis when holding an unexecuted limit order in that same security, and not be required to execute the held limit order is as follows:*

(a) For customer limit orders priced greater than or equal to $1.00, the minimum amount of price improvement required is $0.01;

(b) For customer limit orders priced greater than or equal to $0.01 and less than $1.00, the minimum amount of price improvement required is the lesser of $0.01 or one-half (½) of the current inside spread;

(c) For customer limit orders priced less than $0.01 but greater than or equal to $0.001, the minimum amount of price improvement required is the lesser of $0.001 or one-half (½) of the current inside spread;

(d) For customer limit orders priced less than $0.001 but greater than or equal to $0.0001, the minimum amount of price improvement required is the lesser of $0.0001 or one-half (½) of the current inside spread;

(e) For customer limit orders priced less than $0.0001 but greater than or equal to $0.00001, the minimum amount of price improvement required is the lesser of $0.00001 or one-half (½) of the current inside spread;

(f) For customer limit orders priced less than $0.00001, the minimum amount of price improvement required is the lesser of $0.000001 or one-half (½) of the current inside spread; and

(g) For customer limit orders priced outside the best inside market, the minimum amount of price improvement required must either meet the requirements set forth above or the Trading Permit Holder must trade at a price at or inside the best inside market for the security.

In addition, if the minimum price improvement standards above would trigger the protection of a pending customer limit order, any better-priced customer limit order(s) must also be protected under this Rule, even if those better-priced limit orders would not be directly triggered under the minimum price improvement standards above.

.06 *Order Handling Procedures. A Trading Permit Holder must make every effort to execute a marketable customer order that it receives fully and promptly. A Trading Permit Holder that is holding a customer order that is marketable and has not been immediately executed must make every effort to cross such order with any other order received by the Trading Permit Holder on the other side of the market up to the size of such order at a price that is no less than the best bid and no greater than the best offer at the time that the subsequent order is received by the Trading Permit Holder and that is consistent with the terms of the orders. In the event that a Trading Permit Holder is holding multiple orders on both sides of the market that have not been executed, the Trading Permit Holder must make every effort to cross or otherwise execute such orders in a manner that is reasonable and consistent with the objectives of this Rule and with the terms of the orders. A Trading Permit Holder can satisfy the crossing requirement by contemporaneously buying from the seller and selling to the buyer at the same price.*

.07 *Trading Outside Normal Market Hours. Trading Permit Holder s generally may limit the life of a customer order to the period of normal market hours of 8:30 a.m. to 3:00 p.m. Central Time. However, if the customer and Trading Permit Holder agree to the processing of the customer's order outside normal market hours, the protections of this Rule shall apply to that customer's order(s) at all times the customer order is executable by the Trading Permit Holder.*

* * * * *

Rule 53.8. *Best Execution and Interpositioning*[Reserved]

[Reserved]*(a)(1) In any transaction for or with a customer or a customer of another broker-dealer, a Trading Permit Holder and persons associated with a Trading Permit Holder shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. Among the factors that will be considered in determining whether a Trading Permit Holder or person associated with a Trading Permit Holder has used ''reasonable diligence'' are:*

(A) the character of the market for the security (e.g., price, volatility, relative liquidity, and pressure on available communications);

(B) the size and type of transaction;

(C) the number of markets checked;

(D) accessibility of the quotation; and

(E) the terms and conditions of the order which result in the transaction, as communicated to the Trading Permit Holder and persons associated with the Trading Permit Holder.

(2) In any transaction for or with a customer or a customer of another broker-dealer, no Trading Permit Holder or person associated with a Trading Permit Holder shall interject a third party between the Trading Permit Holder or the person associated with a Trading Permit Holder and the best market for the subject security in a manner inconsistent with paragraph (a)(1) of this Rule.

(b) When a Trading Permit Holder cannot execute directly with a market but must employ a broker's broker or some other means in order to ensure an execution advantageous to the customer, the burden of showing the acceptable circumstances for doing so is on the Trading Permit Holder.

(c) Failure to maintain or adequately staff a department assigned to execute customers' orders cannot be considered justification for executing away from the best available market; nor can channeling orders through a third party as described above as reciprocation for service or business operate to relieve a Trading Permit Holder of its obligations under this Rule.

(d) A Trading Permit Holder through which an order is channeled and that knowingly is a party to an arrangement whereby the initiating Trading Permit Holder has not fulfilled its obligations under this Rule will also be deemed to have violated this Rule.

(e) The obligations described in paragraphs (a) through (d) above exist not only when the Trading Permit Holder acts as agent for the account of its customer but also when transactions are executed as principal.

* * * *Interpretations and Policies:*

.01 *Execution of Marketable Customer Orders. A Trading Permit Holder must make every effort to execute a marketable customer order that it receives fully and promptly.*

.02 *Definition of ''Market.'' For the purposes of Rule 53.8 and the accompanying Interpretations and Policies, the term ''market'' or ''markets'' is to be construed broadly, and it encompasses a variety of different venues, including, but not limited to, market centers that are trading a particular security. This expansive interpretation is meant to both inform broker-dealers as to the breadth of the scope of venues that must be considered in the furtherance of their best execution obligations and to promote fair competition among broker-dealers, exchange markets, and markets other than exchange markets, as well as any other venue that may emerge, by not mandating that certain trading venues have less relevance than others in the course of determining a firm's best execution obligations.*

.03 *Best Execution and Executing Brokers. A Trading Permit Holder's duty to provide best execution in any transaction ''for or with a customer of another broker-dealer'' does not apply in instances when another broker-dealer is simply executing a customer order against the Trading Permit Holder's quote. The duty to provide best execution to customer orders received from other broker-dealers arises only when an order is routed from the broker-dealer to the Trading Permit Holder for the purpose of order handling and execution. This clarification is intended to draw a distinction between those situations in which the Trading Permit Holder is acting solely as the buyer or seller in connection with orders presented by a broker-dealer against the Trading Permit Holder's quote, as opposed to those circumstances in which the Trading Permit Holder is accepting order flow from another broker-dealer for the purpose of facilitating the handling and execution of such orders.*

.04 *Use of a Broker's Broker. Paragraph (b) of Rule 53.8 provides that when a Trading Permit Holder cannot execute directly with a market but must employ a broker's broker or some other means in order to ensure an execution advantageous to the customer, the burden of showing the acceptable circumstances for doing so is on the Trading Permit Holder. Examples of acceptable circumstances are where a customer's order*

is ''crossed'' with another firm that has a corresponding order on the other side, or where the identity of the firm, if known, would likely cause undue price movements adversely affecting the cost or proceeds to the customer.

.05 Orders Involving Securities with Limited Quotations or Pricing Information. Although the best execution requirements in Rule 53.8 apply to orders in all securities, markets for securities differ dramatically. One of the areas in which a Trading Permit Holder must be especially diligent in ensuring that it has met its best execution obligations is with respect to customer orders involving securities for which there is limited pricing information or quotations available. Each Trading Permit Holder must have written policies and procedures in place that address how the Trading Permit Holder will determine the best inter-dealer market for such a security in the absence of pricing information or multiple quotations and must document its compliance with those policies and procedures. For example, a Trading Permit Holder should analyze pricing information based on other data, such as previous trades in the security, to determine whether the resultant price to the customer is as favorable as possible under prevailing market conditions. In these instances, a Trading Permit Holder should generally seek out other sources of pricing information or potential liquidity, which may include obtaining quotations from other sources (e.g., other firms that the Trading Permit Holder previously has traded with in the security).

.06 Customer Instructions Regarding Order Handling. If a Trading Permit Holder receives an unsolicited instruction from a customer to route that customer's order to a particular market for execution, the Trading Permit Holder is not required to make a best execution determination beyond the customer's specific instruction. Trading Permit Holders are, however, still required to process that customer's order promptly and in accordance with the terms of the order. Where a customer has directed that an order be routed to another specific broker-dealer that is also a Trading Permit Holder, the receiving Trading Permit Holder to which the order was directed would be required to meet the requirements of Rule 53.8 with respect to its handling of the order.

.07 Regular and Rigorous Review of Execution Quality.

(a) No Trading Permit Holder can transfer to another person its obligation to provide best execution to its customers' orders. A Trading Permit Holder that routes customer orders to other broker-dealers for execution on an automated, non-discretionary basis, as well as a Trading Permit Holder that internalizes customer order flow, must have procedures in place to ensure the Trading Permit Holder periodically conducts regular and rigorous reviews of the quality of the executions of its customers' orders if it does not conduct an order-by-order review. The review must be conducted on a security-by-security, type-of-order basis (e.g., limit order, market order, and market on open order). At a minimum, a Trading Permit Holder must conduct such reviews on a quarterly basis; however, Trading Permit Holders should consider, based on the firm's business, whether more frequent reviews are needed.

(b) In conducting its regular and rigorous review, a Trading Permit Holder must determine whether any material differences in execution quality exist among the markets trading the security and, if so, modify the Trading Permit Holder's routing arrangements or justify why it is not modifying its routing arrangements. To assure that order flow is directed to markets providing the most beneficial terms for their customers' orders, the Trading Permit Holder must compare, among other things, the quality of the executions the Trading Permit Holder is obtaining via current order routing and execution arrangements (including the internalization of order flow) to the quality of the executions that the Trading Permit Holder could obtain from competing markets. In reviewing and comparing the execution quality of its current order routing and execution arrangements to the execution quality of other markets, a Trading Permit Holder should consider the following factors:

(1) price improvement opportunities (i.e., the difference between the execution price and the best quotes prevailing at the time the order is received by the market);

(2) differences in price disimprovement (i.e., situations in which a customer receives a worse price at execution than the best quotes prevailing at the time the order is received by the market);

(3) the likelihood of execution of limit orders;

(4) the speed of execution;

(5) the size of execution;

(6) transaction costs;

(7) customer needs and expectations; and

(8) the existence of internalization or payment for order flow arrangements.

(c) A Trading Permit Holder that routes its order flow to another Trading Permit Holder that has agreed to handle that order flow as agent for the customer (e.g., a clearing firm or other executing broker-dealer) can rely on that Trading Permit Holder's regular and rigorous review as long as the statistical results and rationale of the review are fully disclosed to the Trading Permit Holder and the Trading Permit Holder periodically reviews how the review is conducted, as well as the results of the review.

* * * * *

The text of the proposed rule change is also available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), 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 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 Rule 53.2 of the CBSX Rules, which governs the treatment of customer orders and prohibits a CBSX Trading Permit Holder from proprietarily trading ahead of a customer order, and to adopt Rule 53.8 in the CBSX Rules to govern Trading Permit Holders' best execution and interpositioning requirements. This proposed rule change is consistent with Financial Industry Regulatory Authority (''FINRA'') Rules 5320 (Prohibition Against Trading Ahead of Customer Orders) [3] and 5310 (Best Execution and Interpositioning),[4] respectively, in the Consolidated FINRA Rulebook. The purpose of these rules is to enhance customer order protection and help customers receive efficient executions of their transactions at the best market prices.

Rule 53.2—Prohibition Against Trading Ahead of Customer Orders

Currently, Rule 53.2 prohibits a Trading Permit Holder on the CBSX

[3] *See* Securities Exchange Act Release No. 63895 (February 11, 2011), 76 FR 9386 (February 17, 2011) (SR–FINRA–2009–090) (order approving FINRA Rule 5320, ''Prohibition Against Trading Ahead of Customer Orders''). Other exchanges have adopted substantially similar rules prohibiting trading ahead of customer orders. *See, e.g.,* Securities Exchange Act Release No. 64418 (May 6, 2011), 76 FR 27735 (May 12, 2011) (SR–CHX–2011–008) (notice of filing and immediate effectiveness of proposed rule change of Chicago Stock Exchange, Inc. to adopt customer order protection language consistent with FINRA Rule 5320); Securities Exchange Act Release No. 65165 (August 18, 2011), 76 FR 53009 (August 24, 2011) (SR–NYSEAmex–2011–059) (notice of filing and immediate effectiveness of proposed rule change of NYSE Amex LLC (now known as NYSE MKT LLC) to adopt customer order protection language substantially the same as FINRA Rule 5320); and Securities Exchange Act Release No. 65166 (August 18, 2011), 76 FR 53012 (August 24, 2011) (SR–NYSEArca–2011–057) (notice of filing and immediate effectiveness of proposed rule change of NYSE Arca, Inc. to adopt customer order protection language substantially the same as FINRA Rule 5320).

[4] *See* Securities Exchange Act Release No. 65895 (December 5, 2011), 76 FR 77042 (December 9, 2011) (SR–FINRA–2011–052) (order approving FINRA Rule 5310, ''Best Execution and Interpositioning''). Other exchanges have similar best execution and interpositioning rules. *See, e.g.,* NASDAQ Stock Market LLC Rule 2320 (Best Execution and Interpositioning) and IM–2320; and NASDAQ OMX PHLX LLC Rule 764 (Best Execution and Interpositioning).

System[5] from trading for its own account any security subject to the CBSX Rules while the Trading Permit Holder personally holds or has knowledge that his Trading Permit Holder organization (or any member, partner, officer or employee) holds an unexecuted market order to buy or sell that security in the unit of trading for a customer.[6] Rule 53.2 also prohibits a Trading Permit Holder on the CBSX System from trading for its own account any security subject to the CBSX Rules at a price that is equal to or better [sic] the price at which the Trading Permit Holder personally holds or has knowledge that his Trading Permit Holder organization (or any member, partner, officer or employee) holds an unexecuted limit order to buy or sell that security in the unit of trading for a customer.

The proposed rule change replaces in its entirety the text of Rule 53.2 and adds a number of exceptions. Proposed Rule 53.2 includes customer order protection language similar to the current Rule that states if a Trading Permit Holder holds an order in an equity security from its own customer or a customer of another broker-dealer, the Trading Permit Holder is prohibited from trading that security on the same side of the market for its own account at a price that would satisfy the customer order. The proposed rule change adds that this prohibition does not apply if a Trading Permit Holder, who has traded proprietarily ahead of a customer order, immediately thereafter executes the customer order up to the size and at the same or better price at which it traded for its own account. In other words, in the event that a Trading Permit Holder trades ahead of an unexecuted customer order at a price that is equal to or better than the unexecuted customer order on the CBSX System, the Trading Permit Holder is required to execute the customer order at the price received by the Trading Permit Holder or better; otherwise the Trading Permit Holder will be in violation of improperly trading ahead of the customer order.[7] The proposed rule change also establishes the minimum amount of price improvement necessary for a Trading Permit Holder to execute an order on a proprietary basis when holding an unexecuted limit order.[8]

The Exchange also proposes to establish that a Trading Permit Holder must have written procedures in place governing the execution and priority of all pending orders that is consistent with proposed Rule 53.2 and the best execution requirements of proposed Rule 53.8 and ensure that these procedures are consistently applied.

In furtherance of ensuring customer order protection on CBSX, the proposed rule change clarifies Trading Permit Holder obligations in handling marketable customer orders. In meeting these obligations, a Trading Permit Holder must make every effort to execute a marketable customer order that it receives fully and promptly. A Trading Permit Holder that is holding a customer order that is marketable and has not been immediately executed must make every effort to cross the order with any other order received by the Trading Permit Holder on the other side of the market up to the size of such order at a price that is no less than the best bid and no greater than the best offer at the time that the subsequent order is received by the Trading Permit Holder and that is consistent with the terms of the orders. In the event that a Trading Permit Holder is holding multiple orders on both sides of the market that have not been executed, the Trading Permit Holder must make every effort to cross or otherwise execute these orders in a manner that is reasonable and consistent with the objects of the proposed rule change and with the terms of the orders. A Trading Permit Holder can satisfy the crossing requirement by contemporaneously buying from the seller and selling to the buyer at the same price.[9]

Large Orders and Institutional Accounts Exception[10]

The most notable proposed exception to the prohibition on trading ahead of customer orders permits Trading Permit Holders to negotiate terms and conditions on the acceptance of certain large-sized orders (orders of 10,000 shares or more and greater than or equal to $100,000 in value) or orders from institutional accounts.[11] These terms and conditions would permit Trading Permit Holders to continue to trade along side or ahead of these customer orders if the customer agrees.

Specifically, under the proposed rule, a Trading Permit Holder would be permitted to trade a security on the same side of the market for its own account at a price that would satisfy a customer order provided that the Trading Permit Holder provides clear and comprehensive written disclosure to each customer at account opening and annually thereafter that: (1) Discloses that the Trading Permit Holder may trade proprietarily at prices that would satisfy the customer order, and (b) provides the customer with a meaningful opportunity to opt in to the Rule 53.2 protections with respect to all or any portion of its order(s).

If a customer does not opt in to the Rule 53.2 protections with respect to all or any portion of its order(s), the Trading Permit Holder may reasonably conclude that the customer has consented to the Trading Permit Holder trading a security on the same side of the market for its own account at a price that would satisfy the customer's order.[12]

In lieu of providing written disclosure to customers at account opening and annually thereafter, the proposed rule would permit Trading Permit Holders to provide clear and comprehensive oral disclosure to, and obtain consent from, a customer on an order-by-order basis, provided that the Trading Permit Holder documents who provided that consent and that the consent evidences the customer's understanding of the terms and conditions of the order. In addition, where a customer has opted in to the Rule 53.2 protections, a Trading Permit Holder may still obtain consent on an order-by-order basis to trade ahead of or along with an order from that customer, provided that the Trading Permit Holder documents who provided the consent

[5] The ''CBSX System'' means the electronic system that performs the functions set out in the CBSX Rules, including controlling, monitoring, and recording trading by Trading Permit Holders through CBSX Workstations and trading between Trading Permit Holders. *See* Rule 50.1.

[6] Rule 53.2 currently also provides a special contract exemption, stating that the provisions of the Rule do not apply to any purchase or sale of a security the delivery of which is to be upon a day other than the day of delivery provided in the unexecuted market or limit order.

[7] For example, if a Trading Permit Holder buys 100 shares of a security at $10 per share while holding customer limit orders in the same security to buy at $10 per share equaling, in aggregate, 1000 shares, the Trading Permit Holder is required to fill 100 shares of the customer limit orders at $10 per share or better.

[8] *See* proposed Rule 53.2, Interpretation and Policy .05. For example, for customer limit orders priced greater than or equal to $1.00, the minimum amount of price improvement required is $0.01.

[9] *See* proposed Rule 53.2, Interpretation and Policy .06.

[10] *See* proposed Rule 53.2, Interpretation and Policy .01.

[11] Proposed Rule 53.2, Interpretation and Policy .01 defines ''institutional account'' as an account of: (a) A bank, savings and loan association, insurance company, or registered investment company; (b) an investment adviser registered either with the Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (c) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.

[12] As is always the case, customers retain the right to withdraw consent at any time. Therefore, a Trading Permit Holder's reasonable conclusion that a customer has consented to the Trading Permit Holder trading along with the customer's order is subject to further instruction and modification from the customer.

and that the consent evidences the customer's understanding of the terms and conditions of the order.[13]

No-Knowledge Exception [14]

The Exchange also proposes to add a ''no-knowledge'' exception to CBSX's customer order protection rule. This proposed exception would allow a proprietary trading unit of a Trading Permit Holder organization to continue trading in a proprietary capacity and at prices that would satisfy customer orders that were being held by another, separate trading unit at the Trading Permit Holder organization. The ''no-knowledge'' exception would be applicable with respect to NMS stocks, as defined in Rule 600 of SEC Regulation NMS. In order to avail itself of the ''no-knowledge'' exception, a Trading Permit Holder organization must first implement and utilize an effective system of internal controls (such as appropriate information barriers) that operate to prevent the proprietary trading unit from obtaining knowledge of the customer orders that are held at a separate trading unit. For example, a CBSX Broker [15] that conducts both a proprietary and agency brokerage business and has implemented and utilized an effective system of internal controls, the ''walled off'' proprietary desk(s) of the CBSX Broker would be permitted to trade at prices that would satisfy the customer orders held by the agency brokerage desk without any requirement that these proprietary executions trigger an obligation to fill pending customer orders at the same price. The ''no-knowledge'' exception would also apply to a Trading Permit Holder organization's market-making unit.

A Trading Permit Holder organization that structures its order handling practices in NMS stocks to permit its proprietary and/or market-making desk to trade at prices that would satisfy customer orders held as a separate trading unit must disclose in writing to its customers, at account opening and annually thereafter, a description of the manner in which customer orders are handled by the Trading Permit Holder and the circumstances under which the Trading Permit Holder may trade proprietarily at its market-making desk at prices that would satisfy the customer order. This proposed disclosure may be combined with the disclosure and negative consent statement permitted in connection with the proposed large order and institutional account exceptions.

If a Trading Permit Holder intends to rely on the no-knowledge exception by implementing information barriers, those information barriers must (1) provide for the organizational separation of a Trading Permit Holder's trading unit that holds customer orders and a proprietary trading unit; (2) ensure that one trading unit does not exert influence over the other trading unit; (3) ensure that information relating to each trading unit's stock positions, trading activities, and clearing and margin arrangements is not improperly shared (except with persons in senior management who are involved in exercising general managerial oversight of one or both entities); (4) require each trading unit to maintain separate books and records (and separate financial accounting); (5) require each trading unit to separately meet all required capital requirements; (6) ensure the confidentiality of each trading unit's book as provided by Exchange rules; and (7) ensure that any other material, non-public information (e.g. information related to any business transactions between a trading unit and an issuer or any research reports or recommendations issued by the trading unit) is not made improperly available to the other trading unit in any manner that would allow that trading unit to take undue advantage of that information while trading on CBSX. A Trading Permit Holder must submit the proposed information barriers in writing to the Exchange upon request.

Similar to FINRA Rule 5320, the proposed rule change requires Trading Permit Holders that intend to rely on the no-knowledge exception by implementing information barriers to have ''appropriate'' information barriers. The Exchange believes that including these specific information barrier requirements will clarify for Trading Permit Holders what types of information barriers would be deemed appropriate information barriers and thus better allow Trading Permit Holders to rely on this exception. The Exchange notes that its surveillance procedures will continue to include a review of all orders for compliance with the prohibition on trading ahead of customer orders, and part of that will review [sic] include review of Trading Permit Holders' information barriers to determine whether they are sufficient for the Trading Permit Holders to avail themselves of the no-knowledge exception for each applicable order. These requirements regarding information barriers are substantially similar to those set forth in CBOE Rule 54.8, which includes special provisions for trading commodity-based trust shares on CBSX, except that the proposed rule change provides that information barriers must be submitted upon request while CBOE Rule 54.8 provides that information barriers must be submitted and approved in advance. The Exchange believes it is appropriate and efficient to request from a Trading Permit Holder its information barriers as part of its surveillance procedures with respect to the customer order protection rule.

ISO Exception [16]

The proposed rule change also clarifies that a Trading Permit Holder will be exempt from the obligation to execute a customer order in a manner consistent with CBSX's customer order protection rule with regard to trading for its own account that is the result of an intermarket sweep order routed in compliance with Rule 600(b)(30)(ii) of SEC Regulation NMS (''ISO'') where the customer order is received after the Trading Permit Holder routed the ISO. Where a Trading Permit Holder routes an ISO to facilitate a customer order and that customer has consented to not receiving the better prices obtained by the ISO, the Trading Permit Holder also will be exempt with respect to any trading for its own account that is the result of the ISO with respect to the consenting customer's order.

Odd Lot and Bona Fide Error Transaction Exception [17]

The Exchange also proposes applying an exception for a firm's proprietary trade that (1) offsets a customer odd lot order (i.e., an order less than one round lot, which is typically 100 shares); or (2) corrects a bona fide error. With respect to bona fide errors, Trading Permit Holder would be required to demonstrate and document the basis

[13] While a Trading Permit Holder organization relying on this or any exception must be able to proffer evidence of its eligibility for and compliance with the exception, the Exchange believes that when obtaining consent on an order-by-order basis, Trading Permit Holders must, at a minimum, document not only the terms and conditions of the order (e.g., the relative price and size of the allocated order/percentage split with the customer), but also the identity of the person at the customer who approved the trade-along request. For example, the identity of the person must be noted in a manner that will enable subsequent contact with that person if a question as to the consent arises (i.e., first names only, initials, and nicknames will not suffice). A ''trade along'' request would be when a Trading Permit Holder asks to trade for his/her proprietary account while simultaneously holding and working a customer order in that same stock.

[14] *See* proposed Rule 53.2, Interpretation and Policy .02.

[15] A ''CBSX Broker'' is a Trading Permit Holder who enters orders as an agent. *See* Rule 50.3(5).

[16] *See* proposed Rule 53.2, Interpretation and Policy .03.

[17] *See* proposed Rule 53.2, Interpretation and Policy .04.

upon which a transaction meets the bona fide error exception. For purposes of this proposed Rule, the definition of a ''bona fide error'' is as defined in SEC Regulation NMS's exemption for error correction transactions.[18]

Trading Outside Normal Market Hours [19]

This proposed rule change also expands CBSX's customer order protection requirements to apply at all times that a customer order is executable by the Trading Permit Holder, even outside the period of normal market hours. Thus, customers would have the benefit of the customer order protection rules at all times where such order is executable by the Trading Permit Holder, subject to any applicable exceptions. This exception will apply to those Trading Permit Holders that accept customer orders after normal market hours.

Rule 53.8—Best Execution and Interpositioning

The Exchange proposes to adopt a new rule to govern Trading Permit Holders' best execution and interpositioning requirements. Proposed Rule 53.8(a)(1) requires a Trading Permit Holder or person associated with a Trading Permit Holder, in any transaction for or with a customer or a customer of another broker-dealer, to use ''reasonable diligence'' to ascertain the best market for a security and to buy or sell in that market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. The rule identifies five factors that are among those to be considered in determining whether the Trading Permit Holder or person associated with a Trading Permit Holder has used reasonable diligence:

(1) the character of the market for the security;

(2) the size and type of transaction;

(3) the number of markets checked;

(4) the accessibility of the quotation; and

(5) the terms and conditions of the order as communicated to the Trading Permit Holder or person associated with the Trading Permit Holder.

Proposed Rule 53.8(a)(2) relates to interpositioning and prohibits a Trading Permit Holder or person associated with a Trading Permit Holder, in any transaction for or with a customer or a customer of another broker-dealer, from interjecting a third party between the Trading Permit Holder or person associated with a Trading Permit Holder and the best market for the subject security in a manner inconsistent with the best execution requirements in subparagraph (a)(1) of proposed Rule 53.8.

Proposed Rule 53.8 also includes provisions related to the use of a broker's broker, the staffing of order rooms, and the application of the best execution requirements to other parties. Proposed paragraph (b) provides that when a Trading Permit Holder cannot execute directly with a market but must employ a broker's broker or some other means in order to ensure an execution advantageous to the customer, the burden of showing the acceptable circumstances for doing so is on the Trading Permit Holder. Proposed paragraph (c) provides that failure to maintain or adequately staff a department assigned to execute customers' orders cannot be considered justification for executing away from the best available market; nor can channeling orders through a third party as reciprocation for service or business operate to relieve a Trading Permit Holder of its obligations under proposed Rule 53.8. Proposed paragraph (d) provides that a Trading Permit Holder through which an order is channeled and that knowingly is a party to an arrangement whereby the initiating Trading Permit Holder has not fulfilled its obligations under Rule 53.8 will also be deemed to have violated Rule 53.8. Proposed paragraph (e) provides that the obligations in paragraphs (a) through (d) apply when the Trading Permit Holder acts as agent for the account of its customer as well as when transactions are executed as principal.

Proposed Rule 53.8 includes several Interpretations and Policies to provide additional guidance and clarity regarding Trading Permit Holders' obligations with respect to the best execution and interpositioning requirements. Proposed Interpretation and Policy .01 reinforces a Trading Permit Holder's duty to make every effort to execute a marketable customer order that it receives fully and promptly. Proposed Interpretation and Policy .02 defines the term ''market'' for the purposes of proposed Rule 53.8.[20]

Proposed Interpretation and Policy .03 addresses broker-dealers that are executing a customer's order against the Trading Permit Holder's quote. It provides that a Trading Permit Holder's duty to provide best execution in any transaction ''for or with a customer of another broker-dealer'' does not apply in instances when another broker-dealer is simply executing a customer order against the Trading Permit Holders' quote. The duty to provide best execution to customer orders received from other broker-dealers arises only when an order is routed from the broker-dealer to the Trading Permit Holder for the purpose of order handling and execution. This clarification is intended to draw a distinction between those situations in which the Trading Permit Holder is acting solely as the buyer or seller in connection with orders presented by a broker-dealer against the Trading Permit Holder's quote, as opposed to those circumstances in which the Trading Permit Holder is accepting order flow from another broker-dealer for the purpose of facilitating the handling and execution of such orders.

Proposed Interpretation and Policy .04 provides that when a Trading Permit Holder cannot execute directly with a market but must employ a broker's broker or some other means in order to ensure an execution advantageous to the customer, the burden of showing the acceptable circumstances for doing so is on the Trading Permit Holder. Examples of acceptable circumstances are where a customer's order is crossed with another firm that has a corresponding order on the other side, or where the identity of the firm, if known, would likely cause undue price movements adversely affecting the cost or proceeds to the customer.

Proposed Interpretation and Policy .05 addresses the fact that markets for securities differ dramatically and provides additional guidance regarding a Trading Permit Holder's best execution obligations when handling an order involving any security for which there is limited pricing information or other quotations available. The Interpretation and Policy emphasizes that Trading Permit Holders must be especially diligent with respect to best execution obligations where there is limited quotation or other pricing

[18] *See* Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926 (June 14, 2007) (Order Exempting Certain Error Correction Transactions from Rule 611 of Regulation NMS under the Securities Exchange Act of 1934).

[19] *See* proposed Rule 53.2, Interpretation and Policy .07.

[20] For purposes of proposed Rule 53.8 and the accompanying Interpretations and Policies, the term ''market'' or ''markets'' is to be construed broadly, and it encompasses a variety of different venues, including, but not limited to, market centers that are trading a particular security. This expansive interpretation is meant to both inform broker-dealers as to the breadth of the scope of venues that must be considered in the furtherance of their best execution obligations and to promote fair competition among broker-dealers, exchange markets, and markets other than exchange markets, as well as any other venue that may emerge, by not mandating that certain trading venues have less relevance than others in the course of determining a firm's best execution obligations.

information available regarding the security that is the subject of the order and requires Trading Permit Holders to have written policies and procedures in place to address the steps the Trading Permit Holder will take to determine the best interdealer market for such a security in the absence of multiple quotations or pricing information and to document how they have complied with those policies and procedures. The Interpretation and Policy specifically notes that, when handling orders for these securities, Trading Permit Holders should generally seek out other sources of pricing information or potential liquidity, which may include obtaining quotations from other sources (e.g., other firms that the Trading Permit Holder previously has traded with in the security). For example, in many instances, particularly in the context of equity securities with limited quotation information available, contacting other broker-dealers may be necessary to comply with a Trading Permit Holder's best execution obligations.

When placing an order with a Trading Permit Holder, customers may specifically instruct the Trading Permit Holder to route the order to a particular market for execution.[21] Proposed Interpretation and Policy .06 addresses situations where the customer has, on an unsolicited basis, specifically instructed the Trading Permit Holder to route that customer's order to a particular market for execution.[22] Under those circumstances, the Trading Permit Holder would not be required to make a best execution determination beyond that specific instruction; however, the Interpretation and Policy mandates that Trading Permit Holders process that customer's order promptly and in accordance with the terms of the order. The Interpretation and Policy also makes clear that where a customer has directed the Trading Permit Holder to route an order to another specific broker-dealer that is also a Trading Permit Holder, the exception would not apply to the receiving Trading Permit Holder to which the order was directed.[23]

Proposed Interpretation and Policy .07 codifies a Trading Permit Holder's obligation when it undertakes a regular and rigorous review of execution quality likely to be obtained from different market centers. These longstanding obligations are set forth and explained in various SEC releases and NASD *Notices to Members*.[24]

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.[25] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[26] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitation transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[27] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that amending CBSX's customer order protection rule and adopting a best execution and interpositioning rule will promote just and equitable principles of trade and protect investors and the public interest by bringing CBSX's Rules more in line with industry standards, most notably FINRA Rules 5320 and 5310, respectively. Additionally, the requirement to have certain information barriers in place to take advantage of the no-knowledge exception to the prohibition on trading ahead of customer orders is substantially similar to the information barrier requirement set forth in CBOE Rule 54.8 regarding trading commodity-based trust shares on CBSX. The Exchange believes it will be efficient to review the information barriers upon request in connection with its overall surveillances procedures related to the customer order protection rule.

The Exchange believes this consistency among Rules of different self-regulatory organizations will in turn reduce the complexity of customer order protection for those firms subject to the rules of multiple trading venues. It will also contribute to investor protection by defining important parameters by which Trading Permit Holders must abide when trading proprietarily and when handling customer orders. In addition, the Exchange believes harmonizing customer order protection, best execution and interpositioning rules across self-regulatory organizations will foster cooperation and contribute to perfecting the mechanism of a free and open market and national market system. The Exchange also believes that including these rules in CBSX's rules will reinforce the importance of these requirements and ensure that Trading Permit Holders are aware of these requirements. The Interpretations and Policies for each Rule will provide Trading Permit Holders with additional guidance and clarification on their obligations under these Rules and thus potentially increase compliance with those obligations. The proposed rule change will impose the same requirements on all Trading Permit Holders. Finally, the Exchange believes that the proposed rule change will maintain the necessary protection and priority of customer orders designed to prevent fraudulent and manipulative acts, without imposing any undue regulatory costs on industry participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE 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. The Exchange believes the proposed rule change will reduce the burdens on market participants that result from their having to comply with varying rules related to customer order protection, thus reducing the complexity of customer order protection rules, particularly for those firms subject to the rules of multiple trading venues. Overall, the Exchange believes the proposed rule change enhances customer order protection by harmonizing customer order protection, best execution and interpositioning rules across self-regulatory organizations, which ultimately benefits

[21] When the order is for an NMS security, these orders are often referred to as ''directed orders.'' *See* 17 CFR 242.600(b)(19). Of note, directed orders are excluded from the order routing statistics required to be produced under Rule 606 of SEC Regulation NMS. *See* 17 CFR 242.606.

[22] The Interpretation and Policy also clarifies that a Trading Permit Holder's best execution obligations extend to all customer orders and is intended to avoid the potential misimpression that the paragraph limits the scope of the rule's requirements.

[23] For example, if a customer of Trading Permit Holder Firm A directs Trading Permit Holder Firm A to route an order to Trading Permit Holder Firm B, Trading Permit Holder Firm B would continue to have best execution obligations to that customer order received from Trading Permit Holder Firm A.

[24] *See, e.g.,* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996); and NASD *Notice to Members* 01–22 (April 2001).

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

[27] *Id.*

market participants and does not impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange 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–2013–027 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–2013–027. 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 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–CBOE–2013–027, and should be submitted on or before April 11, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–06478 Filed 3–20–13; 8:45 am]

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[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69148; File No. SR–ISE–2013–20]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Limit Up/Limit Down

March 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 4, 2013, the International Securities Exchange, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The 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 rules proposing changes to its rules in light of the implementation of limit-up/limit-down procedures for securities that underlie options traded on the ISE. The text of the proposed rule change is available on the Exchange's Web site *www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On May 31, 2012, the Commission approved the Plan to Address Extraordinary Market Volatility (the ''Plan''),[3] which establishes procedures to address extraordinary volatility in NMS Stocks. The procedures provide for market-wide limit up-limit down requirements that prevent trades in individual NMS Stocks from occurring outside of specified Price Bands. These limit up-limit down requirements are coupled with Trading Pauses to accommodate more fundamental price moves. The Plan procedures are designed, among other things, to protect investors and promote fair and orderly markets.[4]

ISE is not a participant in the Plan because it does not trade NMS Stocks. However, the ISE trades options contracts overlying NMS Stocks. Because options pricing models are highly dependent on the price of the underlying security and the ability of options traders to effect hedging transactions in the underlying security, the implementation of the Plan will impact the trading of options classes traded on the Exchange. Specifically, under the Plan, upper and lower price bands will be calculated based on a reference price for each NMS Stock.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (''Plan Approval Order'').

[4] *Id.* at 33511 (Preamble to the Plan).

[5] The reference price equals the arithmetic mean price of eligible reported transactions for the NMS

When one side of the market for an individual security is outside the applicable price band, the national best bid or national best offer will be disseminated with a flag identifying it as non-executable (i.e., a ''Straddle State''). When the other side of the market reaches the applicable price band, such national best bid or offer will be disseminated with a flag identifying it as a Limit State Quotation.[6] If trading for a security does not exit a Limit State within 15 seconds, a Trading Pause will be declared by the Primary Listing Exchange.[7] The Trading Pause will last at least five minutes [8] and will end when the Primary Listing Exchange disseminates a Reopening Price.[9]

When the national best bid (offer) for a security underlying an options class is non-executable, the ability for options market participants purchase (sell) shares of the underlying security and the price at which they may be able to purchase (sell) shares will become uncertain, as there will be a lack of transparency regarding the availability of liquidity for the security.[10] This uncertainty will be factored into the options pricing models of market professionals, such as options market makers, which will likely result in wider spreads and less liquidity at the best bid and offer for the options class. In light of these unusual market conditions, when the national best bid or offer for a security underlying an options class traded on the Exchange is non-executable or when the underlying security is in a Limit State, the Exchange proposes to reject incoming and pending orders that do not have a limit price. This proposed change is consistent with the views of the Securities Industry and Financial Markets Association's (''SIFMA'') Listed Options Trading Committee.[11] The Exchange believes that all of the options exchanges are considering similar rule changes so that there will be a uniform approach across the exchanges.[12]

Specifically, the Exchange proposes to automatically reject all incoming orders that do not contain a limit price to protect them from being executed at prices that may be vastly inferior to the prices available immediately prior to or following a Limit State or Straddle State. Such un-priced orders include market orders and stop orders, which become market orders when the stop price is elected.[13] The Exchange will also cancel any unexecuted market orders and unexecuted stop orders.[14]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [15] in general, and furthers the objectives of Section 6(b)(5) of the Act [16] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

As discussed above, when an underlying security enters a Limit State or Straddle State, the best bid and offer in the options class is likely to widen considerably, and the liquidity available at those prices may be greatly reduced. In such circumstances, orders entered without a price could receive executions at prices that are vastly inferior to the market price just prior to the initiation of the Limit State or Straddle State and vastly inferior to the market price following the conclusion of the Limit State or Straddle State. Given that these states may be resolved very quickly, the Exchange believes that rejecting un-price orders will protect investors from receiving poor executions and provide a more fair and orderly market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will have any impact on competition, and that it is likely that all of the other options exchanges will adopt similar order protection rules.[17]

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 on this proposed rule change, however, the Exchange received a written request to adopt the rule changes contained in the proposal.[18]

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 [19] and Rule 19b–4(f)(6) thereunder.[20] 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

Stock over the immediately preceding five-minute period. *See* Section I(T) of the Plan.

[6] *See* Section I(D) of the Plan. The Limit State will end when the entire size of all Limit State Quotations are executed or cancelled.

[7] *See* Section VII(A) of the Plan. The Primary Listing Exchange is the market on which an NMS Stock is listed. If an NMS Stock is listed on more than one market, the Primary Listing Exchange is the market on which the security has been listed the longest. *See* Section I(O) of the Plan. A trading pause may also be declared when the national best bid (offer) is below (above) the lower (upper) price band and the security is not in a Limit State, and trading in that security deviates from normal trading characteristics. *See* Section VII(A)(2) of the Plan.

[8] A Trading Pause may last longer than 5 minutes if, for example, the Primary Market declares a Regulatory Halt, or if there is a significant order imbalance. *See* Section VII(B) of the Plan. If the Primary Listing Exchange does not report a Reopening Price within ten minutes after the declaration of a trading Pause and has not declared a Regulatory Halt, all trading centers may begin trading the security. *Id.*

[9] The Reopening Price is the price of a transaction that reopens trading on the Primary Listing Exchange following a Trading Pause or a Regulatory Halt, or, if the Primary Listing Exchange reopens with quotations, the midpoint of those quotations. The Exchange notes that under ISE Rule 702(c), trading on the Exchange is halted whenever trading in the underlying security has been paused by the primary listing market. Accordingly, the Exchange need not adopt any rule changes to address this aspect of the Plan.

[10] *See* Letter to Boris Ilyevsky, Managing Director, ISE, from Thomas Price, Managing Director, Securities Industry and Financial Markets Association, dated October 4, 2012 (''SIFMA Letter''). A copy of the letter is provided in *Exhibit 2* to this filing.

[11] *Id.*

[12] Id. (recommending that the options exchanges and the Commission work together to assemble a uniform set of rules).

[13] ISE Rule 715(e).

[14] Cancelling such orders is consistent with the views expressed by SIFMA. SIFMA Letter, *supra* note 10. Market orders may be unexecuted at the time that a Limit State or Straddle State is initiated for a number of reasons, such as they are being handled by the Primary Market Maker (*see* ISE Rule 803(c)), they are being exposed (*see* ISE Rule 716(c), ISE Rule 722(iii); and ISE Rule 803, Supplementary Material .02)), or they have been directed to a market maker (*see* ISE Rule 811). The Exchange will not reject pending transactions in the Exchange's Facilitation, Solicited Order, Crossing Order or Price Improvement Mechanisms, as all such transactions are initiated with a limit price. ISE Rule 716(d) (Facilitation Mechanism); ISE Rule 716(e) (Solicited Order Mechanism); Rule 721 (Crossing Orders); and Rule 723 (Price Improvement Mechanism). Allowing such transactions during a Limit State or Straddle State is consistent with the views expressed by SIFMA. SIFMA Letter, *supra* note 10.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] SIFMA Letter, *supra* note 10.

[18] *Id.*

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

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.

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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act [21] to determine whether the proposed rule change 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 No. SR–ISE–2013–20 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–ISE–2013–20. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–ISE–2013–20 and should be submitted on or before April 11, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–06481 Filed 3–20–13; 8:45 am]

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[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69151; File No. SR–NASDAQ–2013–033]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend the Pre-Market Hours of the Exchange to 4:00 a.m. EST

March 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 5, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I 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

NASDAQ proposes to extend the pre-market hours of the Exchange to 4:00 a.m. EST, from the current opening time of 7:00 a.m. EST.

[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

Background. NASDAQ's equities trading day is divided into three sessions: (1) The pre-market session which runs from 7:00 a.m. to 9:29:59 a.m.; (2) the regular session which runs from 9:30 a.m. to 4:00 p.m.; and (3) the post-market session which runs from 4:00:00:01 p.m. to 8:00 p.m. The vast majority of trading occurs during the regular session; over 91 percent of average daily trading volume in NASDAQ-listed equities is executed during the regular session. Nonetheless, the pre-market and post-market sessions provide critical price formation and trading opportunities for a small group of equities market participants. For those equities and market participants, the presence of a transparent, liquid, and efficient market during the pre-market or post-market session is vital to public investors, and to the firms themselves.

The NYSE Arca Exchange is currently the only U.S. equities exchange that operates a pre-market trading session for equities beginning at 4:00 a.m. Increasingly, the trading period between 4:00 a.m. and 7:00 a.m. provides a significant opportunity for certain investors and traders. A meaningful percentage of total daily trading volume in NASDAQ-listed securities is reported as executed before 7:00 a.m., especially for individual stocks that experience material news or other trading events overnight. Additionally, NASDAQ understands from its members that an increasing number of limit orders are entered into the NYSE Arca system before 7:00 a.m. and execute after 7:00 a.m. While it is difficult to quantify the total number of orders and shares in this category based on available trade reporting limitations, NASDAQ believes

that significant liquidity comes to rest prior to 7:00 a.m.

Accordingly, NASDAQ believes that opening its system at 4:00 a.m. will benefit investors, the national market system, NASDAQ members and the NASDAQ market. Opening at 4:00 a.m. will benefit investors and the national market system by increasing competition for order flow and executions, and thereby spurring product enhancements and lowering prices. Opening at 4:00 a.m. will benefit NASDAQ members and the NASDAQ market by increasing trading opportunities between 4:00 a.m. and 7:00 a.m. without increasing ancillary trading costs (telecommunications, data, connectivity, etc.) and, thereby, decreasing average trading costs per share. Opening NASDAQ at 4:00 a.m. will also benefit NASDAQ members that choose not to participate in the early hours but nonetheless gain the opportunity to interact with liquidity entered by other members during the early session.

Operations. From the members' operational perspective, NASDAQ's goal is to permit trading for those that choose to trade, without imposing burdens on those that do not. Thus, for example, NASDAQ will not require any NASDAQ member to participate in the extended session, including not requiring registered market makers to make two-sided markets between 4:00 a.m. and 7:00 a.m. NASDAQ will minimize members' preparation efforts to the greatest extent possible by allowing members to trade beginning at 4:00 a.m. with the same equipment, connectivity, order types, and data feeds they currently use from 7:00 a.m. onwards.

Opening Process. NASDAQ will offer no opening cross at 4:00 a.m., just as it offers no Opening Cross at 7:00 a.m. today. Instead, at 4:00 a.m., the NASDAQ system will ''wake up'' by loading in price/time priority all open trading interest carried over from the previous trading day. Also at 4:00 a.m., NASDAQ will open the execution system and accept new eligible orders, just as it currently does at 7:00 a.m. Members will be permitted to enter orders beginning at 4:00 a.m. Market makers will be permitted but not required to open their quotes beginning at 4:00 a.m. in the same manner they open their quotes today beginning at 7:00 a.m.

Order Types. Every NASDAQ order type that is currently available beginning at 7:00 a.m. will be available beginning at 4:00 a.m. All other order types, and all order type behaviors, will otherwise remain unchanged. NASDAQ will not extend the expiration times of any orders. For example, an order that is currently available from 7:00 a.m. to 4:00 p.m. will be modified to be available from 4:00 a.m. to 4:00 p.m. An order that is available from 7:00 a.m. to 9:30 a.m. will be modified to be available from 4:00 a.m. to 9:30 a.m. In the future, display and non-display characteristics will operate beginning at 4:00 a.m., as they do today beginning at 7:00 a.m.

Routing Services. NASDAQ will route orders to away markets between 4:00 a.m. and 7:00 a.m., just as it does today between 7:00 a.m. and 9:30 a.m. All routing strategies set forth in NASDAQ Rule 4758 will remain otherwise unchanged, performing the same instructions they perform between 4:00 a.m. and 7:00 a.m. today.

Order Processing. Order processing under NASDAQ Rule 4757 will operate beginning at 4:00 a.m. just as it does today beginning at 7:00 a.m. There will be no changes to the ranking, display, execution algorithms, or decrementation processes or rules.

Data Feeds. NASDAQ will report the best bid and offer on the Exchange to the appropriate network processor, as it currently does beginning 7:00 a.m. NASDAQ proprietary data feeds will be disseminated beginning at 4:00 a.m. using the same formats and delivery mechanisms with which NASDAQ currently disseminates them beginning at 7:00 a.m.

Trade Reporting. Trades executed between 4:00 a.m. and 7:00 a.m. will be reported to the appropriate network processor with the ''.T'' modifier, just as they are reported today beginning at 7:00 a.m.

Adjustment of Open Orders. NASDAQ will adjust open orders for the 4:00 a.m. opening pursuant to the requirements of NASDAQ Rule 4761 just as it does today for the 7:00 a.m. opening.

Fees. NASDAQ is changing no fees in connection with this proposal.

Market Surveillance. NASDAQ's commitment to high quality regulation at all times will extend to 4:00 a.m. NASDAQ will offer all surveillance coverage currently performed by NASDAQ MarketWatch beginning at 3:45 a.m. In other words, surveillance coverage will begin 15 minutes pre-open, just as it does today.

Personnel. Quality surveillance begins with quality personnel. Highly trained primary and back-up regulatory personnel will be in place at 3:45 a.m. and the NASDAQ Call Center will open at 4:00 a.m.

Systems. All MarketWatch surveillance systems will launch by the time trading starts. At 4:00 a.m. NASDAQ personnel will begin conducting alert reviews, clearly erroneous trade processing, and member firm contacts just as they do today beginning at 7:00 a.m.

Trading Halts. Currently MarketWatch institutes trading halts from 7 a.m. to 8 p.m. NASDAQ plans to institute a subset of trading halts between 4:00 a.m. and 7:00 a.m. First, NASDAQ will halt trading at the request of an issuer, which NASDAQ believes is also the practice of the NYSE across its affiliated exchanges for its listed companies. Second, NASDAQ will halt trading in conjunction with a trading halt imposed by a foreign listing market. As described below, NASDAQ does not plan to review issuer disclosures during the 4:00 a.m. to 7:00 a.m. period, obviating the need for material news halts.

Clearly Erroneous Trade Processing. NASDAQ will process trade breaks beginning at 4:00 a.m. pursuant to NASDAQ Rules 4762 and 11890 just as it does today beginning at 7:00 a.m.

Issuer Disclosure Requirements. To avoid burdening issuers, NASDAQ will not extend the current issuer disclosure requirements set forth in NASDAQ Rule 5250 and NASDAQ IM–5250, which require overnight material disclosures to be forwarded to MarketWatch by 6:50 a.m. This will allow issuers to continue the practice of disclosing material news between 4:00 a.m. and 7:00 a.m. to avoid triggering a halt by NASDAQ or another listing market. Issuers prefer to avoid triggering material news halts because the halt process involves interaction between NASDAQ and designated officials at the issuer. Our proposed policy would obviate the need for these officials to be available at unexpected hours. This also limits the need for trade halt coordination between NASDAQ and the NYSE Arca Exchange between 4:00 a.m. and 7:00 a.m.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general, and with Section 6(b)(5) of the Act,[4] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f(b)(5).

the public interest. The proposed rule change promotes this goal by offering additional trading opportunities to NASDAQ members that desire them, without imposing burdens on NASDAQ members that do not. The proposal will facilitate a well-regulated, orderly, and efficient market during a period of time that is currently underserved.

NASDAQ notes that the proposed trading period has been available for years on the NYSE Arca Exchange. NASDAQ believes that the availability of trading between 4:00 a.m. and 7:00 a.m. has been beneficial to market participants including investors and issuers on other markets. The Exchange believes that offering a competing trading session will further benefit investors by promoting competition and order interaction, while imposing no added costs on investors or other market participants that choose not avail themselves of these benefits.

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. To the contrary, NASDAQ believes that offering a competing early trading session is pro-competitive in that it will increase competition for order flow, for execution services and for listings. The fact that the early trading session is itself an identical response to the competition provided by another market is proof of its pro-competitive nature. NASDAQ fully expects that other listing venues will respond by further extending their trading sessions as well.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [5] and Rule 19b–4(f)(6) thereunder.[6] 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 [7] and Rule 19b–4(f)(6)(iii) thereunder.[8]

The Exchange has asked the Commission to waive the 30-day operative delay.[9] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The proposed rule change does not appear to raise any novel regulatory issues for the Commission to consider.[10] In addition, according to NASDAQ, the introduction of competition during the hours of 4:00 a.m. and 7:00 a.m. will benefit investors by offering alternative execution venues and spurring improvements in pricing and functionality. Accordingly, the Commission designates the proposal operative upon filing.[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–2013–033 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–033. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 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–2013–033 and should be submitted on or before April 11, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–06479 Filed 3–20–13; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(6).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6)(iii).

[10] *See* Securities and Exchange Act Release No. 51014 (January 10, 2005), 70 FR 2918 (January 18, 2005) (SR–PCX–2004–83).

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 8242]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Tuesday, April 23, 2013, in Room 6103 of the United

States Coast Guard Headquarters Building, 2100 Second Street SW., Washington, DC 20593–0001. The primary purpose of the meeting is to prepare for the forty-fourth Session of the International Maritime Organization's (IMO) Sub-Committee on Standards of Training and Watchkeeping (STW) to be held at the IMO Headquarters, United Kingdom, April 29–May 3, 2013.

The agenda items to be considered include:

—Adoption of the agenda; report on credentials
—Decisions of other IMO bodies
—Validation of model training courses
—Unlawful practices associated with certificates of competency
—Casualty analysis
—Development of an e-navigation strategy implementation plan
—Development of guidance for the implementation of the 2010 Manila amendments
—Promotion of the implementation of the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW–F), 1995
—Development of Guidelines for wing-in-ground (WIG) craft
—Role of the human element
  —Guidelines on how to present relevant information to seafarers
  —Enhancing the efficiency and user-friendliness of International Safety Management Code (ISM)
—Development of Guidance for personnel involved with tug-barge operations
—Revision of the Recommendations on training of personnel on mobile offshore units (MOUs)
—Development of a mandatory Code for ships operating in polar waters
—Review and modernization of the Global Maritime DIstress and Safety System (GMDSS)
—Review of general cargo ship safety
—Proposed amendment to the STCW Code's colour vision requirements
—Biennial agenda and provisional agenda for STW 45
—Any other business
—Report to the Maritime Safety Committee

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, Mr. Breyer Davis, by email at *breyer.j.davis@uscg.mil,* by phone at (202) 372–1445, by fax at (202) 372–1925, or in writing at Commandant (CG–5PS), U.S. Coast Guard, 2100 2nd Street SW., Stop 7126, Washington, DC 20593–7126 not later than April 16, 2013, which is one week prior to the meeting. Requests made after April 16, 2013 might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Headquarters building. The Headquarters building is accessible by taxi and privately owned conveyance (public transportation is not generally available). However, parking in the vicinity of the building is extremely limited. Additional information regarding this and other IMO SHC public meetings may be found at: *www.uscg.mil/imo.*

Dated: March 12, 2013.

Brian Robinson,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2013–06529 Filed 3–20–13; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 8243]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 10:00 a.m. on Monday, April 8, 2013, in Room 1422 of the United States Coast Guard Headquarters Building, 2100 Second Street SW., Washington, DC 20593–7121. The primary purpose of the meeting is to prepare for the one-hundredth session of the International Maritime Organization's (IMO) Legal Committee to be held at the IMO Headquarters, London, England, United Kingdom, April 15–19, 2013.

The primary matters to be considered include:

—Adoption of the agenda; report on credentials.
—Monitoring the implementation of the 2010 Protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.
—Provision of financial security in cases of abandonment, personal injury to, or death of seafarers related to entry into force of the International Labour Organization Maritime Labour Convention, 2006.
—Fair treatment of seafarers in the event of a maritime accident.
—Piracy.
—Collation and preservation of evidence following an allegation of a serious crime having taken place on board a ship or a report of a missing person from a ship, and pastoral and medical care of victims.
—Matters arising from the 108th and 109th regular sessions of the Council.
—Technical co-operation activities related to maritime legislation.
—Review of the status of conventions and other treaty instruments.
—Application of the Committee's Guidelines.
—Election of officers.
—Any other business, including reconsideration of the Committee's recommendation related to liability and compensation issues connected to transboundary oil pollution damage from offshore exploration and exploitation activities.
—Consideration of the report of the Committee on its 100th session.

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, LCDR Lineka Quijano, by email at *Lineka.N.Quijano@uscg.mil*, by phone at (202) 372–3865, by fax at (202) 372–3975, or in writing at Commandant (CG–0941), U.S. Coast Guard, 2100 2nd Street SW., Stop 7121, Washington, DC 20593–7121 not later than April 1, 2013, one week prior to the meeting. Requests made after April 1, 2013, might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Headquarters building. The Headquarters building is accessible by taxi and privately owned conveyance (public transportation is not generally available). However, parking in the vicinity of the building is extremely limited. Additional information regarding this and other IMO SHC public meetings may be found at: *www.uscg.mil/imo.*

Dated: March 12, 2013.

Brian Robinson,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2013–06530 Filed 3–20–13; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Availability of the Final Environmental Assessment (EA) and Finding of No Significant Impact/ Record of Decision (FONSI/ROD) for the 2020 Improvement Project for Minneapolis/St. Paul International Airport (MSP), Minneapolis, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA is issuing this notice to advise the public that the FAA has prepared and approved (March 6, 2013) a FONSI/ROD based on the Final EA for the MSP 2020 Improvement Project. The Final EA was prepared in accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, FAA Orders 1050.1E, ''Environmental Impacts: Policies and Procedures'' and 5050.4B, ''NEPA Implementing Instructions for Airport Actions''.

DATES: This notice is effective March 21, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Kandice Krull, Environmental Protection Specialist, FAA Minneapolis Airports District Office (ADO), 6020 28th Avenue South, Suite 102, Minneapolis, Minnesota, 55450. Telephone number is (612) 253–4639. Copies of the FONSI/ROD and/or Final EA are available upon written request by contacting Ms. Kandice Krull through the contact information above.

SUPPLEMENTARY INFORMATION: The Final EA evaluated the MSP 2020 Improvement Project. The purpose of the project is to accommodate the expected demand such that the level of service is acceptable throughout MSP's facilities (terminal and landside facilities such as gates, security checkpoints, parking lots, roadways, etc.) under both existing and 2020 conditions and regional roadways under 2030 conditions.

The FAA and the Metropolitan Airport Commission (MAC) jointly prepared the Final EA, pursuant to the requirements of the NEPA and the Minnesota Environmental Policy Act, respectively. A joint Federal-State EA was prepared.

Chapter 3 of the Final EA identified and evaluated all reasonable alternatives. Numerous alternatives were considered but eventually discarded for not meeting the purpose and need. Three alternatives (No Action, Alternative 1—Airlines Remain, and Alternative 2—Airlines Relocation) were examined in detail. After careful analysis and consultation with various resource agencies, the MAC selected Alternative 2 as the preferred alternative. Alternative 2 satisfies the purpose and need while minimizing impacts.

Alternative 2 includes improvements to Terminal 1—Lindbergh; Terminal 2—Humphrey; Glumack Drive; 34th Avenue South and I–494 interchange; East 72nd Street and 34th Avenue South intersection; 34th Avenue South, East 70th Street; Post Road; the Post Road and Trunk Highway 5 interchange; and I–494.

Based on the analysis in the Final EA, the FAA has determined that Alternative 2 will not result in significant impacts to resources identified in accordance with FAA Orders 1050.1E and 5054.4B. Therefore, an environmental impact statement will not be prepared.

Issued in Minneapolis, Minnesota on March 6, 2013.

Jesse Carriger,

Acting Manager, Minneapolis Airports District Office, FAA, Great Lakes Region.

[FR Doc. 2013–06533 Filed 3–20–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 463 (Sub-No. 1X)]

Alabama Railroad Co.—Abandonment Exemption—in Monroe County, AL

Alabama Railroad Co. (ALAB) has filed a verified notice of exemption under 49 CFR part 1152 subpart F–*Exempt Abandonments* to abandon approximately 7.42 miles of rail line between milepost 655.20 (east of Route 21 at Tunnel Springs) and milepost 662.62 (west of Main Street in Beatrice), in Monroe County, Ala. The line traverses United States Postal Service Zip Codes 36425 and 36471.

ALAB has certified that: (1) No local traffic has moved over the line for at least two years; [1] (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on April 20, 2013, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by April 1, 2013. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by April 10, 2013, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to ALAB's representative: William A. Mullins, 2401 Pennsylvania Ave. NW., Suite 300, Washington, DC 20037.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

ALAB has filed a combined environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by March 26, 2013. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA at (202)

[1] ALAB indicates that portions of the line may have been used for freight car storage during the period. It states that use of the line for this purpose does not disqualify ALAB from invoking the notice of exemption procedures. *See, e.g., Indiana Southwestern Ry.—Abandonment Exemption—in Posey & Vanderburgh Cntys. Ind.,* AB 1065X (STB served Dec. 23, 2010).

[2] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C. 2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[3] Each OFA must be accompanied by the filing fee, which is currently set at $1,600. *See* 49 CFR 1002.2(f)(25).

245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at (800) 877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), ALAB shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by ALAB's filing of a notice of consummation by March 21, 2014, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at ''*www.stb.dot.gov.*''

Decided: March 15, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2013–06537 Filed 3–20–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

March 15, 2013.

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before April 22, 2013 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov.*

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by calling (202) 927–5331, email at *PRA@treasury.gov,* or the entire information collection request may be found at *www.reginfo.gov.*

Bureau of the Public Debt (BPD)

OMB Number: 1535–0120.

Type of Review: Extension without change of a currently approved collection.

Title: FHA New Account Request, Transition Request, and Transfer Request.

Abstract: The information is used to (1) Establish a book-entry account; (2) change information on a book-entry account; and (3) transfer ownership of a book-entry account on the HUD system, maintained by the Federal Reserve Bank of Philadelphia.

Affected Public: Individuals or Households.

Estimated Total Burden Hours: 50.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2013–06460 Filed 3–20–13; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

March 15, 2013.

The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, Public Law 104–13, on or after the date of publication of this notice.

DATES: Comments should be received on or before April 22, 2013 to be assured of consideration.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestion for reducing the burden, to (1) Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Treasury, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA_Submission@OMB.EOP.GOV* and (2) Treasury PRA Clearance Officer, 1750 Pennsylvania Ave. NW., Suite 8140, Washington, DC 20220, or email at *PRA@treasury.gov,* or the entire information collection request maybe found at *www.reginfo.gov.*

Terrorism Risk Insurance Program

OMB Number: 1505–0190.

Type of Review: Extension without change of a currently approved collection.

Title: Terrorism Risk Insurance Program Rebuttal of Controlling Influence Submission.

Abstract: Title 31 CFR 50.8 specifies a rebuttal procedure that requires a written submission by an insurer that seeks to rebut a regulatory presumption of ''controlling influence'' over another insurer under the Terrorism Risk Insurance Program to provide Treasury with necessary information to make a determination.

Affected Public: Private Sector: Businesses or other for-profits.

Estimated Total Burden Hours: 400.

Dawn D. Wolfgang,

Treasury PRA Clearance Officer.

[FR Doc. 2013–06459 Filed 3–20–13; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Government Securities: Call for Large Position Reports

AGENCY: Office of the Assistant Secretary for Financial Markets, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury (''Department'' or ''Treasury'') called for the submission of Large Position Reports by those entities whose reportable positions in the 2% Treasury Notes of February 2023 equaled or exceeded $2 billion as of close of business March 11, 2013.

DATES: Large Position Reports must be received before noon Eastern Time on March 21, 2013.

ADDRESSES: The reports must be submitted to the Federal Reserve Bank of New York, Government Securities Dealer Statistics Unit, 4th Floor, 33 Liberty Street, New York, New York 10045; or faxed to 212–720–5030.

FOR FURTHER INFORMATION CONTACT: Lori Santamorena, Kurt Eidemiller, or Kevin Hawkins; Government Securities Regulations Staff, Department of the Treasury, at 202–504–3632.

SUPPLEMENTARY INFORMATION: In a press release issued on March 15, 2013, and in this *Federal Register* notice, the Treasury called for Large Position Reports from entities whose reportable positions in the 2% Treasury Notes of February 2023 equaled or exceeded $2

billion as of the close of business Monday, March 11, 2013. Entities whose reportable positions in this note equaled or exceeded the $2 billion threshold must submit a report to the Federal Reserve Bank of New York. This call for Large Position Reports is pursuant to the Department's large position reporting rules under the Government Securities Act regulations (17 CFR Part 420). Entities with positions in this note below $2 billion are not required to file reports. Large Position Reports must be received by the Government Securities Dealer Statistics Unit of the Federal Reserve Bank of New York before noon Eastern Time on Thursday, March 21, 2013, and must include the required positions and administrative information. The reports may be faxed to (212) 720–5030 or delivered to the Bank at 33 Liberty Street, 4th floor.

The 2% Treasury Notes of February 2023, Series B–2023, have a CUSIP number of 912828 UN 8, a STRIPS principal component CUSIP number of 912820 B3 0, and a maturity date of February 15, 2023.

The press release and a copy of a sample Large Position Report, which appears in Appendix B of the rules at 17 CFR part 420, are available at *www.treasurydirect.gov/instit/statreg/gsareg/gsareg.htm.*

Questions about Treasury's large position reporting rules should be directed to Treasury's Government Securities Regulations Staff on (202) 504–3632. Questions regarding the method of submission of Large Position Reports should be directed to the Government Securities Dealer Statistics Unit of the Federal Reserve Bank of New York at (212) 720–7993.

The collection of large position information has been approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act under OMB Control Number 1535–0089.

Matthew S. Rutherford,

Assistant Secretary for Financial Markets.

[FR Doc. 2013–06506 Filed 3–18–13; 4:15 pm]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

RIN 1545–BC15

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning guidance necessary to facilitate business electronic filing (TD 9300(final)).

DATES: Written comments should be received on or before May 20, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Katherine Dean at Internal Revenue Service, room 6242, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3186, or through the internet at *Katherine.b.dean@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Guidance Necessary to Facilitate Business Electronic Filing.

OMB Number: 1545–1868.

Regulation Project Number: REG–116664–01 (TD 9300 (final)).

Abstract: This document contains final regulations designed to eliminate regulatory impediments to the electronic filing of certain income tax returns and other forms. These regulations affect business taxpayers who file income tax returns electronically. This document also makes conforming changes to certain current regulations.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Total Annual Reporting Burden: 250,000 hours.

Estimated Average Annual Burden Hours per Respondent: .25 hours.

Estimated Number of Respondents: 1,000,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 12, 2013.

R. Joseph Durbala,

OMB Reports Clearance Officer.

[FR Doc. 2013–06456 Filed 3–20–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection: Comment Request for Notice 2006–83

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 2006–83, Chapter 11 Bankruptcy Cases.

DATES: Written comments should be received on or before May 20, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue

Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of regulations should be directed to Katherine Dean, at Internal Revenue Service, Room 6242, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3186, or through the Internet at *katherine.b.dean@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Chapter 11 Bankruptcy Cases.

OMB Number: 1545–2033.

Notice Number: Notice 2006–83.

Abstract: The IRS needs bankruptcy estates and individual chapter 11 debtors to allocate post-petition income and tax withholding between estate and debtor. The IRS will use the information in administering the internal revenue laws. Respondents will be individual debtors and their bankruptcy estates for chapter 11 cases filed after October 16, 2005.

Current Actions: There are no changes being made to the notice.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 3,000.

Estimated Time per Respondent/Recordkeeper: 30 minutes.

Estimated Total Annual Burden Hours: 1,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 12, 2013.

R. Joseph Durbala,

OMB Reports Clearance Officer.

[FR Doc. 2013–06457 Filed 3–20–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Privacy Act of 1974

AGENCY: Internal Revenue Service, Treasury.

ACTION: IRS notice of its intent to match computerized data to detect sensitive but unclassified (SBU) information that is being transmitted in violation of IRS security policy that requires an adequate level of encryption.

SUMMARY: The IRS will review detections of potential violations to determine whether there has been an actual violation of security policy. This review may include matching data from existing IRS systems of records such as:

I. Treasury Payroll and Personnel System [Treasury/DO.001]
II. Subsidiary Accounting Files [Treasury/IRS 22.054]
III. Automated Non-Master File (ANMF) [Treasury/IRS 22.060]
IV. Information Return Master File (IRMF) [Treasury/IRS 22.061]
V. CADE Individual Master File (IMF) [Treasury/IRS 24.030]
VI. CADE Business Master File (BMF) [Treasury/IRS 24.046]
VII. Audit Trail and Security Records [Treasury/IRS 34.037]
VIII. General Personnel and Payroll Records [Treasury/IRS 36.003]

This review may include using date elements such as:

I. Employee Name, Social Security Number (SSN), Employee Identification Number (SEID), Address, Email Addresses
II. Employee Spouse's Name, SSN, Address
III. Taxpayer Entity Information, including prior and current name, Taxpayer Identification Number (TIN), Address, Tax Return/Account Information
IV. Electronic transmission specifics such as sender's email address, recipient's email address, recipient's Internet service provider, transmission date and time, ''IP Address'', computer machine name, terminal identification

Reporting: A report describing this proposed matching agreement has been provided to the Office of Management and Budget (OMB) and the Congressional committees responsible for oversight of the Privacy Act in accordance with the Privacy Act of 1974, OMB Guidelines on the Conduct of Matching Programs (54 FR 25818, June 19, 1989), OMB Bulletin 89–22, ''Instructions on Reporting Computer Matching Programs to the Office of Management and Budget (OMB), Congress and the Public,'' and OMB Circular No. A–130, (rev. Nov. 28, 2000), ''Management of Federal Information Resources.''

Notice Procedures: IRS employees, contractors, and other individuals who have been granted access to IRS information, or to IRS equipment and resources, are notified regularly that their computer activity is monitored. A notice describing Treasury/IRS 34.037 was most recently published at volume 77, number 155 (Friday, August 10, 2012).

Security: All information obtained and/or generated as part of the IRS computer matching program will be safeguarded in accordance with the provisions of: 5 U.S.C. 552a, 26 U.S.C. 6103, as well as IRS record safeguarding requirements which conform with Treasury Directive (TD) 80–05, Records and Information Management, and TD P 71–10, Department of the Treasury Security Manual, and are no less restrictive than the standards prescribed in IRS Publication 1075, Tax Information Security Guidelines for Federal, State and Local Agencies. Matches under this agreement will comply with the standards of OMB Policy M–06–16, Protection of Sensitive Agency Information, requiring that sensitive information, including all Personally Identifiable Information be protected at all times.

Records Usage, Duplication and Disclosure: The information generated and/or obtained during these computer matches will be used by IRS employees in the performance of their official responsibilities. Access to this information is limited to those individuals who have a need to know the information in the performance of their official duties and to those who are authorized access by disclosure provisions in applicable law. These individuals are subject to criminal and civil penalties for the unauthorized inspection and/or disclosure of this information. During the execution of this program of computer matches and the resultant analyses or investigations, the records used may be duplicated by IRS employees only for use in performing their official duties. The information collected or generated as part of this program of computer matches may only be disclosed in

accordance with the provisions of 5 U.S.C. 552a, 26 U.S.C. 6103, and any other applicable Federal privacy provisions.

Legal and Regulatory Authority: The Internal Revenue Service has responsibilities to follow safeguarding requirements to ensure that information is kept confidential as required by the Internal Revenue Code, the Privacy Act of 1974, the Bank Secrecy Act, Title 18 of the United States Code, the Federal Information Security Management Act (FISMA), and other applicable laws that require safeguarding of information. Confidential information that is sent without sufficient protection is in violation of IRS security policy. This matching program will assist the IRS in ensuring that sensitive information is properly protected from unauthorized use or disclosure.

DATES: Comments must be received no later than April 22, 2013. The proposed matching program will become effective April 30, 2013, unless the IRS receives comments which cause reconsideration of this action.

ADDRESSES: Comments should be sent to the Office of Privacy, Governmental Liaison and Disclosure, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224. Comments will be available for inspection and copying in the IRS Freedom of Information Reading Room (Room 1621) at the above address. The Telephone number for the Reading Room is (202) 622–5164 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: David Silverman, Management and Program Analyst, IRS Office of Privacy, Governmental Liaison and Disclosure, (202) 622–5625 (not a toll-free number).

Dated: March 15, 2013.

Veronica Marco,

Acting Deputy Assistant Secretary for Privacy, Transparency, and Records.

[FR Doc. 2013–06448 Filed 3–20–13; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

Department of Justice

Antitrust Division

United States v. Verizon Communications Inc., et al.; Public Comments and Response on Proposed Final Judgment; Notice

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Verizon Communications Inc., et al.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comments received on the proposed Final Judgment in *United States* v. *Verizon Communications Inc. et al.,* Civil Action No. 1:12–CV–01354–RMC, which were filed in the United States District Court for the District of Columbia on March 11, 2013, together with the response of the United States to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District of Columbia

United States of America, and State of New York, Plaintiffs, v. *Verizon Commnications Inc., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc., and Bright House Networks, LLC, Defendants.*

Case: 1:12-cv-01354 (RMC)

Plaintiff United States's Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (''APPA'' or ''Tunney Act''), the United States hereby files the public comments concerning the proposed Final Judgment in this case and the United States's response to those comments. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court, pursuant to 15 U.S.C. 16(b)-(h), to enter the proposed Final Judgment after the public comments and this Response have been published in the **Federal Register** pursuant to 15 U.S.C. 16(d).

I. Procedural History

On August 16, 2012, the United States and the State of New York filed a Complaint in this matter, alleging that certain agreements among Verizon Communications Inc. (''Verizon''), Cellco Partnership d/b/a Verizon Wireless (''Verizon Wireless''), Comcast Corporation (''Comcast''), Time Warner Cable Inc. (''Time Warner Cable''), Bright House Networks LLC (''Bright House Networks''), and Cox Communications, Inc. (''Cox'') unreasonably restrain trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

Simultaneously with the filing of the Complaint, the United States filed a Competitive Impact Statement (''CIS''), a proposed Final Judgment, and a Stipulation and Order signed by the parties consenting to entry of the proposed Final Judgment after compliance with the requirements of the APPA. Pursuant to those requirements, the United States published the proposed Final Judgment and CIS in the **Federal Register** on August 23, 2012, *see* 77 FR 51048; and had summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, published in *The Washington Post* on August 18, 19, 20, 21, 22, 23, and 24 of 2012. The Defendants filed the statement required by 15 U.S.C. 16(g) on August 27, 2012. The sixty-day period for public comments ended on October 23, 2012. The United States received four comments, as described below and attached hereto.

II. The Investigation and the Proposed Resolution

A. Investigation

In December 2011, Verizon Wireless and each of Comcast, Time Warner Cable, Bright House Networks, and Cox (the ''Cable Defendants'') entered into a series of commercial agreements (the ''Commercial Agreements'') that allow them to sell bundled offerings that include Verizon Wireless services and a Cable Defendant's residential wireline voice, video, and broadband services. In addition, Verizon Wireless and each of the Cable Defendants (except Cox) entered into an agreement (the ''JOE Agreement'') to develop integrated wireline and wireless telecommunications technologies through a research and development joint venture, Joint Operating Entity LLC (''JOE'').

The proposed Final Judgment is the culmination of an investigation by the Antitrust Division of the United States Department of Justice (''Department'') and the Office of the Attorney General of the State of New York into the Commercial Agreements and the JOE Agreement. The Department conducted dozens of interviews with the parties' wireline and wireless telecommunications competitors, media content suppliers, public interest groups, and other interested third parties. The Department obtained testimony from the Defendants' officers and employees and required the Defendants to respond to interrogatories and provide large quantities of documents. Throughout its investigation, the Department coordinated closely with the Federal Communications Commission, which conducted its own parallel investigation into the same agreements. The Department carefully analyzed the information obtained and thoroughly considered all of the relevant issues.

As a result of the investigation the Department filed a Complaint on August 16, 2012, alleging that aspects of the Commercial Agreements and the JOE Agreement were likely to unreasonably restrain competition. A proposed Final Judgment was filed concurrently with the Complaint that, if entered by the Court, would resolve the matter by remedying the violation alleged in the Complaint.

B. The Proposed Final Judgment

The proposed Final Judgment is designed to preserve competition in numerous local markets for broadband, video, and wireless services. In certain parts of the country, Verizon Wireless's parent company [1] Verizon offers fiber-based voice, video, and broadband services under the trade name ''FiOS.'' Verizon offers FiOS service in numerous geographic areas where one of the Cable Defendants also sells wireline voice, video, and broadband services, including parts of New York City, Philadelphia, and Washington, DC. In those areas, the Commercial Agreements would have resulted in Verizon Wireless retail outlets selling two competing ''quad-play'' [2] offerings: One including Verizon Wireless services and a Cable Defendant's services and the

[1] Verizon Wireless is a joint venture owned by Verizon (55%) and Vodafone Group Plc (45%), but is operated and managed by Verizon.

[2] ''Quad play'' refers to a bundle of four telecommunications services: A ''triple play'' of wireline video, broadband, and telephone services, plus mobile wireless services.

other including Verizon Wireless services and Verizon FiOS services. In addition, the Commercial Agreements and the JOE Agreement contained a variety of mechanisms that likely would have diminished Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offerings.

The Commercial Agreements and the JOE Agreement also threatened the Defendants' long-term incentives to compete insofar as they created a product development partnership of potentially unlimited duration. Innovation and rapid technological change characterize the telecommunications industry, but the agreements failed reasonably to account for such change and instead would have frozen in place relationships that, in certain respects, may have been harmful in the long term. Exclusive sales partnerships and research and development collaborations between rivals which have no end date can blunt the long-term incentives of the Defendants to compete against each other, and others, as the industry develops.

The proposed Final Judgment forbids Verizon Wireless from selling the Cable Defendants' wireline telecommunications services (''Cable Services'') in areas where Verizon offers, or is likely soon to offer, FiOS services,[3] and removes contractual restrictions on Verizon Wireless's ability to sell FiOS,[4] ensuring that Verizon's incentives to compete aggressively against the Cable Defendants remain unchanged. In addition, after December 2016 the proposed Final Judgment forbids Verizon Wireless from selling Cable Services to customers in areas where Verizon today sells Digital Subscriber Line (''DSL'') Internet service (subject to potential exceptions at the Department's sole discretion),[5] thereby preserving Verizon's incentives to expand its FiOS network and otherwise compete using DSL or other technologies. Finally, the proposed Final Judgment limits the duration of JOE and other features of the agreements,[6] ensuring that the agreements will not dampen the Defendants' incentives to compete against one another over the long term.

The proposed settlement also requires the Commercial Agreements to be amended so that:

- Verizon retains the ability to sell bundles of services that include Verizon DSL and Verizon Wireless services as well as the video services of a direct broadcast satellite company (i.e., DirecTV or Dish Network);[7]
- The Cable Defendants may resell Verizon Wireless services using their own brand at any time, rather than having to wait for four years;[8] and
- Upon dissolution of JOE, all members receive a non-exclusive license to all of the venture's technology, and each may then choose to sublicense to other competitors.[9]

The proposed Final Judgment also forbids any form of collusion and restricts the exchange of competitively sensitive information.[10] Finally, Verizon is required to provide regular reports to the Department to ensure that the collaboration does not harm competition going forward.[11]

III. Standard of Judicial Review

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see also United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.'').

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States's Complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[12] In determining whether a proposed settlement is in the public interest, a

[3] Proposed Final Judgment, *United States et al.* v. *Verizon Communications Inc. et al.,* Civ. No. 1:12–cv–01354 (RMC), § V.A (D.D.C. filed Aug. 16, 2012) (''Proposed Final Judgment''), *available at http://www.justice.gov/atr/cases/f286100/286102.pdf.*

[4] *Id.* § IV.B.

[5] *Id.* § V.B.

[6] *Id.* §§ V.D, V.F.

[7] *Id.* § IV.C.

[8] *Id.* § IV.F.

[9] *Id.* § IV.E.

[10] *Id.* §§ V.J, V.K.

[11] *Id.* § VI.D.

[12] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''); *see generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's ''prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case'').

Courts have less flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As the United States District Court for the District of Columbia confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[13] Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: ''[T]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[14]

IV. Summary of Public Comments and the United States's Response

During the 60-day public comment period, the United States received comments from the following entities: The Communications Workers of America, a trade union representing workers in the telecommunications industry;[15] RCN Telecom Services, LLC, a facilities-based provider of wireline voice, video, and broadband services;[16] Montgomery County, Maryland;[17] and the City of Boston, Massachusetts.[18] The following is a summary of the issues raised by the commenters and the United States's responses to them. Part A addresses issues that were raised by more than one commenter; Part B addresses issues raised by individual commenters.

A. Response to Issues Raised by Multiple Commenters

1. The Proposed Final Judgment Properly Prohibits Verizon Wireless From Selling Cable Services in All Geographic Markets at Risk of Reasonably Foreseeable Anticompetitive Effects

The proposed Final Judgment prohibits Verizon Wireless from selling Cable Services in areas where Verizon presently offers FiOS or is likely to do so in the foreseeable future. Each of the four commenters argues that the proposed Final Judgment should prohibit Verizon Wireless from selling Cable Services in a broader geographic area.[19] The commenters argue that unless Verizon Wireless is prohibited from selling Cable Services in areas where Verizon operates wireline facilities but does not offer FiOS,

[13] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[14] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298 at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

[15] The Tunney Act Comments of the Communications Workers of America on the Proposed Final Judgment (Oct. 23, 2012) (''CWA Comments''), attached hereto as Exhibit A. On February 19, 2013 CWA submitted an ''Addendum'' to its comment, in which it alleges that Comcast and Verizon violated the proposed Final Judgment by exchanging competitively sensitive information pursuant to an FCC proceeding. Although the Addendum was submitted well outside the 60-day comment period specified in the statute, the Department includes it here as Exhibit B. The Department notes in response to CWA's Addendum that Verizon's disclosure of subscriber data to Comcast apparently occurred in late 2011, well before the proposed Final Judgment was filed with the Court and, therefore, cannot constitute a violation of the proposed decree. *See* Opposition to Motion to Dismiss of Comcast Cable Communications, LLC, *In the Matter of Comcast Cable Communications, LLC Petitions for Determination of Effective Competition in Communities in New Jersey,* FCC MB Docket Nos. 12–152 et al. (Feb. 19, 2013), *available at http://apps.fcc.gov/ecfs/comment/view?id=6017164408.*

[16] Comments Regarding the proposed Final Judgment Submitted on Behalf of RCN Telecom Services, LLC (Oct. 22, 2012) (''RCN Comments''), attached hereto as Exhibit C.

[17] Opposition of Montgomery County, Maryland, to proposed Final Judgment (Oct. 22, 2012) (''Montgomery County Comments''), attached hereto as Exhibit D.

[18] Opposition of the City of Boston, Massachusetts to Proposed Settlement (Oct. 22, 2012) (''Boston Comments''), attached hereto as Exhibit E.

[19] *See* CWA Comments at 14; RCN Comments at 6–10; Montgomery County Comments at 23; Boston Comments at 10.

Verizon will have no incentive to expand its FiOS network.[20]

The Department carefully considered the potential impact of the Commercial Agreements on the likelihood that Verizon would expand its FiOS network. Under its existing franchise obligations, Verizon is required to build FiOS to millions of additional households over the next few years, and as discussed further below, these households are covered by the proposed remedy. However, the Department's investigation also found that, well before entering into the Commercial Agreements at issue in this matter, Verizon had decided not to build its FiOS network throughout its entire wireline footprint.[21] As early as March 2010, Verizon publicly stated that it had no plans to obtain additional franchise agreements or build beyond where it is obligated under existing agreements, and had chosen to focus on increasing its penetration in areas where it has already obtained cable franchise agreements.[22] Accordingly, it appears unlikely that Verizon would have expanded FiOS significantly beyond areas with existing franchise agreements for at least the next several years even in the absence of the Commercial Agreements. Thus, competitive harm resulting from the Commercial Agreements appears unlikely in these areas, and it would be very difficult for the Department to prove a significant risk of such harm.

The proposed Final Judgment therefore takes a bifurcated approach to areas that do not currently have FiOS: (1) In areas where FiOS buildout is likely in the next few years (e.g., areas with franchise agreements or build commitments), the decree immediately prohibits Verizon Wireless from selling Cable Services; and (2) in areas where Verizon does not have a franchise agreement or build commitment, but does offer DSL service as of the date of entry of the Final Judgment—areas in which it is unlikely to build FiOS for at least the next several years—the decree prohibits Verizon Wireless from selling Cable Services after December 2, 2016.

With respect to the first category, the proposed Final Judgment ensures that Verizon will retain whatever incentive it has to maintain and expand its FiOS network in areas where such an expansion is plausible. Section V.A prohibits Verizon Wireless from selling Cable Services to households in the ''FiOS Footprint,'' as well as from selling Cable Services in stores that are located in the FiOS Footprint. Contrary to what the comments may suggest, the FiOS Footprint is defined broadly to include not only areas where Verizon currently offers FiOS, but all areas in which it is either obligated or authorized to provide any fiber-based video service.[23] Thus defined, the FiOS Footprint includes all of New York City and Washington, DC, despite the fact that Verizon has only just begun to build FiOS in those cities. Verizon thus has the same incentive to fully build out in those cities, and in other areas where it is authorized but has not yet built, as it had before entering into the Commercial Agreements.

With respect to the second category, although it appears unlikely that Verizon would, in at least the next few years, expand FiOS beyond the areas where it currently has authorization to build, the Department recognized that developments in the technology and economics of FiOS deployment may make additional expansion attractive. Accordingly, Section V.B of the proposed Final Judgment expands the prohibition on Verizon Wireless's sale of Cable Services to include the ''DSL Footprint'' as of December 2, 2016.[24] Thus, even in areas where Verizon has no plans to expand FiOS, and FiOS expansion is unlikely for the foreseeable future, the proposed Final Judgment has the added protection that Verizon may be prohibited from selling Cable Services beyond the end of 2016 if such selling would adversely impact competition (e.g., by adversely affecting the incentives to engage in additional expansion of FiOS).

The Department believes that, taken together, Sections V.A and V.B preserve Verizon's incentives to continue to invest in FiOS, and that the alternatives proposed by the commenters are overbroad and unjustified by the facts. For instance, the City of Boston and Montgomery County would ban Verizon Wireless from selling Cable Services, and the Cable Defendants from selling Verizon Wireless services *anywhere* in California or Texas, even though Verizon offers wireline services in only a small portion of those states.[25] Such a prohibition would deprive millions of consumers in those states of a potentially attractive quad-play offer of wireline voice, video, and broadband services along with wireless services, despite the fact that those areas have no prospect of being served by Verizon wireline services.

RCN's proposal to ban Verizon Wireless's sales of Cable Services in entire Designated Marketing Areas (''DMAs'') where FiOS is authorized to be offered to 10% of residents[26] is less sweeping, but nonetheless overbroad. RCN argues that ''the most logical and economical area for FiOS expansion is adjacent to the area that [FiOS] presently serves or is authorized to serve.''[27] Although Verizon is likely to expand FiOS in the areas in which Verizon already is authorized to build (and, therefore, the prohibition on Verizon Wireless selling Cable Services immediately applies to those areas), expansion beyond those areas is unlikely to occur in the near term. To the extent further FiOS expansion does eventually occur, the most promising areas are likely within the DSL Footprint, much of which is adjacent to the FiOS Footprint, and thus, beginning on December 2, 2016, the prohibition on Verizon Wireless selling Cable Services expands to Verizon's entire DSL Footprint.

Ultimately, there is little or no justification to expand the immediate prohibition on Verizon Wireless's sale of Cable Services to areas where it is unlikely—and hence the Department could not prove—that Verizon would build out FiOS in the absence of the Commercial Agreements.

[20] *See, e.g.,* Boston Comments at 9; Montgomery County Comments at 12–13.

[21] *See Competitive Impact Statement, United States et al.* v. *Verizon Communications Inc. et al.,* Civ. No. 1:12–cv–01354 (RMC), at 15, 17–18 (D.D.C. filed Aug. 16, 2012) (''CIS''), *available at http://www.justice.gov/atr/cases/f286100/286108.pdf; see also* Boston Comments at 6 (showing that in 2008 Verizon planned to build FiOS only to certain parts of the Boston metropolitan area).

[22] *See* Yu-Ting Wang & Jonathan Make, *Cities Seek Alternatives as Verizon Halts Further FiOS Expansion,* Commc'ns Daily, Mar. 31, 2010, at 4.

[23] *See* Proposed Final Judgment § II.M ('' 'FiOS Footprint' means any territory in which Verizon at the date of entry of this Final Judgment or at any time in the future: (i) Has built out the capability to deliver FiOS Services, (ii) has a legally binding commitment in effect to build out the capability to deliver FiOS Services, (iii) has a non-statewide franchise agreement or similar grant in effect authorizing Verizon to build out the capability to deliver FiOS Services, or (iv) has delivered notice of an intention to build out the capability to deliver FiOS Services pursuant to a statewide franchise agreement.'').

[24] *See id.* § II.J ('' 'DSL Footprint' means any territory that is, as of the date of entry of this Final Judgment, served by a wire center that provides Digital Subscriber Line ('DSL') service to more than a *de minimis* number of customers over copper telephone lines owned and operated by [Verizon], but excluding any territory in the FiOS Footprint. Verizon Wireless may petition the United States to allow continued sales of Cable Services in the DSL Footprint or subsets thereof, which the United States shall grant or deny in its sole discretion.'').

[25] Boston Comments at 11; Montgomery County Comments at 24.

[26] RCN Comments at 9–10.

[27] *Id.* at 9.

2. National and Regional Advertising of Cable Services by Verizon Wireless Will Not Undermine the Proposed Final Judgment

CWA and RCN each argue that Section V.C of the proposed Final Judgment undermines the prohibition on Verizon Wireless's sale of Cable Services by allowing Verizon Wireless to advertise Cable Services in national or regional advertising that may reach households in the FiOS Footprint.[28] This, they argue, will ''inevitably result in Verizon marketing Cable Services to large numbers of residents who live within the FiOS Footprint.'' [29]

Section V.C states:

> Notwithstanding V.A and V.B, Verizon Wireless may market Cable Services in national or regional advertising that may reach or is likely to reach street addresses in the FiOS Footprint or DSL Footprint, *provided that* Verizon Wireless does not specifically target advertising of Cable Services to local areas in which Verizon Wireless is prohibited from selling Cable Services pursuant to V.A and/or V.B. Further notwithstanding V.A and V.B, Verizon Wireless may, in any Verizon Store:
>
> i. service, provide, and support Verizon Wireless Equipment sold by a Cable Defendant; and
>
> ii. provide information regarding the availability of Cable Services, *provided that* Verizon Wireless does not enter any agreement requiring it to provide and does not receive any compensation for providing such information in any Verizon Store where Verizon Wireless is prohibited from selling Cable Services pursuant to V.A and/or V.B.

Importantly, Section V.C does nothing to eviscerate the prohibition on Verizon Wireless selling Cable Services. Rather, Section V.C relates solely to advertising. Even if customers within the FiOS Footprint receive regional or national advertising, Verizon Wireless is nonetheless prohibited by Sections V.A and V.B from selling them Cable Services.

Section V.C, like the rest of the proposed Final Judgment, is designed to balance the Commercial Agreements' potential to result in procompetitive outcomes against their potential to bring about anticompetitive effects. It is possible that the Commercial Agreements will enable the Defendants to create innovative new products that integrate wireline and wireless technologies. Should the Defendants wish to bring such products to market, one expects that they would advertise the products as broadly as possible in order to attract customers from their competitors.[30] Section V.C allows Verizon Wireless to market the availability of Cable Services in national or regional advertising that may reach households within the FiOS Footprint or DSL Footprint, provided that Verizon Wireless does not specifically target advertising of Cable Services to those areas. Absent Section V.C, Verizon Wireless would be prohibited from all national advertising of Cable Services, despite the fact that it is prohibited from selling Cable Services only in a relatively small subset of the nation. Regional and national advertising is generally much more efficient than advertising that can reach only a small, limited audience. Without the ability to efficiently advertise Cable Services, Verizon Wireless would have less ability to market, and ultimately less incentive to develop, innovative technologies through JOE. The proposed Final Judgment properly addresses the need for Verizon Wireless to purchase advertising on an economically efficient scale, while nonetheless preventing Verizon Wireless from conducting marketing activities specifically targeted to areas where it is prohibited from selling Cable Services.

3. Verizon Wireless's Ability To Provide Information About Cable Services on a Voluntary and Uncompensated Basis Will Not Undermine the Proposed Final Judgment

CWA and RCN argue that Section V.C(ii) of the proposed Final Judgment, which allows Verizon Wireless to provide information about Cable Services in Verizon Stores, undermines the prohibition against Verizon Wireless selling Cable Services.[31] The Department believes that allowing Verizon Wireless to provide information about the availability of Cable Services will not cause any anticompetitive harm of the type alleged in the Complaint. The proposed Final Judgment is intended to preserve competition between the respective Cable Defendants and FiOS; it does not require every customer who desires a quad play with Verizon Wireless to purchase FiOS instead of Cable Services. There may be many instances, in fact, when the proposed Final Judgment prevents Verizon Wireless from selling Cable Services to consumers who do not even have the *option* of purchasing FiOS. For example, there will be some customers who live within the FiOS Footprint but do not yet have FiOS available at their homes, and others who live outside the FiOS Footprint but shop at FiOS Footprint Stores.[32] Although the proposed Final Judgment prevents Verizon Wireless from selling Cable Services in those situations, there is no reason to prohibit Verizon Wireless from providing information about the availability of Cable Services on a purely voluntary basis. Indeed, allowing Verizon Wireless to provide this information benefits consumers who visit Verizon Wireless retail stores and are interested in a quad play, but for whom FiOS services are not available.

Because the proposed Final Judgment prohibits Verizon Wireless from receiving any compensation from the Cable Defendants to provide such information, Verizon Wireless has no significant incentive to promote Cable Services in lieu of Verizon products where available, nor is it likely that Verizon Wireless will spend significant resources informing consumers about a product that it cannot actually sell.[33] Section V.C(ii) merely allows Verizon Wireless to provide potentially helpful information to consumers on those occasions when it chooses to do so, perhaps, for instance, to enhance customer satisfaction. The provision does not undermine Verizon Wireless's incentives to promote and sell Verizon's own FiOS products, which was the harm alleged in the Complaint.

B. Responses to Issues Raised by Individual Commenters

1. Communications Workers of America

a. Sections IV.A and IV.B Adequately Ensure That Verizon Wireless Will Be Permitted To Sell Verizon Wireless and Verizon Telecom Services

Sections IV.A and IV.B of the proposed Final Judgment clearly require that the Commercial Agreements be amended to remove any restrictions on Verizon Wireless's ability to sell Verizon Wireless and Verizon Telecom [34] services. Nevertheless, CWA

[28] RCN Comments at 10–13; CWA Comments at 10.

[29] RCN Comments at 11; *see also* CWA Comments at 10 (''The inclusion of this loophole is the functional equivalent of not having included any prohibited conduct in the first place.'').

[30] Indeed, as one of the Defendants' competitors, RCN appears to be concerned about this very possibility. *See* RCN Comments at 12–13.

[31] CWA Comments at 10–11; RCN Comments at 13–15.

[32] For example, the City of Alexandria, VA is outside the FiOS Footprint, but Alexandria residents likely shop in nearby Arlington, VA or Washington, DC, which are within the FiOS Footprint.

[33] RCN argues that Verizon Wireless has an incentive, independent of commissions, to promote the use of JOE-developed technologies. RCN Comments at 12–13. This is likely true. But within the FiOS Footprint, Verizon Wireless will have a greater incentive and ability to promote JOE technologies deployed by FiOS than those deployed by the Cable Defendants.

[34] Verizon Telecom is the business unit through which Verizon offers consumer wireline services,

argues that Section IV.C somehow ''dismantles'' these requirements.[35] CWA's complaint appears rooted in a misreading of the proposed Final Judgment, because Section IV.C addresses a different issue than Sections IV.A and IV.B.

The proposed Final Judgment is designed to address the competitive concerns outlined in the Complaint, which predominantly relate to the effect of the Commercial Agreements on direct horizontal competition between Verizon and the Cable Defendants rather than its incentives to promote third-party products. Accordingly, Sections IV.A and IV.B are designed to ensure that Verizon Wireless—the Verizon entity that is party to the Commercial Agreements—is freely able to sell Verizon Wireless and Verizon Telecom services. Those two Sections are not intended to interfere with restrictions on Verizon Wireless's ability to sell third-party video and wireline broadband services.[36]

Section IV.C addresses another issue, namely, what Verizon *Telecom* may or may not sell. As explained in the CIS, Section IV.C serves to remove an ambiguity in the Commercial Agreements, which, as originally drafted, arguably prohibited Verizon *Telecom*— which is not a party to the Commercial Agreements—from selling Verizon Wireless along with third-party video services.[37] Thus, Section IV.C requires the Defendants to amend the Commercial Agreements to clarify that the Commercial Agreements do not restrict Verizon Telecom's ability to sell a bundle that includes Verizon Telecom services, Verizon Wireless services, and third-party video services.[38] The language cited by CWA simply clarifies that the Commercial Agreements may restrict Verizon *Wireless* from actively marketing this form of combined sale by Verizon Telecom. Thus, Verizon Telecom may resell Verizon Wireless services as part of a triple- or quad-play bundle, but the Commercial Agreements may restrict Verizon Wireless's ability to initiate bundled sales with broadband, telephony, or video services from any firm other than Verizon Telecom or the firms that are parties to the Commercial Agreements.

b. Verizon Wireless's Ability To Service, Provide, and Support Verizon Wireless Equipment Sold by the Cable Defendants Will Not Undermine the Proposed Final Judgment

CWA also objects to Section V.C(i) of the proposed Final Judgment, which permits Verizon Wireless to ''service, provide, and support Verizon Wireless Equipment sold by a Cable Defendant.'' As explained in the CIS, the Cable Defendants do not operate retail stores on a widespread basis.[39] Instead, most of the Cable Defendants' sales of video and broadband services are generated through telephone, Internet, and door-to-door sales channels, and it is likely that their sales of Verizon Wireless products will be as well. Customers who purchase Verizon Wireless handsets through the Cable Defendants might wish to obtain their devices, or seek assistance with setting up their service, at a Verizon Wireless store. Section V.C(i) makes clear that Verizon Wireless will not violate the proposed Final Judgment by providing such services at Verizon Wireless stores within the FiOS Footprint or to customers who live in the FiOS Footprint.

According to CWA, this provision ''eliminates the marketing advantage held by Verizon FiOS, which otherwise may have been able to capitalize on the retail presence of Verizon Wireless.''[40] The Department disagrees. FiOS still will have a marketing advantage in the FiOS Footprint. Verizon Wireless stores in the FiOS Footprint will be able to advertise and sell FiOS, but will be prohibited from selling Cable Services. In addition, the proposed Final Judgment allows the Cable Defendants to sell Verizon Wireless services to customers who live in the FiOS Footprint using their own sales channels—indeed, inhibiting them from doing so would deprive customers in the FiOS Footprint of a choice of quad-play offers. But once a customer chooses to purchase a quad play from a Cable Defendant instead of a FiOS-based quad play from Verizon, there is no reason not to allow that customer to seek support for his wireless services at a Verizon Wireless store.

c. The Proposed Final Judgment Prohibits, Rather Than Permits, Collusion

CWA objects to Sections V.I[41] and V.J[42] on the grounds that they permit the Defendants to collude on price.[43] To the contrary, these provisions are designed to enable the Department to monitor the Defendants' compliance with the proposed Final Judgment without unreasonably burdening either the Department or the Defendants. The Department brought its Complaint in this matter to prevent harm to competition arising from the implementation of the Commercial Agreements. Section V.I is intended to prohibit the Defendants from entering into new agreements that might also threaten competition, or even simply executing new versions of the Commercial Agreements, without notifying, and receiving approval from, the Department.

Section V.I does contain enumerated exceptions, but these are not anticompetitive ''loopholes,'' as CWA argues.[44] Instead, they are categories of agreements that the Department has determined to be likely to occur in significant volume, but unrelated to the sorts of agreements that are the subject of the Complaint and therefore unlikely to pose significant competitive concerns. For instance, Section V.I excepts ''content agreements between the Verizon Defendants and Cable Defendants who provide video content.'' Absent this exception, Verizon and the Cable Defendants would need to seek prior approval from the Department before entering into, extending, or amending an agreement for FiOS to carry channels owned by Comcast. The Defendants will likely enter into dozens of such agreements over the term of the proposed Final Judgment, none of which are likely to pose the sorts of

including FiOS services as well as DSL and traditional telephone services.

[35] CWA Comments at 8.

[36] The Commercial Agreements as originally drafted authorized Verizon Wireless to sell Cable Services as agents of the Cable Defendants but prohibited Verizon Wireless from selling other third-party video or wireline broadband services (except for FiOS Services).

[37] *See* CIS at 24.

[38] For example, Verizon Telecom markets DirecTV service in its DSL service area; should Verizon Telecom wish to offer a quad-play bundle including Verizon Wireless services and DirecTV, Section IV.C ensures that it will be able to do so. *See* Proposed Final Judgment § IV.C (''Defendants shall amend the Commercial Agreements so that there is unambiguously no restriction on Verizon Wireless's ability to authorize, permit, or enable VZT to sell a Verizon Wireless Service in combination with VZT Services *or any Person's* Broadband Internet, telephony, or Video Programming Distribution service.'' (emphasis added)).

[39] CIS at 19–20.

[40] CWA Comments at 10.

[41] Section V.I states in relevant part that ''[n]o Verizon Defendant shall enter into any agreement with a Cable Defendant nor shall any Cable Defendant enter into any agreement with a Verizon Defendant providing for the sale of VZT Services, the sale of Verizon Wireless Services, the sale of Cable Services, or the joint development of technology or services without the prior written approval of the United States in its sole discretion.'' Section V.I excludes certain types of agreements from its coverage. *See infra* page 21.

[42] Section V.J states in relevant part that ''[n]o Defendant shall participate in, encourage, or facilitate any agreement or understanding between VZT and a Cable Defendant relating to the price, terms, availability, expansion, or non-expansion of VZT Services or Cable Services.'' Section V.J excludes certain types of agreements from its coverage. *See infra* page 22.

[43] CWA Comment at 13.

[44] CWA Comments at 13.

competitive concerns identified in the Complaint. Rather than burden the Department with reviewing each such transaction, and the Defendants with waiting for the Department's approval, Section V.I allows the Defendants to continue entering into video content agreements without undue delay.

Unlike Section V.I, Section V.J prohibits certain agreements outright, rather than conditioning them on the prior approval of the Department. Section V.J's exceptions were designed to allow generally benign transactions between the Defendants while ensuring that anticompetitive conduct does not go unnoticed or unpunished. Section V.J prohibits the Defendants from entering into agreements that relate to the ''price, terms, availability, expansion, or non-expansion of VZT Services or Cable Services,'' with exceptions for certain categories of agreements: ''(1) intellectual property licenses between JOE LLC and VZT, (2) the negotiation of and entering into content agreements between Verizon Defendants and Cable Defendants who provide video programming content, (3) the purchase, sale, license or other provision of commercial or wholesale products or services (including advertising and sponsorships) and the lease of space in the ordinary course among or between the Defendants, or (4) any interconnection agreement between any Cable Defendant and the Verizon Defendants.'' As CWA notes, ''[i]t is impossible for the Defendants to discuss these topics without discussing 'price, terms, availability, expansion, or non-expansion of VZT or Cable Services.' '' [45] That is precisely the point. Strictly construed, absent the exceptions enumerated above Section V.J would prohibit the Defendants from entering into even routine interconnection agreements. But interconnection agreements do not implicate the type of harm alleged in the Complaint and are unlikely to be anticompetitive in most circumstances. Prohibiting them would serve no useful purpose but would greatly disrupt the functioning of the Internet.

In order to avoid any misunderstanding that Section V.J's exceptions serve to condone anticompetitive agreements, as CWA is concerned, the provision contains a savings clause making clear that ''in no event shall a Defendant participate in, encourage, or facilitate any agreement or understanding between VZT and a Cable Defendant that violates the antitrust laws of the United States.'' This savings clause ensures that an agreement that falls within Section V.J's exceptions may nonetheless violate the decree if it violates the antitrust laws.

d. The Court Did Not Refuse To Enter the Proposed Final Judgment in *United States* v. *Comcast Corp.*

CWA urges the Court to refuse to enter the proposed Final Judgment, citing the example of *United States* v. *Comcast Corp.* CWA misrepresents that case. In *Comcast,* U.S. District Judge Richard Leon held a hearing in which he raised concerns about arbitration provisions in the proposed Final Judgment in that matter. However, Judge Leon did not ''determin[e] that the binding arbitrations are not in the public interest,'' as CWA asserts.[46] Judge Leon entered the proposed Final Judgment, but also issued a Memorandum Order setting forth certain reporting requirements ''to ensure that the Final Judgment is, and continues to be, in the public interest[.]'' [47]

2. RCN

a. The Mandatory Licensing of JOE Technology Is Not Justified Based on the Harms Alleged in the Complaint

RCN urges the Court to require that ''products developed by JOE [ ] be available to other wired broadband providers on a commercially reasonable and nondiscriminatory basis.'' [48] RCN believes that ''because of the size of the participants in the JOE, the technology that it develops for the exclusive use of its members will become the industry standard for integration of wired and wireless technologies, and those that have no ability to use that technology will find themselves unable to compete.'' [49] RCN thus believes that JOE could harm competition among wireline firms by foreclosing some of them from access to JOE-developed technologies.

As RCN notes, the proposed Final Judgment does not address this concern. That is because the Department did not allege such harm in its Complaint. Instead, the Complaint alleges that JOE may unreasonably restrict the JOE members' abilities to innovate outside the joint venture.[50] JOE's exclusivity provisions and unlimited duration could reduce the Defendants' incentives and abilities to compete against one another through product development.

The proposed Final Judgment addresses this harm in two ways. First, Section V.F requires each JOE member to exit the joint venture by December 2, 2016, unless the Department decides in its sole discretion that the member's participation will not adversely impact competition. In exercising its discretion, the Department may rely in part on periodic reports on the activities of JOE that Verizon Wireless is required to furnish to the Department under Section VI.A. Second, Section IV.E requires the Defendants to amend the JOE Agreement to ensure that parties exiting JOE will take with them any intellectual property rights owned by JOE as of the date they exit. Defendants exiting JOE (including those exiting JOE pursuant to Section V.F) each will be free to license any such technologies to other firms, including RCN. These two provisions address the harm identified in the Complaint by ensuring that (1) the joint venture does not lock its members into an exclusive partnership that reduces their incentives to compete with one another over the long term, and (2) each member is free immediately to use the fruits of the venture upon its dissolution without anticompetitive interference by the others. Any further mandatory licensing requirement that would require the Court to determine whether any given set of licensing terms is ''commercially reasonable'' is unnecessary here and unjustified by the competitive harm that the Department alleged in its Complaint.

b. RCN's Desired Backhaul Remedies Are Not Justified Based on the Harms Alleged in the Complaint

RCN complains that the Commercial Agreements require Verizon Wireless to give the Cable Defendants preferential treatment when purchasing backhaul services, the means by which data are carried from wireless cell sites to the core wireline networks that underlie the wireless communications infrastructure. Backhaul services are provided by wireline network operators, including the Cable Defendants, cable overbuilders (e.g., RCN), and traditional telephone carriers (e.g., Verizon, AT&T, CenturyLink).

The proposed Final Judgment does not address this issue because the United States's Complaint does not allege any anticompetitive harm relating to backhaul services. Absent any such allegation, there is no justification for a remedy relating to backhaul services.

[45] *Id.* at 14.

[46] *Id.*

[47] *United States et al.* v. *Comcast Corp. et al.,* 808 F. Supp. 2d 145, 150 (D.D.C. 2011).

[48] RCN Comments at 18.

[49] *Id.*

[50] Complaint, *United States et al.* v. *Verizon Communications Inc. et al.,* Civ. No. 1:12–cv–01354 (RMC), ¶ 40 (D.D.C. filed Aug. 16, 2012) (''Complaint''), *available at http://www.justice.gov/atr/cases/f286100/286100.pdf.*

c. The Definition of ''FiOS Footprint'' Unambiguously Includes the District of Columbia

RCN argues that the phrase ''non-statewide franchise'' in the proposed Final Judgment's definition of ''FiOS Footprint'' creates ambiguity as to the District of Columbia. According to RCN, Verizon could ''take the position that its franchise to provide service throughout the District of Columbia is not a 'non-statewide franchise' because the District of Columbia has many of the attributes of a State.'' [51]

The FiOS Footprint is defined in the proposed Final Judgment to mean ''any territory in which Verizon at the date of entry of this Final Judgment or at any time in the future: (i) Has built out the capability to deliver FiOS Services, (ii) has a legally binding commitment in effect to build out the capability to deliver FiOS Services, (iii) has a non-statewide franchise agreement or similar grant in effect authorizing Verizon to build out the capability to deliver FiOS Services, or (iv) has delivered notice of an intention to build out the capability to deliver FiOS Services pursuant to a statewide franchise agreement.'' [52] Even if, as RCN argues, there is ambiguity as to whether Verizon's franchise to provide service in the District of Columbia is a ''statewide'' or ''non-statewide'' franchise, there is no ambiguity as to whether Verizon ''has a legally binding commitment in effect to build out the capability to deliver FiOS Services'' there. Verizon's video franchise agreement with the District of Columbia requires it to offer video service to residential areas throughout the District by 2018.[53] The entirety of the District of Columbia is therefore unambiguously included within the definition of the FiOS Footprint.

3. Montgomery County, Maryland

a. Mandatory Build Out Requirements Are Not Justified Based on the Harms Alleged in the Complaint

Montgomery County asks that ''[a]s a condition of approval, Verizon and the Cable Defendants should be ordered to provide a 100 percent build out of their respective service footprints without any limitations.'' [54] The proposed Final Judgment does not place any requirements on Verizon or the Cable Defendants to extend or upgrade their networks.

The Complaint alleges harm to competition resulting from the Commercial Agreements' diminishing the incentives to compete between Verizon, on the one hand, and a relevant Cable Defendant, on the other. The purpose of the proposed Final Judgment is therefore to ensure that Verizon and the Cable Defendants have the same incentives to compete against each other, including by extending and upgrading their respective networks, as they had before they entered the Commercial Agreements. The proposed remedy accomplishes this. The proposed Final Judgment is not a vehicle for Montgomery County to obtain through this Court what it has been unable to obtain as a local franchising authority.[55] The County heretofore has not required Comcast, Verizon, or RCN for that matter, to build their networks to every single residential unit in the county ''without any limitations,'' [56] and indeed such a requirement would be extraordinary and inappropriate to this proceeding.

b. The Proposed Final Judgment Properly Balances the Potential Benefits of Cooperation With the Need for Strong Protections of Competition

Montgomery County asserts that the proposed Final Judgment is not in the public interest because it allegedly permits an ''[u]nprecedented [l]evel [o]f [c]ooperation [a]nd [c]ollaboration'' among competitors and will lead to the ''allocation'' of wireless and wireline markets.[57]

The Department carefully considered the potential impact of the Commercial Agreements and the JOE Agreement on the likelihood and intensity of competition among the parties in the future. The Department's investigation did not uncover any anticompetitive ''allocation'' of markets. Moreover, the Department's investigation revealed that the cooperation and collaboration enabled by the Commercial Agreements have the potential both to benefit competition and consumers (e.g., through the introduction of new products) but also to create competitive risks. The proposed Final Judgment seeks to allow the realization of the benefits from the Commercial Agreements while, by imposing certain restrictions, minimizing the potential competitive risks. For example, recognizing risks from indefinite collaboration, the Department included in the proposed Final Judgment automatic time limits on participation in JOE and certain exclusivity provisions of the Commercial Agreements.[58] It also mandated vigorous reporting requirements, document retention, and mandatory antitrust education for all Defendants.[59] The Department reserves the right to pursue any illegal conduct, and stands ready and willing to enforce the antitrust laws should violations occur in the future.

c. Montgomery County's Grievances With the Contemporary Practice of Bundling Are Irrelevant to the Harms Alleged in the Complaint

Montgomery County devotes a substantial portion of its comments to explaining how, in its view, bundled sales tend to work to the benefit of producers rather than consumers.[60] These remarks are irrelevant to the question of whether the proposed Final Judgment adequately remedies the harms alleged in the Complaint and is therefore ''within the reaches'' of the public interest.[61] The Complaint filed by the Department alleges no harm resulting from the bundling of wireless and wireline services. Montgomery County is not entitled to substitute its own hypothetical complaint for the one filed in this case by the Department of Justice.[62]

d. The Proposed Final Judgment Is Workable and Enforceable

Finally, Montgomery County suggests that the proposed Final Judgment is ''obviously fraught with problems,'' ''will lead to consumer confusion,'' and ''will be difficult to monitor, interpret, and enforce.'' [63] However, the County provides no explanation as to why it believes the proposed Final Judgment will be unworkable or unenforceable. The Department of Justice has carefully crafted the proposed Final Judgment exactly so that it will be understandable and enforceable throughout the life of the decree, and does not foresee any significant difficulties with its interpretation or enforcement.

[51] RCN Comments at 20.

[52] Proposed Final Judgment § II.M.

[53] Cable Franchise Agreement Between the District of Columbia and Verizon Washington, DC Inc. (Apr. 30, 2009), *available at http://www.oct.dc.gov/information/legal_docs/verizon/doc_viewer.asp?document=Verizon_DC_Franchise_Agrement_2009.pdf.*

[54] Montgomery County Comments at 25.

[55] *See* Montgomery County Comments at 5–8.

[56] *See id.* at 6 n.13.

[57] *See id.* at 11–19; *see also* Boston Comments at 9–10 (arguing that the Commercial Agreements will enable Verizon Wireless and the Cable Defendants to ''remain the dominant players in their respective broadband markets avoiding direct competition with each other'').

[58] *See, e.g.,* Proposed Final Judgment §§ V.D, V.F.

[59] *See, e.g., id.* §§ VI, VIII.

[60] *See* Montgomery County Comments at 19–23.

[61] *See Microsoft,* 56 F.3d at 1461.

[62] *See id.* at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20.

[63] *See* Montgomery County Comments at 23–24.

V. Conclusion

After reviewing the public comments, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this response are published in the **Federal Register**.

Dated: March 11, 2013.

Respectfully submitted,

/s/ Jared A. Hughes

Jared A. Hughes

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice, Antitrust Division
450 5th Street, N.W., Suite 7000
Washington, DC 20530

and

STATE OF NEW YORK,
Office of the Attorney General
120 Broadway
New York, NY 10271,

Plaintiffs,

v.

VERIZON COMMUNICATIONS INC.,
140 West Street
29th Floor
New York, NY 10007

CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS,
One Verizon Way
Basking Ridge, NJ 07920

COMCAST CORPORATION,
One Comcast Center
Philadelphia, PA 19103

TIME WARNER CABLE INC.,
60 Columbus Circle
New York, NY 10023

COX COMMUNICATIONS, INC.,
1400 Lake Hearn Drive
Atlanta, GA 30319

and

Civil Action No. 1:12-cv-01354

Judge: Collyer, Rosemary M.

BRIGHT HOUSE NETWORKS, LLC,
5000 Campuswood Drive
East Syracuse, NY 13057

Defendants.

TUNNEY ACT COMMENTS OF THE COMMUNICATIONS WORKERS OF AMERICA ON THE PROPOSED FINAL JUDGMENT

INTRODUCTION

The Communications Workers of America ("CWA") is the largest telecommunications union in the United States, representing over 700,000 workers in communications, media, airlines, manufacturing, and the public sector. CWA has an interest in this proceeding because CWA members, their families, and the communities in which they live could experience higher prices, reduced service, less innovation, reduced investment and fewer jobs if the anti-competitive harm implicated in this transaction is not adequately addressed.

The Department of Justice ("DOJ") and the State of New York challenged the transaction alleging that it would "unreasonably restrain competition in numerous local markets for broadband, video, and wireless services" in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, Comp. ¶42, but then agreed to settle the case with a consent decree, as reflected in the proposed Final Judgment (also referred to as "the consent decree"). The anticompetitive effects identified by the DOJ in the Complaint are accurate and thorough. The DOJ explained "the Commercial Agreements contain a variety of mechanisms that are likely to diminish Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offerings, and they create an opportunity for harmful coordinated interaction among the Defendants regarding, among other things, the pricing of competing offerings." Comp. ¶2. The

DOJ acknowledged that the Cable Defendants each have market power in "numerous local geographic markets for both broadband and video services." Comp. ¶33. The DOJ also determined that "[t]he Commercial Agreements unreasonably restrain future competition" Comp. ¶42 and "significantly and adversely affect Verizon's long-term incentives to … build out FiOS beyond its current commitments." Comp. ¶43.

Notwithstanding these broad and substantial concerns, the DOJ agreed to a consent decree that fails to alleviate the clear competitive harms identified in the Complaint. CWA focuses in these comments on the weaknesses in the remedies related to the Commercial Agreements. The fundamental problem in the consent decree related to the Agreements lies with the series of loopholes, exceptions, and qualifiers in the DOJ's proposed Final Judgment that renders any intended remedy ineffective. The consent decree prohibits Verizon Wireless from selling the Cable Defendants' products in the "FiOS Footprint" (the territories in which Verizon's FiOS competes with the Cable Defendants' video and broadband services.) Yet, the exceptions effectively undermine this remedy. One loophole enables the parties to prohibit Verizon Wireless from marketing or initiating the sale of a wireless/FiOS bundle, disadvantaging FiOS vis-à-vis a wireless/cable bundle. A second loophole permits Verizon Wireless to provide information regarding the availability of Cable Services in the FiOS footprint and to promote Cable Services through regional and national advertising that may reach or is likely to reach customers in the FiOS footprint. A third loophole allows the Defendants to exchange almost any competitively sensitive information, including price, terms, availability, or expansion, so long as they exchange this information under a series of broad exceptions. With these loopholes, the proposed Final Judgment opens the door to Defendants' opportunity for harmful coordinated

interaction and reduces Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offering.

CWA submits these comments pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 ("Tunney Act"). Congress has made this Court the final arbiter of the propriety of mergers under the antitrust laws. The Court must "determine that the entry of such judgment is in the public interest."[1] As this Court has observed

> It does not follow... that courts must unquestionably accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the "rubber stamp" rile which was at the crux of the congressional concerns when the Tunney Act became law.

U.S. v. AT&T, 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd *sub nom.*, *Maryland v. U.S.*, 460 U.S. 1001 (1983). If the Court cannot make this finding, it must reject the proposed Final Judgment unless more adequate provisions are made to protect the public interest. CWA respectfully argues that the consent decree is not in the public interest because it fails to address adequately the substantial harm to competition identified in the Complaint and provides too many avenues for the Defendants to undermine intended remedial measures. CWA urges this court to reject the proposed Final Judgment or, in the alternative, to create prophylactic measures sufficient to prevent the harm identified by the DOJ but unaddressed in the consent decree.

I. Overview of the Anticompetitive Effects of the Commercial Agreements

The DOJ recognized the potential harm to competition that will result from this joint venture, and identified three categories of harm: (1) Commercial Agreements that neutralize competition in the markets for broadband and video services, including a bundle that combines these products; (2) the removal of the Cable Defendants as competitors in the market for wireless services; and (3) the pooling and restriction of the use of intellectual property necessary

[1] 15 U.S.C. § 16(e). *See, e.g., United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995).

to compete in the future market of bundled broadband/video/telephony/wireless services (colloquially termed a "quad play"). CWA's comments address the DOJ remedial steps as they relate to the first category, the Commercial Agreements.[2]

The DOJ properly concluded that each of the Cable Defendants has market power in numerous local geographic markets, and correctly described FiOS[3] as a disruptive force in challenging this market power, stating "FiOS has been, and remains, a significant competitive threat to cable in the regions where it has been built. Verizon's FiOS offerings have been aggressive in terms of both price and quality, and the cable companies have reacted to FiOS by upgrading their broadband networks and improving the quality of their video products." Competitive Impact Statement ("CIS") at 12. CWA research confirms this analysis. The charts below compare the prices and services available to consumers when both a Cable Defendant and FiOS are available.

Price and Services when FiOS Competes with Comcast and Time Warner

	Comcast	Verizon FiOS	Verizon Price Difference
Top Tier	$189.99 200+ channels, 5 premium 28/5 Mbps normal, with "burst" at 30/6 Mbps	$144.99 380+ channels, 4 premium 75/35 Mbps	- $40 or -28%
Middle Tier	$149.99 290+ channels 28/5 Mbps normal, with "burst" at 30/6 Mbps	$104.99 290+ channels 50/25 Mbps	- $45 or 43%
Basic Tier	$89.00 80+ channels 18/3 Mbps normal, with "burst" at 20/4 Mbps	$94.99 210+ channels 15/5 Mbps	+$5.99 or 6%
Source: Comcast website http:/www.comcast.com/Corporate/Learn/Bundles/bundles.html and Verizon website http://www22.verizon.com/home/shop/shopping.html (Data for Washington DC)			

[2] CWA limits its Tunney Act comments to the Commercial Agreements because this is the area in which CWA has researched and analyzed the negative impact of the joint venture, and this is where CWA can offer the most insight to the court. This limitation does not mean that CWA does not believe there are concerns with other categories of the joint venture, particularly the pooling of intellectual property and the limitations on the use of that intellectual property that might one day negatively impact other firms' ability to compete in a market for quad play services. However, CWA's comments will not provide detail on these concerns.

[3] The DOJ defines "FiOS Service" to mean "any wireline Broadband Internet service, telephony service, or Video Programming Distribution service offered by Verizon that operates over fiber to the home over facilities owned or operated by Verizon." Proposed Final Judgment at 5.

	Time Warner	Verizon FiOS	Verizon Price Difference
Top Tier	$199.99 200+ channels 50 Mbps "burst," but normal speed is less	$144.99 380+ channels, 4 premium 75/35 Mbps	- $55 or -38%
Middle Tier	$164.99 200+ channels 20 Mbps "burst," but normal speed is less	$104.99 290+ channels 50/25 Mbps	- $60 or 57%
Basic Tier	$89.99 200+ channels 10/1 Mbps	$94.99 210+ channels 15/5 Mbps	+$5 or 5%
Source: Time Warner website https://order.timewarnercable.com/OfferList.aspx and Verizon website http://www22.verizon.com/home/shop/shopping.html (Data for Albany NY)			

As the data reveals, FiOS is considerably cheaper than its competition, offers more channels, and faster internet for the middle and top tiers. The disruptive nature of FiOS cannot be overstated, as it provides a legitimate alternative while compelling incumbent dominant Cable Defendants to compete on both price and service.

Having firmly established the importance of Verizon's FiOS as a disruptive force, the DOJ details the various harms to competition that will result from the Commercial Agreements. The Commercial Agreements – by requiring Verizon Wireless to sell the Cable Defendants' product on an "equivalent basis" to its own FiOS product and for a commission – would impair Verizon's incentive and ability to compete with Cable Defendants in those territories in which Verizon's FiOS overlaps with the wireline territory of a Cable Defendant (identified as the "FiOS Footprint").[4] The DOJ concludes that this alliance turns competitors into partners, gives Verizon a financial interest in the success of the Cable Defendant's traditional wireline services, and facilitates anticompetitive coordination among the Defendants. Comp. ¶ 38. The DOJ correctly emphasizes the value of marketing channels in this industry, and adeptly recognizes

[4] The DOJ defines the "FiOS Footprint" to mean "any territory in which Verizon at the date of entry of this Final Judgment or at any time in the future: (i) has built out the capability to deliver FiOS Services; (ii) has a legally binding commitment in effect to build out the capability to deliver FiOS Services, (iii) has a non-statewide franchise agreement or similar grant in effect authorizing Verizon to build out the capability to deliver FiOS Services, or (iv) has delivered notice of an intention to build out the capability to deliver FiOS Services pursuant to a statewide franchise agreement." Proposed Final Judgment at 5.

that the Commercial Agreements "deprive Verizon of the ability to exploit fully a valuable marketing channel and alter Verizon's incentives with respect to pricing, marketing, and innovation." Comp. ¶ 39. The Commercial Agreements also drastically alter Verizon's long-term perception of the wireline broadband/video market. The DOJ acknowledges that these Commercial Agreements represent the end to any incentive for Verizon to revisit its FiOS deployment options as a result of changes in technology, economics of FiOS deployment, or macroeconomic changes.[5] Comp. ¶ 43. Finally, the DOJ's Complaint attempts to summarize the problematic open-endedness of the deal, stating that "the Commercial Agreements also unreasonably restrain competition due to ambiguities in certain terms regarding what conduct Verizon can, and cannot, engage in." Comp. ¶ 44.

The DOJ accurately describes the anticompetitive effects of the Transaction. However, the proposed Final Judgment that the DOJ presents to this court fails to protect consumers and those relying on competition in the telecommunications industry from the harm the DOJ has identified.

II. Remedial Measures Suggested are Rendered Moot by Exceptions and Loopholes

Despite identifying multiple broad concerns about this joint venture, the DOJ's remedies regarding the Commercial Agreements fail to prevent fully the harm it anticipates.[6] While there are numerous shortcomings in the proposed Final Judgment, the exceptions, loopholes, and

[5] The DOJ accepts Verizon's assertion of a pre-existing plan not to build out FiOS beyond its current commitments. CWA provided evidence to both the DOJ and the FCC to refute this decision. *See* "Analysis of FiOS Profitability and Strategic Options," Appendix B attached to CWA Comments, In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent to Assign Licenses, WT Docket No. 12-4, July 10, 2012.

[6] For example, by allowing Verizon Wireless to sell Cable Defendants' broadband and video services outside the "FiOS Footprint," for at least the next four years, the DOJ not only ignores the fact that Verizon's DSL broadband service competes directly with cable's broadband service, the DOJ also fails to impose a remedy that would eliminate incentives that "adversely affect Verizon's long-term competitive incentives to reconsider, in future years, its pre-existing decision not to build out FiOS beyond its current commitments." Comp. ¶ 43.

qualifying language are the most problematic. CWA focuses on three loopholes that are particularly egregious. The net effect of these loopholes is the de facto acquiescence by the DOJ to conduct that the DOJ has identified as anticompetitive and likely to harm consumers.

1. Section IV: Required Conduct

In Subsections IV.A and IV.B of the proposed Final Judgment, the DOJ takes appropriate steps to ensure that Verizon Wireless can continue to market and sell products that compete with the Cable Defendants' products, including Home Fusion (wireless broadband connectivity at the home), Home Phone Connect (home telephony over a wireless connection), and any Verizon Telecom (VZT) service,[7] including FiOS. The DOJ expressly eliminates the requirement in the original Commercial Agreements that would have required Verizon Wireless to sell Verizon Telecom services, such as FiOS, on an "equivalent basis" as Cable Services, and attempts to prevent Verizon from sacrificing the marketing and point-of-sale advantages it has through its retail presence. Proposed Final Judgment at 8.

However, the next paragraph in Subsection IV.C dismantles this effort. The paragraph requires the Defendants to amend the Commercial Agreements to allow Verizon Communications to sell Verizon Wireless services as part of a bundle, but then explicitly permits the Commercial Agreements to "prohibit Verizon Wireless from initiating or marketing such a combined sale." Proposed Final Judgment at 9. Thus, in one sentence, the DOJ's consent decree undermines Verizon's marketing and point-of-sale advantages that it clearly intended to protect in the previous Subsections IV.A and IV.B. This limitation is particularly confusing because the proposed Final Judgment defines "Sell" to include "offer, promote, market, or sell" and all correlative terms. Proposed Final Judgment at 6. Thus the proposed Final Judgment

[7] The DOJ defines Verizon Telecom (VZT) Service to mean "any Broadband Internet service, telephony service, Video Programming Distribution service, or any other consumer service offered by VZT, or any bundle thereof, including FiOS Services, over facilities, owned, operated, or leased by VZT." Proposed Final Judgment at 7.

simultaneously requires amendments that may not restrict or condition the ability of Verizon Wireless to "offer, promote, market, or sell" VZT Service, but then allows them to limit the offering and marketing of these services if combined in a joint sale. The net effect is that Verizon Wireless may be prohibited from initiating or marketing the sale of a Verizon Wireless/FiOS quad play bundle, but no similar restriction applies to a Verizon Wireless/Cable Defendant quad play bundle. It is difficult to understand how a Verizon Wireless customer would know about the availability of a wireless/FiOS bundle if the agent at the store is not allowed to "initiate or market" the bundle. This loophole gives the Defendants the incentive and ability to marginalize FiOS in favor of a wireless/cable bundle, contrary to the intended goal of the DOJ remedy. The exception consumes the rule.

2. Section V: Prohibited Conduct

Sections V.A and V.B of the proposed Final Judgment strive to limit Verizon Wireless' ability to sell Cable Defendant products within the FiOS Footprint. Subsection V.A bans Verizon Wireless sale of a Cable Service to a street address in the FiOS Footprint or from a store within the FiOS Footprint. Subsection V.B places a four-year limit on the ability to sell Cable Services within the broader DSL Footprint (where Verizon Communications offers wireline broadband but not fiber optic services).[8] These measures are designed to "maintain Verizon's incentives to aggressively market FiOS against the Cable Defendants in the areas in which both services are available and to ensure vigorous competition in the future." Competitive Impact Statement at 17.

[8] The DOJ defines "DSL Footprint" to mean "any territory that is, as of the date of entry of this Final Judgment, served by a wire center that provides Digital Subscriber Line ("DSL") service to more than a *de minimis* number of customers over copper telephone lines owned and operated by VZT, but excluding any territory in the FiOS Footprint." Proposed Final Judgment at 4.

Then, in Subsection V.C, the proposed Final Judgment provides marketing and sales loopholes that are so broad they eviscerate the effect of Subsections V.A and V.B. Section V.C begins "Notwithstanding V.A and V.B, Verizon Wireless may market Cable Services in national or regional advertising that may reach or is likely to reach street addresses in the FiOS Footprint or DSL Footprint…" Proposed Final Judgment at 11. The DOJ attempts to salvage some aspect of that provision by stating that Verizon Wireless may not "specifically target" advertisements of Cable Defendants' products within these restricted areas. Of course proving this *mens rea* element would be nearly impossible, especially considering the fact that national and regional advertising campaigns will be more efficient than targeted campaigns. The inclusion of this loophole is the functional equivalent of not having included any prohibited conduct in the first place. A customer living in an area in which a Cable Defendant and FiOS are both offered, but adjacent to an area where FiOS has not yet expanded, will see advertising from both the Cable Defendant and Verizon Wireless for a wireless/cable bundle. This reduces Verizon's incentive and ability to compete against the Cable Defendants in the FiOS Footprint.

The proposed Final Judgment follows this enormous loophole with more. First, Verizon Wireless may service, provide, and support in any store, including those in the FiOS Footprint, any Verizon Wireless product sold by a Cable Defendant. This eliminates one of the few marketing advantages that had not already been specifically eliminated. When a Cable Defendant sells a Verizon Wireless product as part of its arrangement under this Joint Venture, even when included in a bundle with its own services, the Cable Defendant may direct the customer to the Verizon Wireless store to retrieve the item. This eliminates the marketing advantage held by Verizon FiOS, which otherwise may have been able to capitalize on the retail presence of Verizon Wireless. Second, Verizon Wireless may "provide information regarding

the availability of Cable Services" as long as Verizon Wireless is not contractually bound to provide this information, and provided it does not receive compensation for stores in the FiOS Footprint. Thus imagine a customer living in an area in which a Cable Defendant and FiOS are both offered, but adjacent to an area where FiOS has not yet expanded. Verizon Wireless will be permitted to 1) advertise the Cable Defendant's product "regionally or nationally" to this customer while perhaps opting not to advertise FiOS, 2) provide information about the Cable Defendant's product in its retail store, and 3) deliver and service the Verizon Wireless products sold by the Cable Defendants.

The Competitive Impact Statement mentions the confused customer "who wishes to purchase Cable Services but is confused about a particular Verizon Wireless store's ability to sell those services." CIS at 20. This confusion is inevitable, and is a symptom of the anticompetitive spirit of the Commercial Agreements. It is improper and against the public interest to permit these competitors to rectify the harmful results of their anticompetitive conduct through more anticompetitive conduct. Rather, it is in the public interest to prevent the confusion in the first place. It is completely incoherent to ban the sale of a competitor's services in one breath, and then allow these exceptions in the next. Verizon Wireless will be able to advertise and market the Cable Defendants' services, and the system will be designed in a way that it is not technically Verizon Wireless completing the sale. Then, the Verizon Wireless store will serve as a point of contact for delivery, service, and support for the bundled sale, as well as a secondary source of information regarding its competitors' products. In this way, Verizon and the Cable Defendants easily circumnavigate the prohibition against cross-marketing in the FiOS Footprint. Verizon's disincentives to compete aggressively against Cable Defendants that the DOJ identified in the complaint remain intact.

The DOJ asserts in its Competitive Impact Statement that exceptions allow Verizon Wireless to advertise efficiently and provide a service to customers who have already purchased a Cable Defendant's product. CIS at 19. Allowing competitors to advertise efficiently but not preventing discrimination for its own product will result in the marginalization of FiOS. The Competitive Impact Statement goes on to say that because Cable Defendants do not operate retail outlets, this exception does not harm competition. CIS at 20. The presence or lack thereof of retail outlets does not define whether this arrangement harms competition. The key to evaluating competitive harm is understanding how economic incentives change as a result of the Commercial Agreements and the proposed Final Judgment. By allowing these competitors to perform so many services for each other, the proposed Final Judgment fails in its mission to prevent competitive harm.

These competitive concerns are not speculative. A September 25, 2012 *New York Times* story cites Time Warner and Comcast executives' plans to use loopholes to get around the proposed Final Judgment's ban on cross-marketing in the FiOS Footprint.[9] According to the article, that prohibition appears to be "malleable," and notes that "Time Warner Cable says it plans to have a presence in select Verizon stores in New York City, although FiOS is available in much of the area. Comcast says it plans to enter the Northeast market, too, possibly via the Verizon website if it is not permitted to enter stores in FiOS areas." Perhaps summarizing the lack of concern stemming from a weak proposed Final Judgment, Comcast's executive vice president proclaims "We'll work around that and figure it out while complying with the consent decree." The purpose of the government's regulatory oversight is not to challenge companies to violate antitrust laws in a more creative fashion. The task of the DOJ is to protect consumers by promoting competition. It is clear that this proposed Final Judgment fails that task.

[9] Amy Chozick, *Mobile Services and Cable TV are Unexpected Allies,* NEW YORK TIMES, September 23, 2012.

3. Sections V.I and V.J: Broad Exceptions to Prohibited Conduct

A third loophole relates to the very real and widely overlooked coordinated effects threat stemming from having competitors sharing sensitive information. Media technology is a price sensitive market, and the gravest threat lies in a coordinated agreement to raise prices. The DOJ attempts to restrict these opportunities in Subsections V.I and V.J which prohibit, respectively, agreements between Verizon Defendants and Cable Defendants regarding the sale of the other's services, and the participation in or encouragement of agreements between the Defendants relating to "price, terms, availability, expansion, or non-expansion of VZT or Cable Services." Proposed Final Judgment at 14. However, as with other instances, the consent decree then allows a set of exceptions so numerous and broad that it swallows the prohibition. These exceptions allow negotiations concerning content agreements over video programming; the purchase, sale, or license of wholesale products; agreements executed in the ordinary course of business pursuant to the Commercial Agreements or the Joint Operating Entity (JOE) Agreement; and any interconnection agreement between the Defendants. It is impossible for the Defendants to discuss these topics without also discussing "price, terms, availability, expansion, or non-expansion of VZT or Cable Services." This broad loophole condemns consumers of broadband and video services to an industry with fewer competitors, fewer options, aligned incentives to forego price competition, and unmitigated opportunity for these providers to do so.

CONCLUSION

The Department of Justice Antitrust Division's Policy Guide to Merger Remedies states "The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market. That is the appropriate goal of merger enforcement." U.S. DEP'T. OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO

MERGER REMEDIES, June 2011. The DOJ has not accomplished its goal in this instance. When the DOJ is unable to represent appropriately the public interest, it is imperative that this court intervene. In June 2011, Judge Richard Leon refused to sign a proposed Final Judgment granting approval to the merger between Comcast and NBC Universal after determining that the binding arbitration provisions are not in the public interest.[10] Though different in kind, the shortcomings in the consent decree between the Cable Defendants and Verizon are as egregious as the shortcomings of the arbitration procedures identified by Judge Leon. Here, we have a Complaint that concisely and articulately explains the anticompetitive harm that will result from a merger, and then a proposed Final Judgment that qualifies each remedial action with loopholes and exceptions so pervasive that they render the remainder of the Order ineffective.

The DOJ's should close these loopholes. First, CWA agrees that the Commercial Agreements should be amended as outlined in Section IV.A and IV.B, but believes the Commercial Agreements should not be allowed to prohibit Verizon Wireless from initiating and marketing products necessary to maintain Verizon FiOS as a legitimate competitor in the market – including a wireless/Verizon Telecom Services bundle. Second, CWA agrees with the cross-marketing ban within the FiOS Footprint, and even believes it would be in the optimal consumer interest to ban cross-marketing within the DSL Footprint. Notwithstanding the scope of the ban, the DOJ should remove the exceptions allowing for advertising, product servicing, and information distribution in the FiOS Footprint. CWA disagrees with the assertion that these exceptions allow for efficient consumer benefit without harming competition. Rather, they facilitate anticompetitive conduct on the pretext of consumer benefit. Third, the exceptions outlined in Subsections V.I and V.J are too broad and virtually impossible to monitor. Given the

[10] U.S. v. Comcast Corp., 808 F. Supp.2d 145 (2011). *See also, e.g.*, Stephanie Gleason & Thomas Catan, *Judge Threatens Comcast, NBCU Merger Delay*, WALL ST. J., July 28, 2011.

precarious position in which this transaction leaves FiOS, it is crucial that the government erect barriers to further anticompetitive conduct. As such these exceptions should be much more limited.

CWA respectfully argues that the consent decree is not in the public interest because it fails to address adequately the substantial harm to competition identified in the Complaint and provides too many avenues for the Defendants to undermine intended remedial measures. The loopholes are numerous and the exceptions broad, and the impact on competition will be deleterious. Consumers will experience fewer competitors and less innovation, leading to higher prices, decreased quality, and the creation of a de facto quad-play monopoly. CWA urges this court to reject the proposed Final Judgment or, in the alternative, to create prophylactic measures sufficient to prevent the harm identified by the DOJ but unaddressed in the consent decree.

Respectfully Submitted,

David A. Balto
District of Columbia Bar # 412314

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Suite 850
Washington, DC 20005

Counsel to Communications Workers of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice, Antitrust Division
450 5th Street, N.W., Suite 7000
Washington, DC 20530

and

STATE OF NEW YORK,
Office of the Attorney General
120 Broadway
New York, NY 10271,

Plaintiffs,

v.

VERIZON COMMUNICATIONS INC.,
140 West Street
29th Floor
New York, NY 10007

CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS,
One Verizon Way
Basking Ridge, NJ 07920

COMCAST CORPORATION,
One Comcast Center
Philadelphia, PA 19103

TIME WARNER CABLE INC.,
60 Columbus Circle
New York, NY 10023

COX COMMUNICATIONS, INC.,
1400 Lake Hearn Drive
Atlanta, GA 30319

and

Civil Action No. 1:12-cv-01354

Judge: Collyer, Rosemary M.

BRIGHT HOUSE NETWORKS, LLC,
5000 Campuswood Drive
East Syracuse, NY 13057

Defendants.

TUNNEY ACT COMMENTS OF THE COMMUNICATIONS WORKERS OF AMERICA ON THE PROPOSED FINAL JUDGMENT - ADDENDUM

INTRODUCTION

The Communications Workers of America ("CWA") is the largest telecommunications union in the United States, representing over 700,000 workers in communications, media, airlines, manufacturing, and the public sector. CWA has an interest in this proceeding because CWA members, their families, and the communities in which they live could experience higher prices, reduced service, less innovation, reduced investment and fewer jobs if the anti-competitive harm implicated in this transaction is not adequately addressed.

CWA files this addendum to Tunney Act comments filed on October 23, 2012 in the above captioned matter to bring to light yet another example of how the Proposed Final Judgment fails to protect consumers and competition. In the initial filing CWA outlined the reasons the Proposed Final Judgment fails to address the numerous and legitimate competition concerns resulting from the *de facto* merger of Comcast, Verizon Telecommunications, TimeWarner, and Bright House Networks. To summarize, the Department of Justice ("DOJ") identified three categories of harm: (1) Commercial Agreements that neutralize competition in the markets for broadband and video services, including a bundle that combines these products; (2) the removal of the Cable Defendants as competitors in the market for wireless services; and (3) the pooling and restriction of the use of intellectual property necessary to compete in the

future market of bundled broadband/video/telephony/wireless services. CWA limited their Tunney Act comments to the first category, the Commercial Agreements. CWA articulated in October 2012 and continues to believe that the DOJ accurately identified the competitive harm resulting from this transaction in its Complaint. However, the Proposed Final Judgment does not adequately address the harm to competition anticipated by the Complaint. These agreements contain opaque language and gaping loopholes that fail to protect consumers from the very harm that the DOJ identified as likely to occur as a result of this transaction.

It has only been six months since the DOJ and the defendants entered into a stipulation and order on August 24, 2012, and already the inherent failures of the Proposed Final Judgment are manifesting themselves. CWA highlighted a *New York Times* article in its initial filing that noted the fact that executives of the defendants are publically acknowledging their intent to exploit the Proposed Final Judgment's loopholes.[1] Notwithstanding the DOJ's desire to preserve competition at the retail level, it is evident that the members of the joint venture are content to work around contours of the agreement to achieve their anticompetitive truce.[2]

On February 8, 2013 an even more disturbing allegation came to light. In a series of nine proceedings[3] (collectively "New Jersey Effective Competition Cases" pursuant to the FCC's own shorthand) before the Federal Communications Commission ("FCC") Comcast has petitioned the FCC for "a determination that Comcast is subject to effective competition in several

[1] Amy Chozick, *Mobile Services and Cable TV are Unexpected Allies,* NEW YORK TIMES, September 23, 2012.
[2] Verizon Wireless provides more info on the MSO bundle offers at www.verizonwireless.com/twc and www.verizonwireless.com/cox. The operators' websites are www.twc.com/verizonwireless and www.cox.com/wireless.
[3] MB Docket No. 12-152, CSR-8649-E; MB Docket No. 12-159, CSR-8650-E; MB Docket No. 12-160, CSR-8651-E; MB Docket No. 12-161, CSR-8652-E; MB Docket No. 12-164, CSR-8655-E; MB Docket No. 12-165, CSR-8656-E; MB Docket No. 12-166, CSR-8657-E; MB Docket No. 12-180, CSR-8668-E; MB Docket No. 12-183, CSR-8671-E; MB Docket No. 12-190, CSR-8675-E.

communities located in New Jersey."[4] According to the FCC's explanation of the case, "In its attempt to demonstrate that its systems meet the effective competition requirements of Section 623(l)(1)(B) of the Communications Act, Comcast relies upon subscriber data obtained from Verizon New Jersey Inc. ("Verizon") and from two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV"), and DISH Network ("DISH")."[5]

On Monday February 8, 2013 *Communications Daily*, one of the leading telecommunications news providers, reported that the New Jersey Division of Rate Counsel[6] ("Rate Counsel") filed a motion to dismiss Comcast's petition for a declaration of effective competition.[7] The Rate Counsel argues that dismissal is proper because "Comcast relies on competitively sensitive data provided by Verizon Communications ("Verizon") that violates restrictions contained in the Spectrum Decision."[8] Rate Counsel Motion to Dismiss at 2. The Rate Counsel points out that the fact that the FCC granted a protective order confirms the fact that the information submitted by Comcast with its petitions is competitively sensitive information. Thus, according to Rate Counsel, Comcast is violating the terms of the FCC's Order in the *Spectrum Decision*.

Not only does this action violate the FCC Order, but it also violates the terms of the Proposed Final Judgment entered into by Comcast and Verizon to placate the Antitrust Division's concerns. Section V.K of the PFJ states "No Verizon Defendant shall disclose

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[4] Media Bureau Order, Protective Order Adopted in NJ Effective Competition Cases, Dec. 20, 2012, *available at* http://apps.fcc.gov/ecfs/document/view?id=7022088078.
[5] *Id.*
[6] The New Jersey Division of Rate Counsel represents the interests of consumers of electric, natural gas, water/sewer, telecommunications, cable TV service, and insurance (residential, small business, commercial and industrial customers). For more information see: http://www.state.nj.us/rpa/.
[7] Motion to Dismiss on Behalf of New Jersey Division of Rate Counsel, Feb. 8, 2013, *available at* http://apps.fcc.gov/ecfs/document/view?id=7022119433.
[8] *I/M/O Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC, etc.*, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95, WT Docket No. 124, ULS Files Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598, WT Docket NO. 12-175 (Released August 23, 2012). ("Spectrum Decision").

competitively sensitive VZT information to any Cable Defendant, nor shall any Cable Defendant disclose any competitively sensitive Cable information to VZT." PFJ at 15. The Analysis to Aid Public Comment explains "Section V.K ensures that no competitively sensitive information passes between the Cable Defendants and Verizon's consumer wireline business, in order to prevent collusion or other lessening of the intensity of the competitive rivalry between FiOS and the Cable Defendants." CIS at 26.

The Rate Counsel articulates the argument well: "Comcast relies on Verizon FiOS subscriber data in conjunction with satellite subscriber data in an attempt to show that competitive subscribership satisfies the Competing Provider Test. However, the use of the Verizon data violates the FCC's restrictions on use of competitively sensitive data contained in its Spectrum Decision. Verizon's subscriber information is competitively sensitive data and its use by Comcast and Verizon where both companies are competing for cable customers is foreclosed by the conditions imposed by the FCC in its Spectrum Decision. There is no question that the Verizon data is not public data and that Verizon considers such data to be proprietary competitively sensitive data." Rate Counsel Motion to Dismiss at 6.

It is already apparent that the Proposed Final Judgment and Stipulation and Order are ineffective in preventing the anticipated anticompetitive conduct. In less than six months after agreeing to modify both the contracts and behavior, Comcast and Verizon are exchanging and using each other's competitively sensitive data in the most brazen of ways. Not only is Comcast violating the letter and spirit of the agreement, and harming competition in the process (as anticipated by many, including the DOJ), but it is doing so in a petition <u>seeking a determination that it is subject to effective competition.</u> Comcast's behavior demonstrates unequivocally that

the terms of the Proposed Final Judgment cannot and will not constrain anticompetitive behavior in any meaningful way.

The terms of the Proposed Final Judgment fail the public interest test. A district court must not rubber stamp an antitrust settlement if it believes "the competitive impact of such judgment, including... any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest"[9] does not pass muster. What better competitive considerations could there be than actual, egregious, and blatant misuse of competitive information in direct contradiction to the terms of the settlement being analyzed?

CWA requests the court to carefully analyze and consider whether the Proposed Final Judgment truly is in the public interest. It is hard to fathom how allowing competitors to 1) cease competing against each other; 2) share competitively sensitive information; and 3) use this information to seek deregulation on the grounds that competition is present could possibly benefit the public interest.

Dated: February 19, 2013

Respectfully Submitted,

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[9] 15 U.S.C. § 16(b)–(h) (2000).

State of New Jersey
DIVISION OF RATE COUNSEL
31 CLINTON STREET, 11TH FL
P. O. BOX 46005
NEWARK, NEW JERSEY 07101

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

STEFANIE A. BRAND
Director

February 8, 2013

Electronically Filed
Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: I/M/O Petitions of Comcast Cable Communications, LLC
For a Determination of Effective Competition in Communities in New Jersey
MB Docket No. 12-152, CSR-8649-E
MB Docket No. 12-159, CSR-8650-E
MB Docket No. 12-160, CSR-8651-E
MB Docket No. 12-161, CSR-8652-E
MB Docket No. 12-164, CSR-8655-E
MB Docket No. 12-165, CSR-8656-E
MB Docket No. 12-166, CSR-8657-E
MB Docket No. 12-180, CSR-8668-E
MB Docket No. 12-183, CSR-8671-E
MB Docket No. 12-190, CSR-8675-E

I/M/O Docket Established for Monitoring Recent Verizon Wireless Transactions,
WC Docket No. 12-234

Motion toDismiss

Dear Secretary Dortch:

Enclosed for filing is a Motion to Dismiss on behalf of the New Jersey Division of Rate Counsel in connection with the above referenced matter.

This Motion will be electronically filed through the Commission's Electronic Filing system. Service of the Motion will also be by electronic mail.

Tel: (973) 648-2690 • Fax: (973) 624-1047 • Fax: (973) 648-2193
http://www.nj.gov/rpa E-Mail: njratepayer@rpa.state.nj.us

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Very truly yours,

Stefanie A. Brand
Director, Division of Rate Counsel

By: _____
Jose Rivera-Benitez, Esq.
Assistant Deputy Rate Counsel

cc: Service List (via electronic mail)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **Comcast Cable Communications, LLC** **On behalf of its subsidiaries and affiliates**	)	
For a Determination of Effective Competition in:	)	
Beachwood, NJ–Area Franchise Areas	)	**CSR-8650-E** **MB Docket No. 12-159**
East Windsor, NJ–Area Franchise Areas,	)	**CSR-8651-E** **MB Docket No. 12-160;**
Hazlet, NJ (NJ0405),	)	**CSR-8652-E** **MB Docket No. 12- 161**
Chatham, NJ–Area Franchise Areas,	)	**CSR-8657-E** **MB Docket No. 12-166**
Buena, NJ–Area Franchise Areas,	)	**CSR-8656-E** **MB Docket No. 12-165**
Delaware, NJ–Area Franchise Areas,	)	**CSR-8668-E** **MB Docket No. 12-180**
Berkeley Heights, NJ– Area Franchise Areas,	)	**CSR-8671-E** **MB Docket No. 12-183**
Bellmawr, NJ–Area Franchise Areas,	)	**CSR-8675-E** **MB Docket No. 12-190**
North Arlington, NJ (NJ0298) & **Rutherford, NJ (NJ0294),**	)	**CSR-8649-E** **MB Docket No. 12-152**
Bordentown (City), NJ (NJ0511) & **Bordentown (Township), NJ (NJ0461),**	)	**CSR-8655-E** **MB Docket No. 12-164**
In the Matter of Docket Established for Monitoring **Recent Verizon Wireless Transactions**	)	**WC Docket 12-234**

To: Secretary, FCC

Chief, Media Bureau

Chief, Wireline Competition Bureau

MOTION TO DISMISS
ON BEHALF OF
NEW JERSEY DIVISION OF RATE COUNSEL

The New Jersey Division of Rate Counsel ("Rate Counsel")[1] hereby moves to dismiss the above captioned ten Petitions ("Petitions") filed on behalf of Comcast Cable Communications ("Comcast") with the Federal Communications Commission ("FCC") Media Bureau ("Bureau") seeking a declaration of effective competition in the multiple franchises covered by the respective Petitions. By letter dated January 22, 2013, the Media Bureau set February 22, 2013 as the date for Rate Counsel to file opposition in these matters.

Dismissal of the Petitions is warranted because Comcast relies on competitively sensitive data provided by Verizon Communications ("Verizon") that violates restrictions contained in the *Spectrum Decision*.[2] As explained more fully below, the *Spectrum Decision* precludes the sharing and use of competitively sensitive data between Verizon and Comcast. As a result, the subject Petitions must be refiled without Verizon's competitively sensitive data. In addition, as discussed below, Comcast should be directed to refile the Petitions with updated subscriber data and household data that reflects the effects of Hurricane Sandy. Hurricane Sandy resulted in substantial losses of homes which directly impact both subscriber data and the number of household used in the application of the Competitive Provider Test under which the subject Petitions were filed.

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[1]/ Rate Counsel is authorized to represent the public interest of New Jersey public utility and cable television service consumers before State and Federal regulatory bodies. See N.J.S.A. 52: 27 EE - 48, 55.

[2]/ *I/M/O Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC, etc.*, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95, WT Docket No. 12-4, ULS Files Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598, WT Docket N0. 12-175 (Released August 23, 2012). ("*Spectrum Decision*").

Rate Counsel also request that the comment period be stayed pending Media Bureau action on this motion as discussed below.

LEGAL ARGUMENT

DISMISSAL OF THE PETITIONS IS NECESSARY DUE TO COMCAST'S RELIANCE ON PROHIBITED DATA

As part of the Competitive Provider Test analysis, Comcast relies upon confidential competitively sensitive data provided by Verizon. The Media Bureau entered a Protective Order regarding the use and disclosure of this proprietary data in this proceeding. The issuance of the Protective Order confirms that Verizon's data included in the filing is proprietary competitively sensitive information. Rate Counsel submits that use of this competitively sensitive data by Comcast violates specific conditions contained in and imposed upon Comcast and Verizon in the FCC's *Spectrum Decision*. Hence, the Petitions should be dismissed and Comcast directed to refile the subject Petitions without the competitively sensitive Verizon information.

Section 543 of the Communications Act of 1934, as amended by Section 623 of the Telecommunications Act of 1996,[3] provides that subscriber rates of cable television systems are subject to either local or federal regulation where effective competition is absent.[4] The Comcast franchises at issue here are currently subject to the regulatory jurisdiction of the Local Franchise Authority ("LFA") for the State of New Jersey, the New Jersey Board of Public Utilities ("Board"), based on the FCC's certification that

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[3] / Pub. L. No. 104, 100 Stat. 56, approved February 8, 1996, codified at 47 *U.S.C.* § 151 *et se.*

[4] / 47 *U.S.C.* § 543(a)(2).

effective competition is not present there. Under FCC rules, a cable operator, who claims that effective competition exists in a particular franchise, and seeks to rebut the statutory presumption against the existence of effective competition, must satisfy one of four tests set forth in Section 76.905(b) of the Commission's rules.[5] The statutory burden of proof rests exclusively with the cable operator to rebut the presumption by competent evidence.[6]

In these Petitions, Comcast relies upon the Competing Provider Test for its claim that effective competition exists in each subject franchise. Under this test, Comcast must provide competent evidence demonstrating that each claimed franchise is subject to effective competition because the franchise is:

> (1) served by at least two unaffiliated multichannel video programming distributors ("MVPDs"), each of which offers comparable programming to at least 50 percent of the households in the franchise area; and,
>
> (2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.[7]

A finding of effective competition exempts a cable operator from rate regulation.[8] Comcast bears the burden of proof and must affirmatively demonstrate that each claimed

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5/ 47 *C.F.R.* § 76.905(b).

6/ Regardless of whether an effective competition is contested or not, the cable operator's failure to sustain the burden of proof must result in denial and dismissal of the Petition. *See Cox Southwest Holdings, LP, ten Unopposed Petitions for Determination of Effective Competitions in 17 Local Franchise Areas*, CSR 6877-E, etc., DZ 07-933 (Released March 2, 2007); *I/M/O Time Warner Entertainment Co. LP*, CSR 5136-E, DA 99-234 (Released January 26, 1999).

7/ 47 *U.S.C.* § 623(l)(1)(B); See also, 47 *C.F.R.* §76.905(b)(2).

8/ 47 *C.F.R.* § 76.905.

franchise is subject to effective competition by satisfaction of the Competing Provider Test.[9]

Comcast asserts that it meets the Competing Provider Test based upon data on direct broadcast satellite ("DBS") service (from providers DirecTV and DISH Network) penetration data and based upon proprietary competitively sensitive data from Verizon service on households served in each the subject franchisees for which effective competition status is sought.

Comcast's use and submission of competitively sensitive Verizon subscriber data is inappropriate and contrary to the conditions imposed upon Comcast and Verizon in its *Spectrum Decision*. The sharing of competitively sensitive data between Verizon and Comcast is prohibited by the *Spectrum Decision*.

Thus, such Verizon data cannot be used in this matter to substantiate the claim of effective competition. As a result, the Petitions should be dismissed and Comcast should be directed to refile the Petitions without Verizon's competitively sensitive data. In addition, upon refiling, Comcast should be directed to update both subscriber data and household data to reflect the effects of Hurricane Sandy as discussed below.

I. THE VERIZON SUBSCRIBER DATA CANNOT BE USED TO SUPPORT THE FILED PETITONS.

Comcast relies on Verizon FiOS subscriber data in conjunction with satellite subscriber data in an attempt to show that competitive subscribership satisfies the

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9/ *See In re C-Tec Cable Systems of Michigan, Inc.*, 10 F.C.C.R. 1735, 1736 (1995); *See also, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 5631, 5669-70 (1993) ("*Report and Order*").

Competing Provider Test. However, the use of the Verizon data violates the FCC's restrictions on use of competitively sensitive data contained in its *Spectrum Decision*.

Verizon's subscriber information is competitively sensitive data and its use by Comcast and Verizon where both companies are competing for cable customers is foreclosed by the conditions imposed by the FCC in its *Spectrum Decision*. There is no question that the Verizon data is not public data and that Verizon considers such data to be proprietary competitively sensitive data.[10]

As a result, use of this data by Comcast violates the conditions imposed by the FCC precluding sharing of competitively sensitive data by and between Verizon and Comcast. Therefore, the Media Bureau should dismiss the Petition and direct refiling without the use and reliance upon the Verizon competitively sensitive information.

In the *Spectrum Decision*, the FCC noted that Verizon and Comcast (as part of SpectrumCo LLC) had negotiated a Consent Decree with the United States Department of Justice ("DOJ") addressing the public interest concerns posed by the sale of spectrum held by SpectrumCo to Verizon. The FCC specially found that the Consent Decree coupled with the DOJ restrictions were sufficient to protect the public interest for the time being, and hence, would not impose further restrictions to guard against anti-competitive or anti-consumer conduct by any of the parties.[11] The Consent Decree clearly established the prohibition on disclosure of competitively sensitive information by either

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[10]/ See, *In the Matter of Comcast Cable Communications, LLC Petitions for Determination of Effective Competition in Communities in New Jersey* , Order, DA 12-2069 (Released December 20, 2012).

[11]/ Spectrum Decision, ¶¶ 144, 145.

Verizon or Comcast, one of the cable carriers involved.[12] Section V, subpart K of the Final Judgment provides, in pertinent part, that:

> No Verizon Defendant shall disclose competitively sensitive VZT information to any Cable Defendant, nor shall any Cable Defendant disclose any competitively sensitive Cable information to VZT.[13]

Comcast's disclosure and use of Verizon's subscriber data in support of the Petition for which Comcast seeks a finding of effective competition is conduct that is foreclosed and precluded by the Consent Decree and inconsistent with the FCC's approval based upon compliance with the terms and conditions of the Consent Decree. Comcast and Verizon are improperly sharing Verizon's competitively sensitive data in franchise areas where they both are competing in direct contravention of the restrictions contained the Consent Decree which the FCC relied upon to approve the spectrum sale transaction in the first instance. Absent the FCC modifying its *Spectrum Decision* and its reliance on the Consent Decree, Comcast cannot use Verizon's data in support of its Petitions. Therefore, dismissal of these Petitions is justified, subject to refiling based on removal of the competitively sensitive Verizon data.

Concerning any refiled Petition, competitive subscriber data submitted by Comcast must account for any cancellations in the months that lapsed between the time of the usual SBCA satellite subscriber counts and the filing of the Petition, and account for any service cancellations due to the effects of Hurricane Sandy, since November 1,

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[12]/ *United States of America and State of New York v. Verizon Communications, INC., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., et. als.*, Stipulation and Order and Proposed Final Judgment, No. 1:12-cv-01354 (D.C., filed August 16, 2012) ("Consent Decree").

[13]/ *Id*, at Section V, Subpart K.

2012. New Jersey Governor Christie cited the following Hurricane Sandy impact on New Jersey in his recent State of the State address:

> Sandy was the worst storm to strike New Jersey in 100 years. 346,000 homes were damaged or destroyed. Nearly 7 million people and 1,000 schools had their power knocked out. 116,000 New Jerseyans were evacuated or displaced from their homes. 41,000 families are still displaced from their homes.

The satellite subscriber and household data time lag and the absence of accounting for such a horrific weather event undermine the reliability of both the household and the satellite penetration data.[14]

Rate Counsel respectfully request that the comment period be stayed pending Media Bureau action on this motion.[15] A copy of this Motion is also being filed in Docket No. 12-234, established by the FCC for the purpose of monitoring issues that arise from its recent approval of the sale of spectrum in the Spectrum Decision.

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[14]/ As recent as February 5, 2013, the FCC held open forums for discussion on the impact of Hurricane Sandy in New Jersey and New York. Additionally, the attached State of the State Speech by New Jersey Governor Chris Christie provides gross impact details on households due to lost homes and displaced families.

[15]/ Under the current schedule, Rate Counsel's opposition is due on February 22, 2013. This filing is being made on February 8, 2013. Rate Counsel submits once all matters regarding this motion are resolved, Rate Counsel should have 14 days to file any supplemental comments.

CONCLUSION

For the foregoing reasons, dismissal of the subject Petitions is warranted. Any refiled Petition must not include Verizon competitively sensitive data and the refiling should reflect updated household and subscriber data based upon the effects of Hurricane Sandy.

Respectfully submitted,

STEFANIE A. BRAND
Director,
New Jersey Division of Rate Counsel

By: _____
Jose Rivera-Benitez
Assistant Deputy Rate Counsel
New Jersey Division of Rate Counsel

Dated: February 8, 2013

Trenton, New Jersey
January 8, 2013

Lt. Governor Guadagno, Madam Speaker, Mr. President, members of the Legislature, fellow New Jerseyans.

Since George Washington delivered the first State of the Union in New York on this day in 1790, it has been the tradition of executive leaders to report on the condition of the nation and state at the beginning of the legislative year. So it is my honor and pleasure to give you this report on the state of our state.

One year ago, we were scheduled to gather on this second Tuesday in January when our friend and colleague Alex DeCroce passed suddenly the night before, causing us to delay this report. I miss the hard work and kind spirit of Alex. I think of him often, but I am so pleased to see his wife Betty Lou here in this chamber as a duly elected member of the Assembly today. She continues his work and does honor to his memory.

Just three months ago, we were proceeding normally with our lives, getting ready for a national election and the holidays to follow. Then Sandy hit.

Sandy was the worst storm to strike New Jersey in 100 years. 346,000 homes were damaged or destroyed. Nearly 7 million people and 1,000 schools had their power knocked out. 116,000 New Jerseyans were evacuated or displaced from their homes. 41,000 families are still displaced from their homes.

Sandy may have damaged our homes and our infrastructure, but it did not destroy our spirit.
The people of New Jersey have come together as never before. Across party lines. Across ideological lines. Across ages, races and backgrounds. From all parts of our state. Even from out of state. Everyone has come together.

So today, let me start this address with a set of "thank yous" from me on behalf of the great people of this state.
First, I want to thank the brave first responders, National Guard, and emergency management experts who prepared us for this storm and kept us safe in its aftermath.

I want to thank the members of this Legislature for their cooperation in answering Sandy's challenges and for being by my side as I toured so many of the devastated areas of our state.

I want to thank the Community Food Bank of New Jersey, the Southern Baptists, the Salvation Army and the American Red Cross – who helped us deliver over one million pounds of food and over five million meals and snacks to families who needed them.
They are part of a network of organizations, a family really, who make life better in New Jersey every day – and who really came through when the times were toughest.

I want to thank the New Jersey Business and Industry Association, the state Chamber of Commerce, the Commerce and Industry Association of New Jersey and the National Federation of Independent Businesses -- for keeping us in touch with the needs of small businesses in the wake of the storm, so New Jersey can help get these businesses back on their feet.

I want to thank the 17,000 out-of-state utility workers who came to New Jersey from all over America and joined with 10,000 of our own to get power restored as quickly as possible – so that within nine days of this horrific storm, electric power had been restored to 90% of customers.

I want to thank the members of my cabinet and senior staff, who for days before the storm and weeks after it, put their own personal losses aside, worked 18 hours a day and slept very little. They led their departments and their dedicated colleagues in putting the safety and well-being of others ahead of their own.

To everyone who opened their homes, assisted senior citizens, fed their neighbors, counseled the grief-stricken, or pitched in to clear debris, remove sand, or get a school back opened, I say "thank you." You have helped define New Jersey as a community, one which – when faced with adversity – rolls up its sleeves, gets back to work, and in word and deed shows that it will never, ever give up.
And make no mistake. We will be back, stronger than ever.

The spirit of our New Jersey community was shown in the days immediately after

the storm. In Sea Bright, Mary Pat was by the side of one small businessman at the moment when he was allowed to return to his business and see what Sandy had done to his restaurant, a pizzeria. As the plywood was removed, allowing him to see for the very first time the destruction of his means of earning a living, he turned and said without hesitation: "Don't worry. We will build this back better than it was."
His words were forceful. They were optimistic. And they were emblematic – capturing the indomitable spirit of this state.

And he was just one example of how New Jersey and its citizens were showing our whole country how to bravely and resolutely deal with a crisis.

Citizens like Frank Smith, Jr., the Volunteer Chief of the Moonachie First Aid Squad. His home was destroyed during the storm. His headquarters were destroyed during the storm. After securing the safety of his three young children, he did not take himself to higher ground. No, he led his team through fires and flood waters, through buildings and trailer parks, and saved over 2,000 lives. Moonachie's citizens were saved because he put them first. Frank thanks for your bravery.

In Toms River, Marsha Hedgepeth, an emergency room technician, had the day off when Sandy hit her hometown. She could have gotten herself to safety and forgotten about her colleagues at the community medical center and most importantly her patients. Instead, facing several feet of water on her flooded street, she swam to higher ground, then hitchhiked with a utility worker from Michigan and got to the hospital for a 12-hour shift treating her fellow citizens. Swimming through flood waters to save lives—thank you Marsha for setting such a great example.

In Brick, Tracey Keelen and Jay Gehweiler watched as the flood waters consumed their town. Concerned about Jay's father, they tried to reach him and could not. Not content to wait, they put on their wet suits, got in their row boat and rescued Jay's dad. In the process, they saw dozens of others stranded in their homes. They turned back around and, one by one, saved over 50 of Jay's father's neighbors along with their pets. Then, for those they rescued who had no place to go, they housed them as well. They admitted they did not know these neighbors that well before the storm, but they didn't care—they put extending a helping hand in a crisis ahead of social comfort. Thank you to

Tracey and Jay for saving lives and making a difference.

New Jerseyans are among the toughest, grittiest and most generous people in America. These citizens are a small example of that simple truth. Our pride in our state in our moment of loss and challenge is reflected in the eyes of these extraordinary people.

You see, some things are above politics. Sandy was and is one of those things. These folks stand for the truth of that statement.

We now look forward to what we hope will be quick Congressional action on a full, clean Sandy aid bill – now, next week -- and to enactment by the President. We have waited 72 days, seven times longer than victims of Hurricane Katrina waited. One thing I hope everyone now clearly understands—New Jersey, both Republicans and Democrats, will never stand silent when our citizens are being short changed.

The people of New Jersey are in need, not from their own actions but from an act of God that delivered a natural, human, and financial disaster --- and we are thankful to the people of America for honoring the tradition of providing relief. We have stood with the citizens of Florida, Alabama, Mississippi, Louisiana, Iowa, Vermont, California and Missouri in their times of need—now I trust that they will stand with us.

So make no mistake. New Jersey's spirit has never been stronger. Our resolve never more firm. Our unity never more obvious.
Let there also be no mistake: much work still lies ahead. Damage that comes only once in a century will take in some cases years to repair.

Here is some of what we have done already:

We have created a cabinet-level position to coordinate the State's efforts across every agency – and Marc Ferzan is here today – ready to work with you on this restoration effort.

We've requested the federal government to pay 100% of the costs of the significant debris removal that we require – and have already received $18 million for that task.

We have secured $20 million from the Federal Highway Administration for emergency repair of our roads, bridges and tunnels – a down payment on a major infrastructure task ahead.

We have directed our Department of Environmental Protection to streamline approvals for restoring critical infrastructure.

We have overseen the removal of over 2.5 million cubic yards of debris to date and counting. 17 towns have already completed debris removal. Over 1,000 trucks are working daily to continue dry land debris removal with 26 more towns moving towards completion. We are now removing debris from our waterways. New Jerseyans need to know—nearly 1,400 vessels were either sunken or abandoned in our waterways during Sandy. In Mantoloking alone, 58 buildings and 8 cars were washed into Barnegat Bay. We will remove this debris and dredge the bay to reduce the risk of flooding and to improve the health of the bay—beginning the very same week that this Administration furthers its commitment to the health of the bay by implementing the toughest fertilizer law in America.

We have helped get temporary rental assistance for 41,000 New Jersey families, and where necessary, secured transitional shelters in hotels or motels or even in Fort Monmouth.

We have worked with the Small Business Administration to secure nearly $189 million in loans for thousands of home and small businesses, and through our New Jersey EDA, we have provided lines of credit for businesses awaiting insurance reimbursement, grants for job training, and benefits for displaced workers.

Our New Jersey DOT has been one of the busiest agencies – removing over 4,400 truckloads of debris from state and local roads, and cleaning another 4,300 truckloads of sand to restore and replenish our beaches.

Our Department of Education has worked night and day to get schools re-opened right away, and where that wasn't possible, to get them restored by the next school year – all while maintaining our commitment to a full 180-day school year of education for our kids.

Executive Order 107 makes sure that when insurance payments do come, they are not compromised by excessive deductibles and ensures that our citizens maximize their reimbursement.

While there are dozens of other examples of the never quit attitude of this Administration and our citizens, there is none better than the miracle of Rt. 35 in Mantoloking. At the Mantoloking Bridge, Rt. 35 had been completely washed

away by Sandy—I stood at the spot where the Atlantic Ocean flowed into the bay where Rt. 35 once carried thousands of cars a day to vacations down the shore. Within days, Commissioner Jim Simpson, the Department of Transportation and our private sector partners had a temporary road built to allow emergency vehicles onto the island. Now, merely 10 weeks after our state's worst storm, you see a permanent Rt. 35 already being rebuilt. That's what an effective government can do. That's what a determined people can do. That is how and where we will lead New Jersey in the months and years ahead.

There is no question that Sandy hit us hard – but there is also no question that we're fighting back with everything we've got.

Sandy took a toll on New Jersey's economy.
Just when we were coming back from the national recession, Sandy disrupted our economic life: cars weren't bought, homes weren't sold, and factories couldn't produce. From those things we can catch up, and we are catching up. But make no mistake, as common sense would tell you, Sandy hurt New Jersey's economy.

Some losses we will never get back – electric power that wasn't produced, visitors who didn't come to our casinos or our downtown centers.

In all, Sandy cost us over 8,000 jobs in November – mostly in our leisure and hospitality industries. But we were relatively fortunate. Louisiana lost 127,000 jobs after Hurricane Katrina.

Sandy may have stalled New Jersey's economy, but there is plenty of evidence that New Jerseyans have not let it stop our turnaround.

The direction is now clear.

Here is the latest economic report:

Unemployment is coming down.

2011 was our best private sector job growth year in eleven years and 2012 is also positive.

Personal income set a record high in New Jersey for the seventh quarter in a row.

Gross income tax receipts are exceeding the Administration's projections for this fiscal year prior to Sandy.

Sales of new homes are up.

Consumer spending is up.

Industrial production is up.

Since I took this office, participation in New Jersey's labor force is higher than the nation as a whole and the number of people employed has grown. That means that more people have the confidence to be out looking for jobs, and more people actually have jobs.

In total, we have added nearly 75,000 private sector jobs in New Jersey since we took office in January 2010.

I mention the words 'private sector' advisedly, because we have not grown government. Quite the contrary. We have gotten our house in order by keeping our promise to reduce the size of government.

In the last three years, we have cut more than 20,000 government jobs. In 2012, we had fewer state government employees than at any time since Governor Whitman left office in January 2001. We promised to reduce the size of government and we have delivered.

We have also held the line on taxes. We have held the line on spending. We have made New Jersey a more attractive place in which to grow a business, to grow jobs, to raise a family.

This Legislature knows the history.

In fiscal year 2010, we faced a $2 billion budget deficit with only 5 ½ months left in the fiscal year when we took office. We cut over 200 programs and balanced the budget with no new taxes.

In fiscal year 2011, the picture was even worse: a projected $11 billion deficit – on a budget of $29 billion -- in percentage terms, the worst in the nation. In total, we cut 832 programs. Each department of government was reduced. An 8% cut in spending – in real dollars spent -- not against some phony baseline. But with this Legislature's help, again we balanced the budget without raising taxes.

Because we had made the tough choices, last year's budget was a bit easier -- we were able not only to balance the budget, but to actually begin to reduce taxes by enacting the first year of tax relief for job-creating small businesses in New Jersey. Meanwhile, we devoted a record amount in aid to schools in New Jersey.

And in the budget which governs the current year, even with growth in the national economy slowing again, we have been able to achieve balance with not only no new taxes, but with a second year of small business tax relief.

And let me make this point clearly and unequivocally. Despite the challenges that Sandy presents for our economy, I will not let New Jersey go back to our old ways of wasteful spending and rising taxes. We will deal with our problems but we will continue to do so by protecting the hard earned money of all New Jerseyans first and foremost. We will not turn back.

Our handling of the budget is but one example of the change that I told New Jersey had arrived with our inauguration. I've come to this chamber in the years since that day urging us to do the big things to transform our state; to make the tough decisions we had avoided for far too long.

We asked this in the context of a state where only 27% of our citizens felt that government was moving our state in the right direction in January 2010. We asked this while the citizens of our country watched a dysfunctional, dispirited and distrustful government in Washington bicker and battle not against our problems but against each other. Against that backdrop, few would have bet on us; few would have bet on New Jersey leading the way to restore people's belief that government could accomplish things for them. But here we are, three years later, and look at all of those things some called impossible in this town that we have made a reality.

A real 2% property tax cap. Interest arbitration reform. Pension and health benefit reform. Teacher tenure reform. Higher education restructuring resulting in Rutgers now being in the top 25 in research dollars and the newest member of the Big 10. $1.3 billion in new capital investment in all our universities for the first time in 25 years. A ground breaking teacher contract in Newark that finally acknowledges merit pay. Three years ago, a national reputation for corruption

and division and waste. Today, a national model for reform and bipartisanship and leadership. Let's review this new reality specifically, to remind our constituents and ourselves how far we have come and to resolve to never return to the old, dark days of our past in Trenton.

Four years. Four balanced budgets. No new taxes. New tax relief to create 75,000 new private sector jobs.

A far different picture from the prior eight years, which saw 115 increases in taxes and fees. It hasn't been easy, but we have done it together. And the people of New Jersey are better off for it.

The story is the same on property taxes, maybe even better. They had increased 70% in the prior 10 years --- the most in the nation.

Together, we enacted a 2% per year cap on growth and the interest arbitration reform that was needed to make that cap work.

Many said it wouldn't work, but the record tells a different story.

Last year, property taxes in New Jersey grew by only 1.7% -- the lowest rise in two decades.

And our pension system, which was on a path to insolvency, is now on much more sound footing. With your help, we tackled the problem head on – modestly raising the retirement age, reducing incentives for early retirement, suspending COLAs until the plan is 80% funded, and yes, asking for something slightly closer to market in terms of employee contributions.

In total, the pension and health benefits reform package that you passed will save taxpayers over $120 billion over the next 30 years. Just as importantly, it will help make sure the pension is actually there when our public employees and school teachers retire. Other states have noticed: this reform is becoming a model for America.

When we combine this needed discipline on spending and taxes, with responsibility in addressing our long-term liabilities, with pro-growth actions on the regulatory side, we have made New Jersey a better place to do business.

The combination of policies that are not hostile to business, and an environment which actually welcomes new businesses and new jobs, is working.

It is clear. In a competitive world, policies matter. Companies have choices. Job-creators have choices. That is why our work is far from done.

That is why a top priority must be to continue New Jersey's record of excellence in education, and to fix problems where we are failing.

In higher education, the task force led with skill by former Governor Tom Kean has helped us develop strategies for making New Jersey's institutions more competitive. We need to turn New Jersey's universities – including Rutgers – from good to great, because that will help us keep more talented New Jersey students in New Jersey, and will strengthen the link between higher education and high quality jobs.

At the heart of these reforms we need, of course, is the plan to make sure that New Jersey's critically important medical and health sciences institutions remain world class. By merging Rutgers and UMDNJ in the north and Rowan and UMDNJ's Stratford campus in the south, we will enhance three established hubs of educational excellence in north, south, and central New Jersey. And we will bring Rutgers, and New Jersey medical education, into the 21st century. I thank you for passing this plan, and I was proud to sign it into law this summer.

In K-12 education, we have made great strides, but there is much more to be done.

Who would have thought, just three years ago, in the face of entrenched resistance, that I could stand here and congratulate us today for the following:

Ensuring accountability by passing the first major reform of tenure in 100 years;

Establishing performance-based pay in Newark through hard-nosed collective bargaining so that we can reward and retain the very best teachers where we need them most;

Implementing inter-district school choice, which has tripled its enrollment in the last 3 years and will grow to 6,000 students next year;

Growing the number of charter schools to a record 86 in New Jersey;

Signing the Urban Hope Act to turn failing schools into Renaissance Schools in Newark, Trenton, and Camden;

And finally, investing the largest amount of state aid to education in New Jersey history-- $8.9 billion in this year's budget, over $1 billion higher than in Fiscal Year 2011.

In New Jersey, we have combined more funding with needed reform. Both money and reform of our schools are essential, but neither alone is sufficient. In New Jersey, we are leading the way for the nation by providing both.

As we assess the state of our state this afternoon, we should be proud of our record. The state is stronger today than it has been in years. We are recovering and growing, not declining and descending.

We are working together, not just as a people in digging out from Sandy and rebuilding our economy. Here in Trenton, in this chamber, we have had our fights. We have stuck to our principles. But we have established a governing model for the nation that shows that, even with heartfelt beliefs, bipartisan compromise is possible. Achievement is the result. And progress is the payoff.

So I want to thank President Sweeney and Speaker Oliver, Leaders Kean and Bramnick-- for your hard work, for your frankness when we disagree, and for your willingness to come together on the truly important issues – on the big things.

Maybe the folks in Washington, in both parties, could learn something from our record here. Our citizens certainly have—now 61% of them believe our state is moving in the right direction—more than double the amount that believed it on that cold day in January three years ago.

Make no mistake; our work is far from finished.

Rebuilding the homes and infrastructure damaged and destroyed by Sandy is the next big challenge and it will take years. We will need to spend our funds wisely and efficiently. We will need to cooperate. We will need to learn the lessons from past disasters and listen to each other.

The good news is that strong leadership and bipartisan cooperation makes all

these things possible. Our work over the last three years proves that beyond argument. Having worked hard to tackle our most urgent legacy problems – having faced up to and corrected some poor decisions from the past – we now have more freedom to chart a course of excellence in the future.
As we begin this new legislative year, we can now look ahead from Sandy, ahead from the national recession, to a brighter day for New Jersey.

The author Bern Williams once said, "Man never made any material as resilient as the human spirit."

For all I have seen and experienced as your governor in this extraordinary year, one experience will be indelibly etched in my memory. Her name is Ginjer.

As I walked around the parking lot of the fire department in Port Monmouth in one of the days soon after Sandy had laid waste to so much of our state, I saw so many of the scenes that I had come to expect in the aftermath of the storm. Neighbors helping neighbors. Food being prepared for the hungry. First responders helping the homeless. Then I met nine-year-old Ginjer. Having a nine-year-old girl myself, her height and manner of speaking was immediately familiar and evocative. Having confronted so many crying adults at that point I felt ready to deal with anything. Then Ginjer looked at me, began to cry and told me she was scared. She told me she had lost everything; she had lost her home and her belongings. She asked me to help her.

As my eyes filled with tears, I took a deep breath and thought about what I would say to my Bridget if she said the same thing to me. If she had the same look on her face. If she had the same tears in her eyes. I asked her where her mom was and she pointed right behind her. I asked her if her dad was ok. She told me he was. So I told Ginjer, you haven't lost your home; you've just lost a house. A house we can replace, your home is with your mom and dad. I hugged her and told her not to cry—that the adults are in charge now and there was nothing to be afraid of anymore. Ginjer is here today—we've kept in touch—and I want to thank her for giving voice to New Jersey's children during Sandy and helping to create a memory of humanity in a sea of despair.

In this year ahead, let us prove the truth of the words I spoke to Ginjer that day. Let's put aside destructive politics in an election year. Let's put aside accusations and false charges for purely political advantage. Let's work together

to honor the memories of those lost in Sandy. Let's put the needs of our most victimized citizens ahead of the partisan politics of the day. Let's demonstrate once again the resilience of New Jersey's spirit. And let us continue what we have started:

Rebuilding from Sandy with pride and determination;

Restoring our economy to growth and prosperity after a decade of decline and high taxes; and

Reclaiming the promise of New Jersey for future generations – presenting to our children renewed excellence in our schools, a sound and balanced budget, and a vibrant economy with jobs for those willing to work hard.

That is our mission – to hurdle barriers no matter how high, to fight the elements of doubt or disaster, and to leave this place better than we found it.

Let us prove, once and for all, that what I said to Ginjer is undeniably true: the adults are in charge. Let's accomplish the mission of rebuilding our battered state and restoring the hope and the faith and the trust of our people that government can work in a bipartisan way to restore our great way of life to all New Jerseyans.

In the year ahead, I look forward to working with all of you on that most important mission of all.

Thank you, God bless you, and God bless the great State of New Jersey.

CERTIFICATE OF SERVICE

I, Jose Rivera-Benitez, of full age, being duly sworn according to law, upon my oath depose and state:

I am an attorney at law in the State of New Jersey, in good standing, and an Assistant Deputy Rate Counsel, with the New Jersey Division of Rate Counsel in the Division's Telecommunications and Cable Section. I have on this 8th day of February 2013, sent a true and correct copy of the foregoing "Motion to Dismiss" via electronic mail to the following:

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All municipal franchises involved.

Jose Rivera-Benitez, Esq.
Assistant Deputy Rate Counsel
New Jersey Division of Rate Counsel

COMMENTS REGARDING THE PROPOSED FINAL JUDGMENT

IN

UNITED STATES OF AMERICA and STATE OF NEW YORK
vs.
VERIZON COMMUNICATIONS INC., CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, COMCAST CORP., TIME WARNER CABLE INC., COX COMMUNICATIONS, INC., and BRIGHT HOUSE NETWORKS, LLC

Submitted on behalf of

RCN Telecom Services, LLC.

I. INTRODUCTION AND SUMMARY

RCN Telecom Services, LLC ("RCN"), through its undersigned counsel, hereby expresses its concern that the Proposed Final Judgment ("PFJ")[1] fails to prevent the harms to competition that the Competitive Impact Statement ("CIS")[2] recognizes will arise as a result of the commercial agreements entered into among Verizon Wireless and the Cable Defendants. RCN is a robust competitor and the only cable over-builder that competes in several major U.S. geographic markets directly with cable companies and Verizon FiOS/DSL in three product markets (*i.e.*, wireline voice, wireline broadband Internet access, and wireline video programming). RCN provides these services in Boston, Philadelphia, and the Washington DC metropolitan area in competition with Comcast and Verizon FiOS/DSL and in competition with Time Warner Cable and Verizon FiOS/DSL in portions of New York City. RCN also provides

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[1] *U.S. and State of New York v. Verizon Communications Inc., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc. and Bright House Networks, LLC,* Proposed Final Judgment, Civ. Action No. 12-01354 (D.D.C. Aug. 16, 2012) ("*Proposed Final Judgment*" or "*PFJ*").

[2] *U.S. and State of New York v. Verizon Communications Inc., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc. and Bright House Networks, LLC,* Competitive Impact Statement, Civ. Action No. 12-01354 (D.D.C. Aug. 16, 2012) ("*Competitive Impact Statement*" or "*CIS*").

these services in Chicago in competition with Comcast and AT&T's U-verse/DSL and in the Pennsylvania Lehigh Valley in competition with Verizon FiOS/DSL and Service Electric Company. In these RCN markets, the incumbent cable company and the incumbent local exchange carrier, combined, dominate the three retail product lines in which RCN competes.

RCN also competes with Comcast, Time Warner Cable and others in providing transmission services known as "backhaul" to Verizon Wireless and other wireless carriers from their cell sites to their switches. Like other cable companies, RCN does not currently offer wireless telephone or wireless broadband services. Additionally, RCN does not have resale agreements with any wireless provider and no wireless provider resells RCN's services.

RCN's principal concerns are as follows:

1. The definition of "FiOS Footprint" in the PFJ is too narrowly drawn, and as a result, Verizon Wireless will be permitted to sell the Cable Defendants' Cable Services in the most logical locations for FiOS expansion, thereby diminishing the effectiveness of FiOS as a potential competitor in those locations.

2. The PFJ allows Verizon Wireless to engage in regional advertising of the Cable Defendants' Cable Services throughout metropolitan areas where Verizon offers FiOS, thereby diminishing the competition between Verizon FiOS and the Cable Defendants and inhibiting Verizon from expanding FiOS to portions of the area where it is not now offered.,

3. Verizon is permitted to provide sales information about Cable Services in Verizon Stores, even within the FiOS Footprint, as long as it does not make actual sales of Cable Services in a FiOS Footprint Store or to persons residing in the FiOS Footprint. This, too, reduces both actual and potential competition between Verizon FiOS and the Cable Defendants.

4. The Defendants' creation of a joint operating entity (the "JOE") designed to develop technology that integrates Defendants' wireless and wireline products and services, disadvantages competitors that offer only wireline or wireless services. While RCN does not object to technological advancement, when this type of integration is performed by entities with very large market shares, and competitors are excluded from use of the integration product competition is likely to be significantly diminished.

5. The Cable Defendants are provided preferential treatment in bidding for contracts to provide backhaul from Verizon Wireless's cell sites, thereby competitively disadvantaging other backhaul providers such as RCN.

II. TUNNEY ACT STANDARD

Before approving an antitrust consent judgment, the Tunney Act requires that a court decide whether the Department of Justice's proposed final judgment is "in the public interest."[3] This determination is "generally left to the discretion of the Court."[4] However, while precedent indicates that district courts should show deference to the government's evaluation of the adequacy of the proposed settlements, a court may not "rubber-stamp" proposed settlements and must engage in an "'independent' determination of whether a proposed settlement is in the public interest."[5]

Although what is considered to be "in the public interest" is not defined in the statute, courts are required to consider:

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[3] 15 U.S.C. § 16(e)(1).

[4] *United States v. SBC Communications, Inc.*, 489 F.Supp.2d 1, 10 (D.D.C.2007) (citing 15 U.S.C. § 16(f)).

[5] *Id.* at 15. *See also United States v. AT&T, Inc.*, 541 F. Supp. 2d 2, 6-7 (D.D.C. 2008).

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[6]

In addition, a court should assess a proposed judgment's clarity, should closely examine compliance mechanisms, and should review any allegations that the proposed settlement would cause harm to a third party.[7] The statute further permits the court to conduct an evidentiary hearing, allow third parties to intervene, or take any further action it deems appropriate to inform its final determination.[8] In sum, the court must evaluate whether there is a "factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable."[9]

III. U.S. DEPARTMENT OF JUSTICE'S COMPETITIVE IMPACT STATEMENT CONCLUSIONS

In its CIS, the Antitrust Division reached a series of conclusions that absent relief, the commercial agreements between Verizon Wireless and the Cable Defendants would have anticompetitive consequences. These conclusions establish a benchmark that must be considered in evaluating whether the relief provided in the PFJ adequately addresses these anticompetitive

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[6] 15 U.S.C. § 16(e)(1).

[7] *United States v. SBC Communications, Inc.*, 489 F.Supp.2d at 17 (citing *United States v. Microsoft*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995)).

[8] 15 U.S.C. § 16(e)(2), (f).

[9] *United States v. SBC Communications, Inc.*, 489 F.Supp.2d at 15-16.

consequences and therefore meets the public interest standard under 15 U.S. C. § 16(e). Among the conclusions regarding competitive harm that the Antitrust Division set forth in the CIS are the following:

- "[T]he Commercial Agreements contain a variety of mechanisms that are likely to diminish Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offerings."[10]
- "The Commercial Agreements contain a number of provisions that are likely to harm competition in the markets for broadband, video, and wireless services."[11]
- "The Cable Defendants are dominant in many local markets for both video and broadband services … . Each Cable Defendant has market power in numerous local geographic markets for both broadband and video services."[12]
- "The Commercial Agreements diminish the incentives and ability of Verizon and the Cable Defendants to compete in those areas where the Cable Defendants' territories overlap with those in which Verizon has built, or is likely to build, FiOS infrastructure. They transform the Defendants' relationship from one in which the firms are direct, horizontal competitors to one in which they are also partners in the sale of the Cable Defendants' services."[13]
- "Verizon will be contractually required and have a financial incentive to market and sell the Cable Defendants' products through Verizon Wireless channels in the same local geographic markets where Verizon also sells FiOS."[14]

The CIS further asserts that the PFJ contains "relief designed to eliminate the anticompetitive provisions, or aspects, of the Commercial Agreements while at the same time allowing the aspects that might be procompetitive to proceed."[15] RCN agrees with the DOJ's conclusions that the commercial agreements contain anticompetitive provisions and aspects. RCN does not, however, agree that the relief provided in the PFJ is a reasonable means "to eliminate the anticompetitive provisions, or aspects of the Commercial Agreements."

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10 *CIS* at 3-4.
11 *CIS* at 8.
12 *CIS* at 11.
13 *CIS* at 13.
14 *Id.*
15 *CIS* at 16.

IV. PROPOSED FINAL JUDGMENT CONDITIONS

To the extent that they are relevant to the concerns raised by RCN, the provisions of the PFJ relating to marketing provide as follows:

- Verizon Wireless is barred from selling Cable Services for a street address within the FiOS Footprint and from selling Cable Services in Verizon Wireless retail stores located within the FiOS Footprint. (PFJ § V.A.)
- After December 2, 2016, Verizon Wireless must stop selling Cable Services in the DSL Footprint. (PFJ § V.B.)
- Verizon Wireless may not "specifically target advertising of Cable Services to local areas in which Verizon Wireless is prohibited from selling Cable Services." (PFJ § V.C.)

To the extent that they are relevant to the concerns raised by RCN, the provisions of the PFJ relating to the JOE provide as follows:

- Defendants must exit the JOE by December 2, 2016. (PFJ §V.F.)
- Time Warner Cable and Bright House Networks have the right to pursue any technology that they have presented to the JOE if the JOE has not determined to pursue it. (PFJ § IV.D)
- Members of the JOE are entitled to royalty-free licenses upon their exit. (PFJ § IV.E.)

RCN shows below that these provisions do not eliminate the anticompetitive provisions or aspects of the Commercial Agreements.

V. PERSISTENT COMPETITIVE HARMS

A. FiOS Footprint Is Too Narrowly Defined

The CIS correctly concludes that the joint marketing agreements "unreasonably diminish competition between Verizon and the Cable Defendants"[16] in that they transform "the Defendants' relationship from one in which the firms are direct, horizontal competitors to one in

[16] CIS at 14.

which they are also partners in the sale of the Cable Defendants' services."[17] To remedy that harm, the PFJ bars Verizon Wireless from selling any high-speed Internet service, telephony service, or video programming distribution services offered by Comcast, Time Warner Cable, Bright House Networks, or Cox, or any bundle of such services to a street address that is within the "FiOS Footprint" or in a "FiOS Footprint Store."[18] "FiOS Footprint" is defined in § II.M as "any territory in which Verizon at the date of entry of this Final Judgment or at any time in the future: (i) has built out the capability to deliver FiOS Services, (ii) has a legally binding commitment in effect to build out the capability to deliver FiOS Services, (iii) has a non-statewide franchise agreement or similar grant in effect authorizing Verizon to build out the capability to deliver FiOS Services, or (iv) has delivered notice of an intention to build out the capability to deliver FiOS Services pursuant to a statewide franchise agreement."

DOJ explains that its prohibition seeks "to maintain Verizon's incentives to aggressively market FiOS against Cable Defendants in the areas in which both services are available and to ensure vigorous competitive in the future"[19] and is intended to "prohibit Verizon Wireless from selling the Cable Defendants' services ("Cable Services") in areas in which Verizon offers, or is likely to offer in the near term, FiOS service."[20] DOJ asserts that the prohibition is "necessary to ensure that Verizon receives no financial return from sales diverted from FiOS to the Cable Defendants."[21]

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17 *CIS* at 13.

18 *PFJ*, § V.A. ("Verizon Wireless shall not sell any Cable Service: (a) for a street address that is within the FiOS Footprint or (b) in a FiOS Footprint Store. Verizon Wireless shall not permit any other Person to sell any Cable Services in a FiOS Footprint Store."); *see also PFJ*, § II (definitions of Cable Service, FiOS Footprint, FiOS Footprint Store, and Person).

19 *CIS* at 17.

20 *Id.*

21 *Id.*

As an initial matter, RCN contends that the PFJ targets only a portion of the actual geographic market affected by the anticompetitive harms stemming from the parties' Commercial Agreements. More specifically, RCN contends that the term "FiOS Footprint" used to establish the boundaries of prohibited conduct under the PFJ is too narrowly defined and does not encompass the entire region affected by the anticompetitive harms of the Commercial Agreements. As a result, the PFJ permits the Commercial Agreements to discourage Verizon from expanding its FiOS services, even into immediately adjacent territories within the same city, town, or metropolitan area.

In its Complaint, DOJ stated that the relevant geographic markets for "broadband services include the local markets throughout the United States where Verizon offers, or is likely soon to offer, FiOS within the franchised territory of a Cable Defendant."[22] DOJ also noted that "the requirement and financial incentive for Verizon Wireless to sell the Cable Defendants' services … could, in the long-term, create a disincentive to additional buildout in some areas within Verizon's wireline territory but outside the currently planned FiOS footprint."[23]

RCN agrees with DOJ's assessment that the "Commercial Agreements diminish the incentives and ability of Verizon and the Cable Defendants to compete in those areas where the Cable Defendants' territories overlap with those in which Verizon has built, or is likely to build,

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[22] *U.S. and State of New York v. Verizon Communications Inc., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc. and Bright House Networks, LLC,* Complaint, ¶ 30, Civ. Action No. 12-01354 (D.D.C. Aug. 16, 2012) ("*Complaint*"). See also CIS at.10.

[23] *CIS* at 15. *See also, CIS* at 13 ("Rather than having an unqualified, uninhibited incentive and ability to promote its FiOS video and broadband products as aggressively as possible, Verizon will be contractually required and have a financial incentive to market and sell the Cable Defendants' products through Verizon Wireless channels in the same local geographic markets where Verizon also sells FiOS.")

FiOS infrastructure."[24] RCN agrees in particular with DOJ's recognition that it should be concerned that Verizon Wireless's ability to sell the Cable Defendants' services could "create a disincentive to additional buildout . . . outside the currently planned FiOS footprint." This recognition is important, because Verizon has incorrectly argued that the possibility of additional FiOS buildout beyond the currently planned FiOS footprint should be ignored. RCN contends that the most logical and economical area for FiOS expansion is adjacent to the area that it presently serves or is authorized to serve. As currently worded, the PFJ allows Verizon Wireless to sell Cable Services in a Verizon Store that is "next door" to locations where Verizon is selling FiOS, as long as it does not sell to persons residing in a location where FiOS is sold, authorized to be sold, or Verizon has indicated that it will sell FiOS and the store itself is outside that territory. Thus, the fact that Verizon Wireless can earn revenue by marketing the Cable Defendants' Cable Services in adjacent towns and neighborhoods will dampen Verizon's incentive to expand its FiOS offering into those same adjacent towns and neighborhoods. This will eliminate FiOS as a potential competitor in those regions and essentially solidify the current boundaries for which FiOS is available. Instead, Verizon Wireless should be precluded from selling Cable Services in a larger area that more accurately reflects where FiOS may be expanded.

Attached as Exhibit A is a map of the Boston area, with FiOS territory marked with cross-hatching, RCN territory marked with purple shading, Verizon Wireless stores with an "X." Comcast offers service throughout the Boston area.[25] Given that FiOS is typically deployed contiguously in towns and neighborhoods within a single metropolitan area, but not in all towns

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[24] *CIS* at 13.

[25] Based on RCN's experience, this map is typical of the pattern of build-out in metropolitan areas.

and neighborhoods within the area, RCN asserts that a more realistic definition of the physical area in which DOJ should not permit the competitive harms of the Commercial Agreements to exist is in within a single market region. Accordingly, RCN believes that the region where Verizon Wireless offering of Cable Services should be restrained is within any Designated Market Area ("DMA") in which FiOS is offered or authorized to be offered to at least 10% of residents. At the very least, Verizon Wireless should be precluded from marketing Cable Services in any Zip Code adjacent to a Zip Code in which Verizon offers FiOS or is authorized to offer FiOS.

By slightly expanding the zone where Verizon Wireless and the Cable Defendants cannot engage in prohibited conduct, the PFJ would preserve Verizon's incentive to expand FiOS service beyond its current locations.

B. Regional Marketing Exceptions Subsume Prohibitions

Section V.C. of the PFJ states that "Verizon Wireless may market Cable Services in national or regional advertising that *may reach or is likely to reach* street addresses in the FiOS Footprint …, *provided that* Verizon Wireless does not specifically target advertising of Cable Services to local areas in which Verizon Wireless is prohibited from selling Cable Services."[26] In other words, so long as Verizon Wireless does not specifically target a particular local area, Verizon Wireless can market and advertise Cable Defendants' Cable Services to entire regions where FiOS customers are likely to be found or where Verizon is planning to deploy FiOS services.

Verizon has received authorization to deploy its FiOS Services in many locations within each metropolitan area but has not sought authorization throughout a given metropolitan area.

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[26] *PFJ*, V.C. (emphasis added).

Accordingly, there are many "pockets" within a metropolitan area where Verizon FiOS is not authorized, although its FiOS is offered in a neighboring community. For example, Exhibit A shows the regions within the Boston DMA where Verizon is authorized to provide FiOS service and the location of Verizon Stores. For many Zip Codes within the Boston DMA, Verizon is not authorized to provide FiOS service but is authorized to provide service in a neighboring area.

From a practical perspective, regional advertising disseminated through television, radio, and print media cannot be narrowly focused so as to be able to exclude those locations within their expected audience where Verizon provides or plans to provide FiOS services. Allowing Verizon Wireless to advertise over a regionally defined area may be reasonable, but allowing Verizon Wireless to advertise Cable Services regionally is not. It defeats the purpose of the prohibitions in that the locations reached by the advertisements will contain many customers within the FiOS Footprint.

Because the PFJ permits such regional marketing, advertising will inevitably result in Verizon marketing Cable Services to large numbers of residents who live within the FiOS Footprint. In fact, within a metropolitan area's DMA, potential Cable Services customers within the FiOS Footprint will receive exactly the same information that Defendants have developed to solicit customers in non-FiOS regions. Accordingly, potential Cable Services customers within the FiOS Footprint will be able to act on the same information available to potential customers outside of the FiOS Footprint.

While Verizon Wireless may be prohibited from actually selling the Cable Services to the prospective customer residing in a location in which FiOS is offered, Verizon Wireless's advertisements will still produce the competitive harm identified by the DOJ – diminished competition between Verizon FiOS and the Cable Defendants' Cable Services. The fact that

Verizon will be spending significant resources to promote the Cable Defendants' Cable Services will reduce Verizon's incentive to compete aggressively through FiOS within the FiOS Footprint or in neighboring regions. The same advertising and the commissions earned by Verizon on sales of Cable Services will reduce Verizon's incentives to expand the FiOS Footprint further.[27] FiOS will pose less of a threat as a potential competitor in areas outside, but close to, the FiOS Footprint, thereby increasing the Cable Defendants' already great market power in those areas.

More importantly, even if it cannot earn commissions on sales of Cable Services to locations within the narrowly defined FiOS Footprint, Verizon Wireless has significant monetary incentives to promote products and services that enhance its wireless offerings. During the second quarter of 2012 ending June 30, 2012, Verizon Wireless' reported operating revenues were $18.6 billion with an operating income margin of 30.8%.[28] For that same time period, Verizon's wireline business unit had operating revenues of $9.9 billion with an operating income margin of only 1.9%.[29] Representing over 65% of Verizon's revenue and 96.8% of its profits for the quarter,[30] Verizon obviously has very strong reasons to sell its wireless services.

As discussed in Section V.D, below, Defendants have agreed to a joint venture ("the JOE") that will integrate Verizon Wireless's services with those of the Cable Defendants. Given that Verizon Wireless sells wireless data plans that will allow smartphone and tablet users to

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[27] *See CIS* at 12 ("Verizon still considers, from time to time, whether to invest further in the expansion of its FiOS infrastructure. Its decision whether to do so will be affected by, among other things, whether technological or business conditions become more conducive to additional buildout in future years.")

[28] Press Release, "Verizon Reports Continued Double-Digit Earnings Growth and Strong Operating Cash Flow in Second-Quarter 2012," July 19, 2012 (found at http://www.sec.gov/Archives/edgar/data/732712/000119312512306829/d380431dex99.htm) ("*Verizon 8-K Filing*").

[29] *See Verizon 8-K Filing.*

[30] For 2Q2012, Verizon Wireless's Operating Income was $5,713 million and Verizon Wireline's was $188 million. *Verizon 8-K Filing.*

utilize next generation capabilities, Verizon Wireless has a clear incentive to have its customers obtain services from the Cable Defendants, which will deploy the proprietary products developed by the JOE.

Verizon Wireless therefore derives benefits from the sale of the Cable Defendants' services beyond just a commission – Verizon Wireless enhances its ability to sell its highly profitable wireless service to that same customer, who will likely want to take advantage of the technical advances included in the jointly developed wireless/wireline integration products. Consequently, independent of the incentive created by a commission, Verizon Wireless has an incentive to encourage the adoption of products developed by the joint venture because Verizon Wireless benefits when the Cable Defendants' services are also promoted.

As the PFJ is currently drafted, the regional advertsing budgets of Verizon Wireless and the Cable Defendant located in each metropolitan area can, and likely will, be combined to promote the Cable Defendant's services, and to train their fire on competitors such as RCN.[31] Moreover, the threat of such a combined attack will intimidate other potential entrants, helping to preserve the Cable Defendant's monopoly (duopoly with FiOS in those portions of the metropolitan area where FiOS is offered). To prevent this, RCN contends that regional marketing should be prohibited in any DMA where FiOS is offered or authorized to be offered to at least 10% of residents.

C. Ubiquitous Provision of Cable Companies' Information

In addition to the distribution of marketing material regarding the Cable Defendants' Cable Services within FiOS Footprint regions, the PFJ also permits Verizon Wireless to "provide

[31] *See Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988) ("Advertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent.").

information regarding the availability of Cable Services" in any Verizon Store.[32] To emphasize the point, Verizon Wireless can market a Cable Defendant's Cable Services in the FiOS Footprint and can provide information and answer questions about those services in the Verizon Stores within the FiOS Footprint. Because customers are not immediately identifiable as living inside or outside the FiOS Footprint, Verizon Wireless store displays and personnel will likely be providing substantial assistance to the Cable Defendants in selling to persons residing in the FiOS Footprint.

The only prohibition is that Verizon cannot receive direct compensation from providing such information in any Verizon Store where Verizon Wireless is prohibited from actually selling Cable Services to that prospective customer. However, as noted above, Verizon Wireless has significant pecuniary interests in having customers use the Cable Defendants' Cable Services because Verizon Wireless' services may be enhanced when paired with JOE developed products.

Allowing information about the availability of Cable Services to be provided in any Verizon Store, regardless of location, dilutes efforts to constrain anticompetitive conduct. Accordingly, by allowing Verizon Wireless to disseminate information about the Cable Services within the Verizon Stores, the PFJ allows Verizon Wireless and the Cable Defendants to engage in every sales and marketing effort to promote Cable Services within the FiOS Footprint except for one thing – the actual sale of that service. At that point, all Verizon Wireless has to do is provide the customer a toll-free number or a website address.

Given that many customers shop "brick and mortar" stores before making purchases either online or over the telephone, the fact that Verizon Wireless is prohibited from making the sale of Cable Services in the store has a relatively minimal impact of the actual sales of Cable

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[32] *PFJ*, V.C.ii.

Services. Thus only conduct prohibited by the exception is the "impulse buys" of someone within a Verizon Store located within a Zip Code where FiOS is offered or authorized.

Accordingly RCN contends that Verizon Wireless should be precluded from providing anything but the contact information of the Cable Defendants within any Designated Market Area in which FiOS is offered or authorized to be offered to 10% or more of the residences and prohibit Verizon Wireless Stores within the FiOS Footprint or in a DMA in which FiOS is offered or authorized to be offered to at least 10% of residents.

D. JOE LLC Raises Competitive Concerns Not Addressed by the PFJ

Relatively little information has been made publicly available regarding JOE, LLC. Virtually all that is publicly known is set forth in public statements of the Defendants, the CIS, the PFJ, and the heavily redacted public record of FCC WT Docket 12-4. For example, in December 2011, Defendants announced, simultaneous with the spectrum transaction, that the companies had "formed an innovation technology joint venture for the development of technology to better integrate wireline and wireless products and services"[33] In testimony before the U.S. Senate Judiciary Committee in March 2012, Verizon Wireless stated that the "companies are working together to create next-generation technical capabilities enabling customers to more seamlessly have wireless devices such as smartphones and tablets interact with home entertainment systems and wired computers."[34] In addition, the CIS states that the JOE is "a joint venture to develop and market integrated wireline and wireless technologies" and "the technology developed within the JOE is exclusively available for use by Verizon, the Cable

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[33] Press Release, "Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for $3.6 billion," December 2, 2011.

[34] *See* filed U.S. Senate Judiciary Committee testimony at http://www.judiciary.senate.gov/pdf/12-3-21MilchTestimony.pdf.

Defendants that are members of the JOE, and potentially other cable companies that agree to sell Verizon Wireless services as agents." (CIS at pp. 8-9.)

RCN believes that there is a real threat that because of the size of the participants in the JOE, the technology that it develops for the exclusive use of its members will become the industry standard for integration of wired and wireless technologies, and those that have no ability to use that technology will find themselves unable to compete. As asserted publically by Public Knowledge in FCC WT Docket 12-4, "practically speaking, the JOE is intended to give its Members control over the *de facto* standards for the next generation of fundamental technology for broadband, video, and voice service providers."[35] Likewise, a group of the largest local telephone carriers other than AT&T and Verizon has publically asserted that "if they are unable to complete seamless and integrated handoffs between wireline and wireless networks, competitors to the Defendants will be at a disadvantage in competing for residential customers"[36] and:

> The JOE . . . is about creating the integration of services, networks, and technologies in a new kind of industry that . . . would be focused on one large partnership capable of integrated telecommunications services--wireless, wireline, and content. . . There is currently no precedent to define the market forces in such a venture, and there appears to be no other possible industry combination that could compete against the partnership. The JOE's initiative is, therefore, like a land rush into new territories to capture the most fertile and unclaimed properties, before other competitors realize the stakes.[37]

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[35] "The Anticompetitive Effects of the Verizon/SpectrumCo Agreements" at p. 11, attachment to Comments of Public Knowledge, filed July 10, 2012 in FCC WT Docket 12-4.

[36] *Ex parte* letter of Genevieve Morelli and Micah Caldwell, filed July 10, 2012 in FCC WT Docket 12-4, at p. 3.

[37] Balhoff Williams, LLC White Paper at pp. 16-17, enclosure to *ex parte* letter of Genevieve Morelli, filed July 18, 2012 in FCC WT Docket 12-4.

The Communications Workers of America has asserted publically that the "JOE agreement creates an anticompetitive patent pool that gives the parties enormous market power in the evolving wired/wireless broadband market." [38] RCN further agrees with the statement of the Communications Workers of America that "the JOE members could find themselves in the position of others that control numerous patents upon which other companies rely. If the government waits until the technology exists and market participants are clamoring for reasonable licensing terms, it will be too late."[39]

The JOE runs afoul of the Department of Justice & FTC, Antitrust Guidelines for Collaborations Among Competitors in several respects. First, as the Guidelines observe, "Joint R&D agreements … can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants' individual competitive R&D efforts."[40] The JOE allows Defendants to use their market power anticompetitively to protect their own respective market positions while retarding the pace of competitors' research and development efforts.[41] This reduces the number of competitors and leads to fewer, lower quality, and/or delayed products and services.[42]

The Guidelines also state that these joint ventures "are more likely to raise competitive concerns when the collaboration or its participants already possess a secure source of market power over an existing product and the new R&D efforts might cannibalize their

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38 "Analysis of FiOS Profitability and Strategic Options" at 25, Appendix B to Comments of the Communications Workers of America, filed July 10, 2012 in FCC WT Docket 12-4.

39 *Id.* at p. 29.

40 Department of Justice & FTC, Antitrust Guidelines for Collaborations Among Competitors (2000) at § 3.3.1

41 *See id.*

42 *See id.*

supracompetitive earnings," especially if the R&D competition is confined to entities with specialized assets like intellectual property, or when regulatory approval processes limit new competitors' ability to catch up with incumbent companies.[43]

The essence of the problem created by the JOE, from RCN's perspective, is that a cartel consisting of the largest players in the wireless and wireline broadband industries has been designed to create a technology that will link the industries, meeting an enormous consumer demand for seamless integration. Smaller players in the wireline industry, such as RCN, that have been denied participation in the JOE venture, will be unable to compete with JOE members such as Comcast and Time Cable. Since the JOE members have decided to exclude RCN from the venture, they should be required to license its technology to nonmembers on a commercially reasonable, nondiscriminatory basis.

If Verizon Wireless customers can integrate these services only with those of Cable Defendants, competing providers of broadband services will not be able to compete for the business of Verizon Wireless customers. To preserve competition, products developed by JOE must be available to other wired broadband providers on a commercially reasonable and nondiscriminatory basis.

E. Preferential Treatment of Cable Companies in Providing Backhaul from Verizon Wireless Cell Sites Is Anticompetitive

As with the JOE, the confidential nature of the provisions of the commercial agreements regarding Verizon Wireless's purchase of backhaul from its cell sites makes it necessary to piece together the terms of the agreements from scraps of publically available information, which is not consistent with the spirit of the Tunney Act. The CIS and the PFJ do not discuss this issue. However, an expert report submitted to the FCC by SpectrumCo asserts that under these

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[43] *Id.*

provisions, "to win VZW's business," independent providers of backhaul services "must offer terms that are better than those of an MSO that is also competing to offer backhaul services to VZW."[44] The first respect in which this is anticompetitive is that the cable MSO wins in case of a tie. But more importantly, there is ambiguity as to which party's terms are "better."

For example, suppose that RCN, whose business includes providing backhaul to wireless carriers from their cell towers, offers to supply backhaul to Verizon Wireless for 50 cell towers in a market that are in RCN's footprint at a price of $500 per tower, while Comcast offers to supply backhaul at a price of $550 per tower for the 70 cell towers that are in Comcast's footprint. Comcast could argue that even though its unit price is higher, its price is as good as or better than RCN's because the towers in Comcast's package are on balance more costly to serve. Faced with a choice between accepting RCN's bid, which may result in litigation with Comcast, or accepting the bid of its partner, Comcast, which would not result in RCN having any basis to litigate, Verizon Wireless would clearly favor Comcast. In addition to the fact that the two bids may cover sets of towers that only partially overlap, there are also non-price considerations in a bid for backhaul service, making it even more complicated to determine which bid is "better," once quality of service and ability to construct the backhaul quickly are considered. The presence of a multitude of objective and subjective considerations will make it even more likely that Verizon Wireless will shy away from a potential claim of breach by Comcast by accepting Comcast's bid.

The fact that the commercial agreements will make it harder for other providers of backhaul service to compete with the Cable Defendants extends beyond the provision of

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[44] Mark Israel, "Implications of the Verizon Wireless & SpectrumCo/Cox Commercial Agreements for Backhaul and Wi-Fi Services Competition. At p. 9, Attachment to *ex parte* letter of Michael H. Hammer, counsel for SpectrumCo, filed August 2, 2012, FCC WT Docket 12-4.

backhaul to Verizon Wireless. This is because there are substantial economies in serving a second wireless provider on a cell tower once one provides backhaul to an "anchor tenant" on the tower. So once the Cable Defendant obtains the backhaul business of Verizon Wireless as an "anchor tenant," it will be much more difficult for RCN to compete with the Cable Defendant for the backhaul business of Sprint, T-Mobile, or another wireless carrier.

Many of the filings in FCC WT Docket 12-4 echo the concerns expressed by RCN, including the concern that the special access market, which includes the market for wireless backhaul, is already highly concentrated, leading to excessive prices, but for the most part, the concerns are articulated in confidential portions of the filings.[45] RCN urges the Antitrust Division to review the unredacted versions of these filings, if it has not already done so.

F. Use of "Non-Statewide Franchise" Is Confusing for the District of Columbia

The use of the phrase "non-statewide franchise"[46] in the definition of "FiOS Footprint" of the PFJ creates additional ambiguity with respect to the District of Columbia. Verizon may take the position that its franchise to provide service throughout the District of Columbia is not a "non-statewide franchise" because the District of Columbia has many of the attributes of a State. RCN contends that the PFJ should make clear that for purposes of this provision, Verizon's franchise for the District of Columbia is not "statewide."

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[45] "Analysis of FiOS Profitability and Strategic Options" at 11-12, Appendix B to Comments of the Communications Workers of America, filed July 10, 2012 in FCC WT Docket 12-4; *ex parte* letter of Genevieve Morelli and Micah Caldwell, Independent Telephone & Telecommunications Alliance, filed July 10, 2012, at p. 4; Balhoff Williams, LLC White Paper at p. 17, enclosure to *ex parte* letter of Genevieve Morelli, filed July 18, 2012 in FCC WT Docket 12-4; "The Anticompetitive Effects of the Verizon/SpectrumCo Agreements" at p. 9, attachment to Comments of Public Knowledge, filed July 10, 2012 in FCC WT Docket 12-4. *Ex parte* letter of Eric Branfman, counsel for Level 3 Communications, LLC, filed May 16, 2012 in FCC WT Docket 12-4, at pp. 1-3.

[46] *PFJ*, § II.M(iii).

VI. NECESSARY MODIFICATIONS TO PROPOSED FINAL JUDGMENT

RCN suggests that to eliminate the anticompetitive provisions and aspects of the commercial agreements discussed above, it is necessary to make several modifications to the PFJ. First, because the anticompetitive effects associated with marketing within the FiOS Footprint cannot be reasonably curtailed given the practicalities of how advertising is sold and distributed within a market, the first sentence in § V.C of the PFJ should be modified so that it permits national or regional advertising in a Designated Market Area only if FiOS is neither offered nor authorized to be offered to 10% or more of the residences in the Designated Market Area. As shown above, using a Designated Market Area to establish the boundaries for marketing restrictions is reasonable as marketing expenditures are in the video and broadband markets are made on the basis of those boundaries.

Second, these boundaries should also extend to the provision of information related to Cable Services. Therefore, the remainder of § V.C of the PFJ should be modified to prohibit Verizon Wireless Stores within the FiOS Footprint or in any Designated Market Area in which FiOS is offered or authorized to be offered to 10% of more of the residences from providing any information regarding Cable Services apart from referring consumers to Internet sites or providing toll-free numbers. Using boundaries similar to those used in the prohibition on regional joint marketing will provide greater clarity concerning where Verizon Wireless would be permitted to market Cable Services. Moreover, basing the boundary on the store location will virtually eliminate the problem of Verizon store employees unknowingly attempting to sell Cable Services to customers whose residences are served by FiOS, an activity that undermines Verizon's incentive to sell FiOS in competition with Cable Services.

Third, to prevent products developed by JOE LLC to integrate wireless and wireline broadband from being used to ensure that (1) Verizon Wireless customers buy their wireline broadband only from Verizon or one of the Cable Defendants and (2) the Cable Defendants' customers buy their wireless service only from Verizon Wireless, the MFJ should be modified to require non-exclusive licensing of intellectual property developed by JOE LLC on commercially reasonable and nondiscriminatory terms.[47]

Fourth, all provisions of the commercial agreements providing the Cable Defendants with any preferential treatment with respect to selling backhaul to Verizon Wireless should be removed.

Fifth, the PFJ should be revised to make clear that for purposes of this provision, Verizon's franchise for the District of Columbia is not "statewide."

Respectfully submitted

/s/

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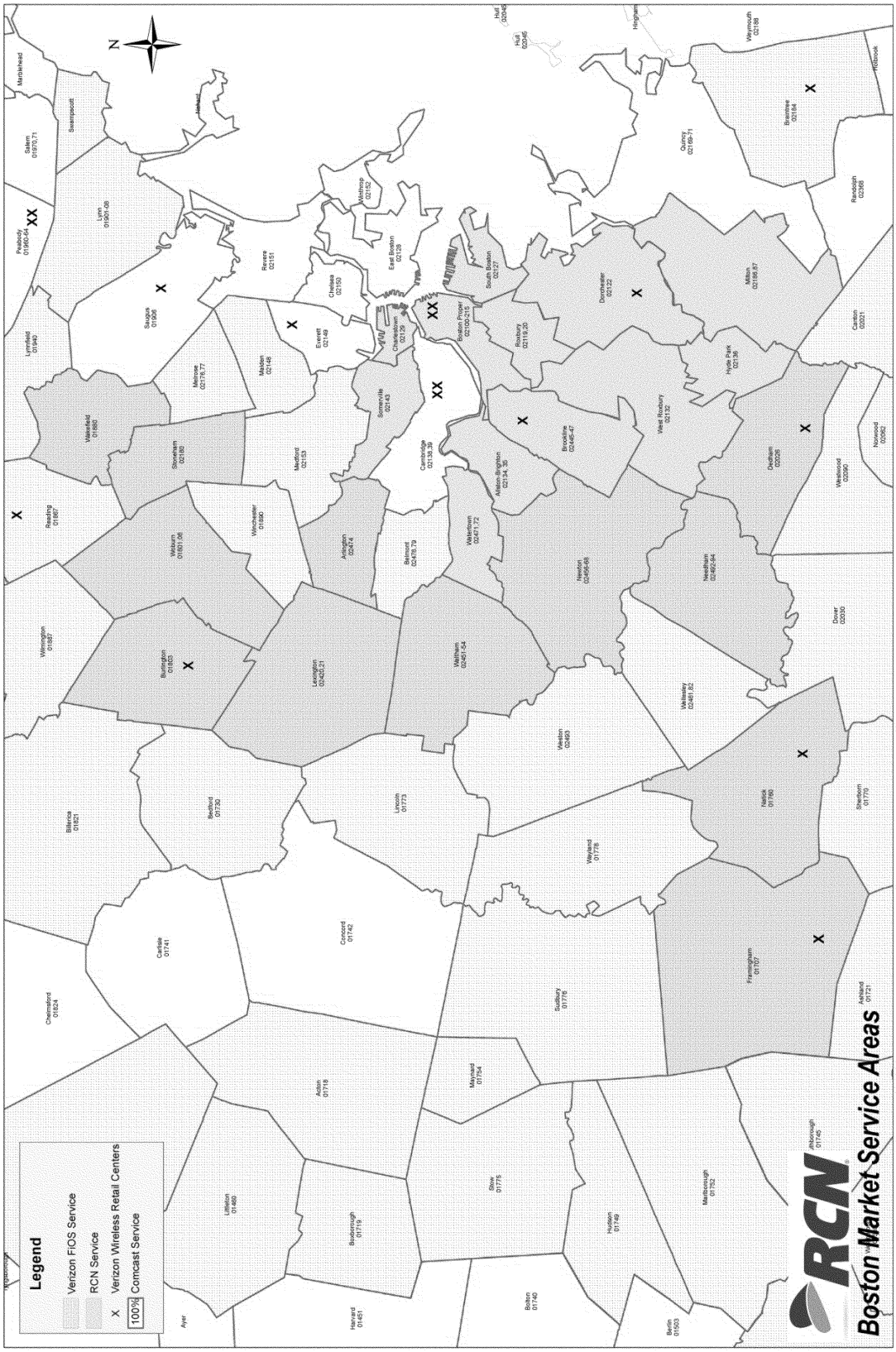
[47] What constitutes reasonable and nondiscriminatory licensing terms was discussed by Acting Assistant Attorney General Joseph F. Wayland in "Oversight of the Impact of Exclusion Orders to Enforce Standards-Essential Patents" before the Senate Committee on the Judiciary, 112th Cong. (2012).


Legend
Verizon FiOS Service
RCN Service
X Verizon Wireless Retail Centers
100% Comcast Service
RCN
Boston Market Service Areas
N
Marblehead
Swampscott
Salem 01970,71
Peabody 01960-64
Lynn 01901-08
Lynnfield 01940
Saugus 01906
Reading 01867
Wilmington 01887
Burlington 01803
Woburn 01801,08
Stoneham 02180
Waterfield 01890
Melrose 02176,77
Malden 02148
Everett 02149
Revere 02151
Chelsea 02150
Winthrop 02152
East Boston 02128
Charlestown 02129
South Boston 02127
Boston Proper 02100-216
Roxbury 02119,20
Dorchester 02122
Milton 02186,87
Quincy 02169-71
Weymouth 02188
Braintree 02184
Randolph 02368
Canton 02021
Hyde Park 02136
Dedham 02026
Westwood 02090
Norwood 02062
West Roxbury 02132
Brookline 02445-47
Newton 02458-66
Needham 02492-94
Wellesley 02481,82
Dover 02030
Natick 01760
Sherborn 01770
Framingham 01701
Ashland 01721
Hopkinton 01748
Marlborough 01752
Berlin 01503
Bolton 01740
Hudson 01749
Sudbury 01776
Wayland 01778
Weston 02493
Lincoln 01773
Bedford 01730
Billerica 01821
Carlisle 01741
Concord 01742
Chelmsford 01824
Acton 01718
Maynard 01754
Stow 01775
Littleton 01460
Boxborough 01719
Harvard 01451
Ayer
Hingham
Hull 02045
Cambridge 02138,39
Somerville 02143
Belmont 02478,79
Arlington 02474
Lexington 02420,21
Waltham 02451-54
Watertown 02472,72
Allston-Brighton 02134,35
Medford 02153
Winchester 01890

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, and STATE OF NEW YORK, *Plaintiffs,* v. VERIZON COMMUNICATIONS INC., CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, COMCAST CORP., TIME WARNER CABLE INC., COX COMMUNICATIONS, INC., and BRIGHT HOUSE NETWORKS, LLC, *Defendants.*	Civil Action No.: 1:12-cv-01354

OPPOSITION OF MONTGOMERY COUNTY, MARYLAND
TO PROPOSED FINAL JUDGMENT

I. INTRODUCTION

Montgomery County, Maryland (the "County") respectfully submits these comments on the Proposed Final Judgment ("PFJ") in the above-captioned case which was published in the Federal Register[1] and made available for public comment as required by federal law.[2] The County opposes the PFJ and contends that the PFJ is not in the public interest for the following reasons:

[1] 77 Fed. Reg. 51048 *et seq.* (Aug. 23, 2012).

[2] Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

(1) the PFJ permits an unprecedented level of cooperation and collaboration by and among Verizon and its primary incumbent competitive providers of services in the video, voice, broadband and wireless markets through commercial agreements ("Commercial Agreements"). The practical competitive harms from these Commercial Agreements are only slightly modified by the PFJ.

(2) In particular the PFJ will permit the dominant wireline and wireless broadband providers in each geographic market to collaborate and potentially to allocate the broadband market among themselves rather than to compete against each other. This will limit the incentive for Verizon, a wireless broadband company with national coverage, to offer wireline broadband services in competition with the wireline broadband offerings of Comcast and the other Cable Defendants[3] in every geographic market where the joint marketing takes effect.

(a) In Montgomery County, where portions of the County are served competitively by both Verizon and Comcast wireline systems, the PFJ limits the incentives for either company to compete head-to-head.

(b) In parts of the County where neither Comcast nor Verizon is offering wireline services, or in places such as Baltimore City where Verizon does not offer FiOS service, the PFJ provides no incentive for Comcast or Verizon to expand deployment of their wireline services.

(3) The PFJ permits the cable companies to engage in a new level of service bundling (quad play) which will further entrench their wireline market dominance. This will allow them to obtain increased profits and inhibit competitive entry by alternative broadband providers, and yet, will provide little, if any, consumer benefits.

(4) The PFJ creates an unworkable scheme for joint marketing that will cause customer confusion and be difficult to monitor, interpret and enforce.

[3] The Cable Defendants are Comcast, Cox, Time Warner, and Bright House.

The Defendants are the dominant companies in the video, broadband, wireless, and voice markets. Verizon Wireless is the single largest wireless carrier in the country and has a significant market share of the voice and wireless broadband service markets.[4] Comcast, Time Warner Cable, Cox, and Verizon are the nation's four largest *wireline* video services providers.[5] Bright House is the eighth largest.[6] Comcast, Time Warner Cable, Cox, and Bright House are incumbent cable operators and generally do not compete with each other because they have developed a business pattern of not seeking competitive franchises in any territory served by one of the other Defendants. As a result, their service territories do not overlap. Each generally dominates the video and wireline (cable modem) broadband service markets in its respective territory. All four companies also offer voice-over Internet Protocol (VOIP) voice service in their service territories as well. Wireline telephony, broadband and video service offered as a single priced bundle by these providers is known as a "triple play." This triple play bundle is offered at a significantly lower price than the combined price of purchasing these services separately.

Verizon is an incumbent telephone company and offers its own triple play bundle. Verizon is a relatively recent entrant into the wireline video service and high speed broadband markets. Its FiOS fiber network is available in certain markets in direct competition with the Cable Defendants and others. In markets where Verizon has not built out its FiOS network, it offers traditional telephone service and a slower, and less competitive, DSL internet service (DSL footprint), but no video service.

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[4] Notably, the Competitive Impact Statement does not state Verizon's market share.

[5] Wireline rankings exclude satellite (DBS) providers, DirecTV and Dish.

[6] Notably, the Competitive Impact Statement does not state the video services and wireline broadband market shares of the Cable Defendants.

As a local regulator, the County has closely followed the development of these services markets, and its experience informs these comments.

A. **Demographics of Montgomery County, Maryland**

Montgomery County is a microcosm of the United States as a whole. The County is a 496-square mile jurisdiction adjacent to Washington, DC with a population of 971,777,[7] and approximately 376,000 households. The County includes density populated urban and suburban communities, as well as low density exurban and rural communities.[8] Although home to biotech, computer science, hospitality and military contractor companies, one-third of the County's land mass is reserved for agriculture use.[9] The County is home to a high and middle income highly-educated workforce, but also has a significant number of low income residents.[10] The age of the County's population is similar to the U.S. overall,[11] but more ethnically and racially diverse.[12]

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[7] Montgomery County is the 41st largest county in America and 42 percent of the American population lives within the largest 100 U.S. counties. 2010 U.S Census data compiled at http://en.wikipedia.org/wiki/List_of_the_most_populous_counties_in_the_United_States (last visited October 22, 2012).

[8] There are 45 "planning places" within the County. As of 2010, 39 percent of the County's residents live within the top five planning places and 64 percent are concentrated within the top ten planning places within the County. See Montgomery County 2010 and 2011 Demographic Profile, http://www.montgomeryplanning.org/viewer.shtm#http://www.montgomeryplanning.org/research/data_library/census/2010/documents/moco_profile_sf12010_mdp.pdf (last visited October 22, 2012). 378,396 people live with Bethesda, Germantown, Silver Spring, and Gaithersburg and Vicinity. An additional 239,341 live within Wheaton, Aspen Hill, Potomac, North Bethesda, and Fairland.

[9] For example, Montgomery County is home to: IGEN and the Human Genome Science Inc.; Sodexho, Marriott and Choice Hotels and Lockheed Martin. For a list of biotech and hospitality companies, *see* http://www6.montgomerycountymd.gov/content/ded/downloads/Biotech%20Companies.pdf (last visited October 22, 2012) and http://www.choosemontgomerymd.com/business-community/industry-sectors/hospitality-tourism (last visited October 22, 2012).

[10] Per capita income 2006-2010: the County's per capita income in the past 12 months (2010 dollars) ($47,310) is 42 percent greater than in the United States overall ($27,334) and the 2006-2010 median household income in the County ($70,647) is 26 percent larger than in the United States overall ($51,914). However, 32 percent of children (47,365) in Montgomery County public schools were eligible for free or reduced-priced meals (FARMs) in 2011-12 school year. U.S. Census Quick Facts at www.census.gov and Montgomery County Public Schools FARMs data.

[11] As of 2011, Montgomery County's population as compared to the United States population: Under age 5, both 6.5 percent; under age 18, both 23.7 percent; and age 65 or older, 12.6 percent versus 13.3 percent. U.S. Census Quick Facts at www.census.gov.

[12] Montgomery County is now one of 336 "majority-minority" counties in the United States. The United States as a whole is 74.5 percent white. As of 2010, Non-Hispanic Whites make up 49.3 percent of the County's population.

Thus, as a local video franchising authority, the County must balance the interests of rural and urban population centers, high income and low income residents, and an ethnically diverse population.

B. Video and Broadband Competition Within Montgomery County

The County has a strong interest in stimulating and fostering deployment of competitive commercial video and broadband services to densely populated high- and middle-income areas concentrated within relatively small geographic portions of the County, while simultaneously also providing incentives for those same companies to deploy video and broadband services to all other areas of the County with relatively low population densities.

The County is served by three franchised cable operators who provide high-speed cable modem service and voice over Internet Protocol (VOIP) service. In the mid-1980's, County granted its first cable franchise and required the cable operator over the life of its 15-year franchise to build-out its cable system to serve the entire County. The cable operator requested and County agreed to add further conditions favorable to the cable operator in areas of the County where the housing densities were below certain levels. When the cable operator began to provide cable modem service, as result of the build-out requirement, Internet access service became available throughout the County. When the cable operator began to upgrade its system to provide broadband service and renewed its franchise in 1998, similar to the initial build-out requirement, the County conditioned the franchise on the cable operator agreeing to upgrade its system throughout the County over the life of its second franchise. When Comcast subsequently

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Hispanics and Latinos are now the County's second largest population group (17.0 percent) followed by African Americans and Blacks (16.6 percent), Asian and Pacific Islanders (13.9 percent) and Other (3.2 percent). Four percent of the County's population are people of more than one race. Montgomery County 2010 and 2011 Demographic Profile. Based 2006-2010 data, 30.9 percent of the County's residents are foreign born, as compared to 12.7 percent of U.S. population, and 37.5 percent of the County's residents speak a language other than English at home, as compared to 20.1 percent of the U.S. population. U.S. Census Quick Facts at www.census.gov.

acquired this cable system, the build-out and upgrade requirements imposed by the County helped to ensure that Comcast's high-speed broadband service was available through the County.[13]

The County granted its second cable franchise to RCN-Starpower in 1999. Similar to the Comcast franchise, the initial RCN-Starpower franchise also required the cable operator to build-out its system throughout the County over the life of the 15-year franchise. The competitive pricing power exerted by Comcast limited RCN-Starpower's ability to achieve significant market share within the portions of the County that it had begun to serve. A subsequent inability to acquire necessary market capital lead RCN-Starpower to sell off many of its cable systems in the Boston to Virginia area and eventually, RCN-Starpower requested that its franchise service area be reduced so that it was no longer required to serve the entire County and could focus of increasing its penetration rate in the areas where it had already built out its system. Comcast objected to a reduction in RCN-Starpower's franchise service area. In the interest of preserving competition in at least some parts of the County, the County agreed to a reduction in RCN-Starpower's franchise service area.

In 2006, the County granted its third competitive cable franchise to Verizon. Similar to its other franchises, the County required Verizon to build-out its system throughout the County, subject to minimum housing density requirements.[14] Verizon has substantially completed its build-out and deployment of its cable and broadband system throughout the County.

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[13] Comcast's franchise commitment is to serve all areas of the County as long as the following conditions are satisfied, per Section 4 of its franchise: (A) the new subscriber requesting service is located 400 feet or less from the termination of Comcast's cable system; and (B) the number of dwelling units to be passed by the extension is equal to or greater than 15 per mile measured from any point on the system. Homes that do not meet these requirements may have service extended to them only if they share in the cost of the line extension.

[14] Verizon's franchise commitment in Section 3 of its franchise. Verizon must build out portions of its franchise territory over six years, expanding the service areas from an initial area to others as certain thresholds are met. Verizon's line extensions commitment also has a staggered implementation schedule with the density requirements

Thus, the County's cable franchise requirement that each franchisee had to build out the entire area of its franchise has guaranteed that competitive high-speed broadband is deployed throughout the County and that the majority of County residents have access to at least two wireline high-speed broadband service providers. Of 376,000 County housing units, approximately 99.6% are passed by one wireline cable company providing broadband service and at least 65.6% are passed by two wireline cable companies providing broadband service; of 357,086 occupied County households, approximately 72 percent subscribe to cable service.[15] Because of bundled pricing incentives, most cable subscribers tend to purchase broadband service from their cable service providers, so the number of cable subscribers is an approximate estimate of the number cable modem broadband subscribers within the County. Based on anecdotal evidence, the County also has reason to believe that cable operators may have a significant number of customers who subscribe to broadband service, but not to cable services. The broadband deployment and broadband adoption rate within the County is greater than 72 percent.

Although the build out requirements have ensured that the majority of residents have access to competing service offerings from Verizon and Comcast (and in some areas also from RCN), there pockets of the County where residents do not have such service. These are in low density areas where Verizon has no obligation to serve, and where Comcast need only serve if the resident agrees to pay a portion of the line extension costs.

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starting at thirty (30) residences per mile during years 1 through 7 of the term of the franchise, and changing to twenty (20) residences per mile during the years 8 to 10 and finally fifteen (15) residences per mile during the years 11 to 15 of the term of this franchise.

[15] 2010 U.S. Census, Profile of General Demographics for Montgomery County, MD; confidential information provided to the Montgomery County Office of Cable and Broadband Services.

II. THE SHERMAN ACT VIOLATIONS AND PROPOSED REMEDIES

The purpose of the Sherman Act "is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. … [C]oncerted activity covered by § 1…[is] 'inherently is fraught with anticompetitive risk.'" (citations omitted). *Spectrum Sports v. McQuillan*, 506 U.S. 447, 458-459 (U.S. 1993).

The Plaintiffs' Complaint alleges that the likely effect of the Commercial Agreements is to unreasonably restrict competition in numerous local markets for broadband, video, and wireless services throughout the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, because they deny consumers the benefits of unrestrained competition between the Verizon Defendants and the Cable Defendants.

The primary anticompetitive effects of the Commercial Agreements identified by the Plaintiffs in the Complaint, and the remedies proposed in the PFJ may be summarized as follows:

- Harm (Paragraph 38): Commercial Agreements harm competition in video and wireline broadband services markets where Verizon's FiOS territory overlaps with the wireline territory of a Cable Defendant because they impair the ability and incentives for Verizon and the Cable Defendants to compete aggressively against each other (Verizon Wireless stores must market FiOS and Cable Defendant's services on an "equivalent basis" or neither at all, and Verizon Wireless is required to sell each Cable Defendant's services in direct competition with FiOS for a commission for each such sale. These requirements reduce Verizon's incentives and ability to compete aggressively against the Cable Defendants with FiOS, and facilitates anticompetitive coordination among the Defendants.

- Harm (Paragraph 39): Commercial Agreements diminish the incentives and ability of Verizon and the Cable Defendants to compete where Verizon has built, or is likely to build, FiOS infrastructure that overlaps Cable Defendants' territory, transforming the Defendants' relationships from direct, horizontal competitors to partners in the sale of the Cable Defendants' services. Rather than having an unqualified, uninhibited incentive and ability to promote its FiOS video and broadband products as aggressively as possible, Verizon will be contractually required and have a financial incentive to market and sell

the Cable Defendants' products through Verizon Wireless channels in the same local geographic markets where Verizon also sells FiOS, unreasonably diminishing competition between Verizon and the Cable Defendants—competition that is critical to maintaining low prices, high quality, and continued innovation.

- Proposed Remedy (Paras. 38 and 39): No sale of Cable Services in FiOS footprint.

- Harm (Paragraph 40): The Commercial Agreements create an enhanced potential for anticompetitive coordination, unreasonably diminishing future incentives to compete for product and feature development pertaining to the integration of broadband, video, and wireless services through the JOE technology joint venture of a potentially unlimited duration, and containing restrictions on its members' ability to innovate outside of the JOE.

- Proposed Remedy: Upon dissolution of the technology joint venture, all members receive a non-exclusive license to all the joint venture's technology, and each may then choose to sublicense to other competitors.

- Harm (Paragraph 41): The Commercial Agreements unreasonably diminish the Cable Defendants' incentives and ability to pursue in the future—as they have in the past—their own wireless services offerings for their customers who want a bundle including such services. The Cable Defendants are explicitly prohibited from competing in wireless for the first four years of the agreements, and meanwhile they may only offer Verizon Wireless services as sales agents, diminishing the incentive to invest in potential wireless offerings and inhibiting the ability to bring those offerings to market in a timely manner.

- Proposed Remedy: The cable companies can elect to resell Verizon Wireless services using their own brand at any time as provided for under the amended agreements.

- Harm (Paragraph 42): The Commercial Agreements unreasonably restrain future competition for the sale of broadband, video, and wireless services to the extent that the availability of these services as part of a bundle, including a quad-play bundle, becomes more competitively significant. The unlimited duration of the wireless exclusivity is unreasonable and unnecessarily restrains competition in the long term, when partnerships between the Cable Defendants and other wireless providers can serve as an important source of competition for the sale of integrated wireline and wireless bundles. Should the ability to offer integrated bundles develop into an important characteristic of competition, these agreements would unreasonably prevent wireless carriers from offering those bundles with the most significant providers of broadband and video services. The reduction in future competition to offer bundled products would result in harm in the markets for each constituent product.

- Proposed Remedy: After five years, the Cable Defendants are no longer barred from selling the wireless services of Verizon Wireless's competitors, and may partner with other wireless providers.

- Harm (Paragraph 43): The Commercial Agreements significantly and adversely affect Verizon's long-term competitive incentives to reconsider, in future years, its pre-existing

decision not to build out FiOS beyond its current commitments. The requirement and financial incentives for Verizon Wireless to sell the Cable Defendants' services, combined with the unlimited duration of the Commercial Agreements, creates a disincentive to additional buildout in areas within Verizon's wireline territory but outside the currently planned FiOS footprint, particularly in those Verizon DSL territories in which buildout might be most profitable.

- Proposed Remedy: Term of Commercial Agreements shortened to a fixed term.
- Harm (Paragraph 44): The Commercial Agreements unreasonably restrain competition due to ambiguities in certain terms regarding what conduct Verizon can, and cannot, engage in. As written, the ambiguous terms could be interpreted to prevent Verizon Wireless from engaging in certain competitive activities, including selling wireless services as a residential (as opposed to mobile) service and allowing Verizon to sell Verizon Wireless services along with other companies' services.
- Proposed Remedy: Verizon retains the ability to sell bundles of services that include DSL, Verizon Wireless and the video services of a direct broadcast satellite company (i.e., DirecTV or Dish Network).

The County suggests that this list is incomplete, and has identified a further harm and proposes a further remedy in its discussion below as to why the Proposed Final Judgment is not in the public interest.

III. THE PROPOSED FINAL JUDGMENT IS NOT IN PUBLIC INTEREST

A. Public Interest Standard

Per 15 U.S.C. § 16(e)(1), before this court may enter any consent judgment proposed by the Plaintiffs, "the court shall determine that the entry of such judgment is in the public interest." The statute *requires* the court to consider a specific list of factors:

(A) the competitive impact of such judgment, including:

- termination of alleged violations,
- provisions for enforcement and modification,
- duration of relief sought,
- anticipated effects of alternative remedies actually considered,
- whether its terms are ambiguous, and

- any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment

- upon competition in the relevant market or markets,
- upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

As discussed further below, the County believes a careful analysis of these factors will result in a determination that the PFJ is not in the public interest.

B. The Public Interest Standard Has Not Been Met By the Proposed Final Judgment

1. The PFJ Permits An Unprecedented Level Of Cooperation And Collaboration By And Among The Most Dominant Companies In The Video, Voice, Broadband And Wireless Markets Through Commercial Agreements That Are Only Slightly Modified By The PFJ.

Both the scope and scale of the arrangements for joint marketing and collaboration in the Commercial Agreements are unparalleled.[16] In the Competitive Impact Analysis, it is admitted that collaboration of this sort is harmful, especially over extended periods of time:

> As the Department of Justice and Federal Trade Commission have stated before, in general, the longer that would-be competitors collaborate with one another on a joint venture, the less likely they are to compete against one another.

Competitive Impact Statement at 20-21. Although the PFJ creates some time limits (whereas the pre-PFJ arrangements had no end dates) and shortens the time limits of some arrangements, the PFJ permitted agreements and commitments remain broad in scope and extended in duration. By contrast, in another recent proceeding before the FCC, a number of the same companies involved

[16] In the companies' filing with the Federal Communications Commission (FCC) they gave examples of agency deals with retailers such as Radio Shack or AT&T's deal with a satellite provider, but these are simply not comparable.

in this transaction insisted that their commitments must be limited to at most three years because of the rapid changes in the sector.[17]

During the period that these highly problematic agreements are in force, the negative impact on the competitive landscape in Montgomery County will be substantial, as it will be elsewhere in Maryland, and in markets across the nation. The Commercial Agreements will have harmful competitive effects in the State, and in particular will mean that the residents of the City of Baltimore will be unlikely to ever receive a competitive wireline broadband service offering by Verizon. Residents of Montgomery County will also be negatively impacted if the PFJ is approved and the Commercial Agreements are allowed to stand. This collaboration among dominant players will dampen competition between them and create disincentives for further competitive network investment.

2. In Particular The PFJ Will Permit The Dominant Wireline And Wireless Broadband Providers To Collaborate To Allocate The Broadband Market Among Themselves Rather Than To Compete With Each Other In It, Discouraging Any Form Of Competitive Wireline Broadband Offering In Rural Areas Within The County (And Elsewhere), And In Urban Centers Such As Baltimore City (And Elsewhere) Which Do Not Have FiOS Service.

As noted in the filings of others in the related FCC proceeding, Verizon has refused to build out its FiOS fiber network in Baltimore City.[18] If Verizon is allowed to partner with

[17] Letter from the National Cable & Telecommunications Association to Marlene H. Dortch, Secretary, FCC, attaching letter to Chairman Julius Genachowski, MB Docket No. 11-169 (filed July 25, 2012), , urging that a commitment to provide equipment at no cost to subscribers in connection with encryption of the basic service tier of video programming should sunset after 3 years unless FCC were to extend it, considering among other factors, the ever-changing state of technology and the marketplace. http://apps.fcc.gov/ecfs/document/view.action?id=7021992753 (last accessed October 22, 2012).

[18] Letter from William H. Cole IV, Baltimore City Council to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed March 16, 2012); Letter from Curt Anderson, The Maryland House of Delegates to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed March 7, 2012); Letter from Roger Manno, The Senate of Maryland to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed March 20, 2012); Letter from Elbridge James, NAACP Maryland State Conference to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed March 8, 2012); Letter from Marceline White, Maryland Consumer Rights Coalition to Marlene H. Dortch, Secretary, FCC,

Comcast to jointly market Verizon Wireless service, then Verizon will have even less incentive to build out FiOS in Baltimore or elsewhere, including in rural areas of Montgomery County. What is especially worrisome is that these Commercial Agreements provide a incentive for Verizon, particularly in areas where building costs are high (such as in urban areas) or where median incomes are lower, to *never* build out its FiOS network to provide a competitive choice for consumers in these markets.

a. Reduced Incentives for Competition in Areas of Head-to-Head Competition

Specifically, the County is concerned that the joint marketing removes the incentive for both companies (Verizon and Comcast) to expand their respective wireline facilities in areas of potential direct wireline competition. Comcast and Verizon have local cable franchises that require them to serve the entire County, where specific housing density requirements exist, as discussed earlier.[19] The Commercial Agreements will create further disincentives to build out in areas in which the two companies will directly compete.

In the broadband services market, the Verizon and the Cable Defendants dominate the broadband infrastructure into consumers homes, do not have to share network facilities,[20] and have repeatedly challenged the validity of any FCC rules intended to ensure fair and open access to the Internet.[21] Allowing their collaboration will further strengthen their dominance in the broadband market, both wireline and wireless. It is particularly bad for broadband competition because it allows providers of two alternative broadband technologies to divide up the broadband

WT Docket No. 12-4 (March 15, 2012). Residents of Baltimore City comprise 10 percent of the State's population and 64 percent are African American. 2010 U.S. Census.

[19] See discussion *supra*.

[20] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB 12-203 (filed September 10, 2012), Netflix Comments at 10 ("Netflix Comments").

[21] *Comcast Corp. v. Federal Communications Commission*, 600 F.3d 642 (DC Cir. 2010); *Verizon et al. v. Federal Communications Commission*, D.C. Circuit, Case No. 11-1355.

market. Verizon will be permitted to focus on wireless and Cable Defendants to focus on wireline. All will be permitted to collaborate in pricing and marketing strategies through exclusivity, cross-marketing, and product development agreements. The companies will thus remain the dominant players in their respective broadband markets avoiding direct competition with each other.

For example, Verizon will be able to require the Cable Defendants to sell Verizon Wireless services exclusively until at least December 2016 (*i.e.*, Cable Defendants cannot sell wireless services of Verizon's competitors). This is a long enough period to establish a strong foothold in a bundled quad market, with its harmful effects, as discussed below. Any period of exclusivity incentivizes Verizon to focus on investments in wireless broadband (through Verizon Wireless) without risk that any of the Cable Defendants will partner with a competitor of Verizon Wireless to offer a quad play. It further incentivizes the Cable Defendants to focus on wireline broadband without risk that Verizon will make further investments in its wireline FiOS business to compete with the Cable Defendants. Indeed, by requiring the Cable Defendants to sell Verizon Wireless exclusively and also allowing Verizon Wireless to offer its own quad play with FiOS, Verizon Wireless wins no matter which wireline provider is involved. Allowing them to allocate the broadband market between themselves rather than to compete against each other within it. The PFJ effectively denies consumers the benefits of unrestrained competition and destroys competition itself contrary to the Sherman Act.

b. Reduced Incentives for Competition in Areas With No Head-to-Head Competition

The PFJ discourages any form of competitive wireline broadband offering in rural areas within the County (and elsewhere), and in urban centers such as Baltimore City (and elsewhere) which do not have FiOS service. For example, the County has observed a failure by both

Comcast and Verizon to build out the entire County, although they both have authority to do so. Where the number of homes per mile falls below 15 or 30 per mile, residents have difficulty obtaining wireline service from either Comcast or Verizon. As discussed previously, within these rural, low housing density areas of the County, Verizon has no obligation to provide wireline services and Comcast must only provide such wireline services if the resident agrees to share the deployment costs which may run over $40,000 per mile. Under the terms of the PFJ, there is no public interest obligation imposed on either Verizon or Comcast to make an investment in further deployment of wireline broadband services in return for the benefits conferred upon them by approval of the PFJ. Under the PFJ, Verizon is not permitted to sell Comcast service, thereby depriving Comcast of an incentive to expand its wireline deployment. Furthermore, Comcast can market Verizon's wireless services in its existing footprint, without having to expand into these unserved areas.

c. Negative Impacts on Every Relevant Services Market

More broadly, these Commercial Agreements can expect to have a negative impact on *every* relevant services market. In the video services market, federal law banned exclusive cable franchises in 1992.[22] DBS is not a true competitor to wireline video service providers.

The recent market entry of Verizon FiOS (as well as AT&T U-verse) has improved customer choice in selected markets, but not in the majority of the local video markets in the

[22] In Montgomery County, as well as elsewhere, competition from satellite video (DBS) providers has permitted the FCC to declare "effective competition" has been achieved, preempting local rate regulatory authority. But in 2007, the FCC recognized that DBS "competition" is insufficient to curb the market power of a wireline cable operator. In its Order imposing new federal regulations on the franchising process, the FCC based its measures on an imperative need for *wireline* competition to incumbent cable operators. The Commission stated that "[t]he record demonstrates that new cable competition reduces rates far more than competition from DBS" and indicated that wireline competitors, not DBS, bring down rates. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television* Consumer *Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, 22 FCC Rcd 5101 (rel. March 5, 2007) at ¶ 50; *see also Id.* at ¶ 35 (analyzing the new entrant as the "second provider," without counting DBS companies as competing providers). These statements were based on cable price data from 2005, and as discussed further *infra*, areas with effective competition now have higher prices than regulated areas.

country. The majority of homes do not have a choice of wireline video providers. A recent FCC report indicated ***65.7 percent of homes*** only have access to the incumbent cable operator or DBS (85.9 million homes).[23]

The entry of Verizon FiOS and AT&T U-verse have had a limited impact on prices. A *de facto* duopoly between the incumbent telephone and cable provider has developed. The FCC's most recent Cable Prices Report chronicles a relentless rise in the average monthly price of expanded basic service (excluding taxes, fees and equipment charges) even in the face of increased competition, noting the average price of expanded basic service for all communities increased at a compound average annual growth rate of 6.1 percent during the period 1995-2011 whereas CPI increased at only 2.4 percent over the same period.[24] Even worse, Commission reports since 2009 have reported the average prices are ***higher*** in effective competition communities than in communities without effective competition ($58.74 in effective competition communities vs. $56.82 in noncompetitive communities).[25] The FCC itself has recognized that the price difference is now statistically significant.[26] And these service rate increases do not include the costs of equipment needed to view services, an increasingly necessary component of service delivery. Though the historical information is less detailed, the cable prices reports have chronicled increases in equipment rates as well.[27] Within Montgomery County, there has been a

[23] *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 07-269, Fourteenth Video Competition Report ("Fourteenth Video Competition Report") (rel. July 20, 2012), Table 2 (on page 18) Because the two DBS providers are included in that tally, only areas that have 4 or more MVPDs have two wireline providers.

[24] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service*, Cable Programming Service, and Equipment, MM 92-266 (rel. Aug. 13, 2012), at ¶ 2 ("Cable Prices Report").

[25] Cable Prices Report at ¶ 3.

[26] Cable Prices Report at ¶¶ 3-4.

[27] Cable Prices Report at ¶ 19 ("Most equipment prices increased on an annual basis.")

similar increase in cable prices since the introduction of competition within the market for video services, as evidenced by the table below.

Table 1 – Cable Service Rates in Montgomery County

	2007	2008	2009	2010	2011	2012	2007-12 Percent Increase
Comcast							
Basic*	$17.30	$17.25	$19.10	$19.10	$21.10	$19.00	0.09%
Standard/Digital Starter*	$58.10	$60.35	$63.30	$64.65	$67.80	$71.15	22.4%
RCN							
Basic*	n.a.	n.a.	$17.95	$22.97	$22.97	$22.97	27.9%**
Signature Lineup*	$56.94	$61.44	$65.50	$70.50	$73.50	$79.50	39.6%
Verizon							
Basic*	$12.99	$12.99	$12.99	$12.99	$12.99	$12.99	0%
Expanded Basic (includes basic)	$39.99	$47.99	$47.99	$57.99	$64.99	$64.99	62.5%

n.a = price not available.
* Analog service eliminated in 2009.
** RCN Basic percentage increase is from 2009-2012.

Cable rates in most areas of Montgomery County were deregulated in 2009 as a result of the Commission's "effective competition" order,[28] but even with head to head competition among these providers, prices for cable services and equipment continue to rise in the County. Consumers cannot realistically expect to benefit if Comcast and Verizon Wireless are permitted to collaborate as envisioned in the Commercial Agreements. Comcast and Verizon will have even less incentive to compete on price going forward.

Some of the more recent service offerings, such as the multi-platform availability of video programming on TVs, computers, handheld devices and the like, are innovative but these new offerings also come at a cost to consumers. For example, to view video programming on

[28] *See In the Matter of Comcast of Potomac, LLC Petition for Determination of Effective Competition in 13 Franchise Areas in Montgomery County, Maryland, MD*, Memorandum Opinion and Order, DA 09-2192 (rel. October 8, 2009).

multiple platforms a consumer must subscribe to both Internet and video service from the same provider. Moreover, the largest DBS provider, DirecTV, cautions that due to trends in bundling, and multi-platform video programming delivery, the "video only market" no longer captures competitive challenges, broadband is becoming the "anchor" product of the wireline video providers and service bundles that include broadband are difficult for DBS providers to compete with.[29]

Moreover, the wireless market will be harmed because the Commercial Agreements effectively eliminate the Cable Defendants as competitors until certain triggering conditions are met.[30] And they continue to severely limit the development of competitive alternatives with other wireless providers. Verizon's wireless exclusivity remains until December 2, 2016, and may be extended by petitioning the United States for permission to continue its exclusive sales agreements with the Cable Defendants.

Finally, the Defendants are dominant providers in the voice services market, including traditional telephone services offered by Verizon, VOIP phone services offered by the cable operators in competition with the traditional phone companies, and wireless voice services offered by Verizon Wireless. Allowing collaboration among the Defendants will hamper robust competition in this market as well, and the County notes with concern that the Competitive Impact Statement does not even consider the impacts on this market in any comprehensive way, focusing only on wireless services.

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[29] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB 12-203 (filed September 10, 2012), DirecTV Comments at 2, 13, 15-18 ("Direct TV Comments").

[30] The PFJ allows the Commercial Agreements to condition a particular Cable Defendant's election to operate as a reseller of Verizon Wireless Services on another Cable Defendant's first making such election, that is, only after a lead Cable Defendant made such an election. The PFJ preserves that.

3. The PFJ Permits The Companies To Engage In A New Level Of Service Bundling (Quad Play) Which Will Further Entrench Their Market Dominance, Allowing Them To Obtain Increased Profits And Inhibiting Competitive Entry Yet Provide Little If Any Consumer Benefits.

The Competitive Impact Statement notes several advantages of bundling for the Defendants: "Telecommunications providers perceive several advantages to offering services in bundles: (1) provisioning more than one service at a time often generates cost efficiencies for the provider; (2) purchasers of bundles tend to spend more; and (3) purchasers of bundles are less likely to switch to another provider." Competitive Impact Statement at 5-6.

The Competitive Impact Statement further notes that while consumers "frequently choose bundled plans, which allow them to have a single relationship for customer service, installation, and billing[,]" they have expressed little interest in bundles including residential voice, video, and broadband services, the so-called quad play. Verizon, however, perceives an opportunity to offer quad plays almost nationwide through a combination of Verizon Wireless services with FiOS and with the Cable Defendants which each have a large customer base, and together cover a broad geographic footprint. Competitive Impact Statement at 5-6.

Comcast executives publicly tout the fact that the Commercial Agreements will permit cable operators to offer a "quad play" to consumers without building a wireless network.[31] The County notes that however positive a "quad play" may sound on its face, there is no evidence in the record that there is any consumer interest in, or benefit from further bundling of services in these markets. To the contrary, as described further below, the benefits of "bundling" go overwhelmingly to the providers, *not* to the consumers.

[31] "Comcast Execs: Verizon deal to bring the 'quadruple play" http://www.digitaltrends.com/mobile/comcast-execs-verizon-deal-to-bring-the-quadruple-play/ (last accessed October 22, 2012).

Bundling is presented as a convenience to the consumer — one stop shopping, so to speak. An alternative purpose of bundling is to create a new product for the provider to sell. The consumer is not really buying three separate services. What the consumer actually buys is a single complex product, which is even harder to evaluate on its own merits and compare to other products than the individual components. Creating this new product — with its mix of features individual consumers might not choose to purchase if they could choose or reject them separately — thus helps the provider maximize revenue.

Research conducted under one of the Defendants' research programs concludes that the potential reasons why consumers bundle are because:

1) it is their only option;

2) perceived price savings; and

3) they value receiving one bill.[32]

Whether any of these reasons are "benefits" is questionable. For example, the first reason – only option – would not be a benefit at all because it is the only option.[33]

The second reason – lower prices – would be a benefit, but price savings can be fleeting as they may only exist for a limited period of time as a promotion, or the standalone offerings may be unreasonably high prices so that bundles are preferred but include services not really desired by the customer.[34] In the County's experience, bundling does lower prices, as long as the consumer is only looking at the cost of the bundle as compared to the cost of purchasing all three

[32] Jeffrey Prince, " The Dynamic Effects of Triple Play Bundling in Telecommunications" Time Warner Cable Research Program on Digital Communications (Winter 2012) at 7. http://www.twcresearchprogram.com/pdf/TWC_PrinceReport.pdf (last accessed October 22, 2012) ("Prince Paper").

[33] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees,* Memorandum Opinion and Order, MB Docket No. 10-56, (rel. Jan. 20, 2011), at ¶¶ 101-103.

[34] *See* discussion in Prince Paper at 6 re bundling of channels.

services from the same provider. But the consumer cannot get the benefit of the lower "bundled" price on individual services without paying for all three. Moreover, competition between standalone services is reduced. Furthermore, bundled packages typically include progressively higher levels of both video and Internet service; subscribers typically cannot choose a high level of Internet service and the lowest tier of cable service, for example. Thus, consumers may well end up paying more than they would if they could pay the discounted rates for each service from different providers. Bundling also favors providers because consumers cannot readily buy different services from different providers: although it is possible to do so, the cost differential makes this irrational for the vast majority of customers. So long as customers have no benchmark by which to compare bundlers from different providers, providers will be able to minimize the role price plays in purchasing decisions, and consequently will be able to charge more than they otherwise would. Bundles thus limit competition, because although the price of choosing service from more than one provider is a total higher rate, the price of choosing bundled service from a single provider may also be greater than the consumer would pay if he or she had more control over the content of the bundle.

The third reason – single billing – may be of only marginal benefit in current times when there are numerous convenient ways to pay bills, such as automated charges to credit cards or debit cards, and online payments. In summary then, the benefits of bundles to consumers are questionable.

The story is very different for providers. The same research paper surveys the research as to why businesses, especially recurrent services businesses such as those involved here in video, voice, broadband and wireless markets, bundle, noting several potential reasons:

- An attempt to extend market power (Whinston, 1990).
- An attempt at price discrimination. For example, Crawford (2008) shows that bundling of cable channels within tiers rather than "a la carte" is an effective way of second degree price discrimination, which enables the firm to recover its high fixed costs across a customer base with heterogeneous (and hidden) preferences.
- Other popular reasons to bundle include: the presence of economies of scope in production, and bundling as a means to simplify the choice set for consumers.[35]

The research paper concludes by suggesting that for recurrent services businesses such as those involved in video, voice, broadband and wireless markets, the principal reason for bundling is to reduce churn (customer turnover) which allows higher margins and dissuades competitive market entry.[36] Bundling protects providers at the expense of consumers because of the costs to subscribers of switching. First, to get the benefit of the lower prices offered through a bundle, subscribers often must sign long-term contracts, which raises the cost of switching. Second, there is simply the likelihood that existing subscribers will accept increases in the price of a bundle because it will be hard for them to tell if a different bundle is cheaper or has gone up proportionately less. Third, there is the cost associated with changing providers, which has significant intangible components. For example, changing from one triple-play provider to another typically entails a change in e-mail addresses.

In addition, in the County's experience, bundling favors providers because customers are forced to choose between providers based on confusing and incomplete information. In a fully competitive marketplace, it might be in the interest of at least one provider to make available full information about its product, so that potential customers could make informed decisions, but this is not the case in an oligopoly. Bundles actually make it harder to compare prices and services

[35] Prince Paper at 6-7.

[36] Prince Paper at 26.

because it is practically impossible for prospective customers to compare the bundles to an objective standard or to each other. In comparing two triple-play packages, for instance, none of the services may be readily comparable: one video service may be analog and another digital, the number of channels may differ significantly, and there may be significant differences in the program offerings. The speed of the broadband services may differ substantially. And even the voice services may be different, since packages may include VoIP, traditional copper wire telephone service, fiber-based switched digital voice, or copper-based switched service provided by the cable company.

4. The PFJ Creates An Unworkable Scheme For Joint Marketing That Will Cause Customer Confusion And Be Difficult To Monitor, Interpret And Enforce.

The changes proposed in the PFJ make some improvements to the Commercial Agreements, but these are only around the edges, and they create confusion, and leave the most fundamental problems in place. The PFJ is practically unworkable and will cause customer confusion over available services, and where they can be purchased, and will deter expansion of the FiOS footprint.

For example, in Montgomery County:

- Comcast may sell only Verizon Wireless services in a quad play.
- Verizon may offer a quad play with its own wireless services and FiOS.
- Verizon Wireless is not permitted to sell Comcast's service within the County because the entire County is within the FiOS footprint.

Notwithstanding the above restrictions:

- Verizon Wireless may, in any Verizon Wireless store (1) service, provide and support Verizon Wireless equipment sold by Comcast and (2) provide information regarding the availability of Comcast service, provided that Verizon Wireless does not enter into any agreement requiring it to provide, and does not receive any compensation for providing, such information in any Verizon Wireless store where Verizon Wireless is prohibited from selling Comcast service.

- Verizon Wireless may market Comcast service in national or regional advertising that is likely to reach street addresses in the FiOS footprint or DSL footprint provided that Verizon Wireless does not specifically target advertising of Comcast service where it is prohibited from selling Comcast service.

This proposal is obviously fraught with problems that will lead to customer confusion.

Moreover, it will be difficult to monitor, interpret and enforce.

IV. REMEDY SOUGHT BY COUNTY

In terms alternatives to the PFJ, the Competitive Impact Statement dismisses the idea that pursuing the Complaint and seeking a preliminary and permanent injunctions against the Commercial Agreements in their entirety would yield a better result.[37] In light of the above, the County disagrees, and urges the Court to reject the PFJ as it is not in the public interest.

In the alternative, the County urges the Court to modify the PFJ such that if the proposed transaction is eventually approved at all, it ameliorates customer confusion and disincentives for Verizon to expand the FiOS footprint and Comcast to expand its wireline footprint into unserved areas of existing franchise territories. ***At the very least*** any final judgment should provide:

1. Neither Verizon Wireless nor any of the Cable Defendants should be able to sell each others' services in any state where Verizon has either a FiOS footprint *or a DSL footprint*. That would mean Comcast could not sell Verizon Wireless service in Montgomery County, and Verizon Wireless would not be able to sell Comcast cable service anywhere in Maryland (it could sell Verizon FiOS service). Other jurisdictions that would also be similarly affected because they are in the Verizon FiOS and/or DSL footprints include California, Connecticut,

[37] Competitive Impact Statement at 30-31 ("The United States is satisfied…that the revisions to the agreements described in the proposed Final Judgment, along with the prohibition of sales by Verizon Wireless of the Cable Defendants' services in areas where Verizon offers FiOS in competition with the Cable Defendants, will preserve competition for the provision of video and residential broadband service in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.").

Delaware, Florida, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Texas, Virginia, and the District of Columbia.

2. As a condition of approval, Verizon and the Cable Defendants should be ordered to provide a 100 percent build out of their respective service footprints without any limitations. This should be an explicit *quid pro quo* of public benefits in return for the benefits conveyed to the companies by approval of the modified Commercial Agreements.

October 22, 2012

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and STATE OF NEW YORK, Plaintiffs, v. VERIZON COMMUNICATIONS INC., CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, COMCAST CORP., TIME WARNER CABLE INC., COX COMMUNICATIONS, INC., and BRIGHT HOUSE NETWORKS, LLC, Defendants.	Case No. 1:12–cv–01354

OPPOSITION OF THE CITY OF BOSTON, MASSACHUSETTS TO PROPOSED SETTLEMENT

I. SUMMARY

The City of Boston, Massachusetts[1] (the "City") files these comments to express the City's ongoing opposition to the spectrum transfers and related commercial agreements entered into between Verizon and the cable operator Applicants.[2]

1 The Mayor's Office of Cable Communications was established in July of 1980 and given the task of researching and planning the development of Boston's cable television and communication system. The idea of cable for the City of Boston was first explored in 1973, but was abandoned because the City found that it would have to bear an unfair financial burden. Mayor Kevin White revisited the cable issue in 1979 and it was decided that the City would move forward with a franchise system. The Office of Cable Communications was the sole office within the City government that dealt exclusively and specifically with the cable franchising process in Boston; and as such, the office served an important policy-making function as the principle advisor to the Mayor on the cable franchise issue. Under Massachusetts' law, the Mayor of Boston has the exclusive power to award the cable franchise license. Presently the Office of

The City also wishes to make clear its deep disappointment in the actions of the Federal Communications Commission and the Department of Justice in approving the spectrum transfers and the commercial agreements between Verizon and the cable operators as the transactions are anti-competitive, unlawful, and not in the public interest. If the transaction is approved as proposed, it could leave Boston and Bostonians permanently on the wrong side of the digital divide. The City urges the Court to deny the Applications, and to exercise its authority-- in this proceeding and/or by initiating a separate proceeding – to halt the implementation of the related commercial agreements. The City strongly believes that the spectrum transfers and related commercial agreements create significant disincentives for Verizon to make any future investments in its FiOS fiber network which in turn will harm Boston consumers, who lack robust competition and investment in wireline broadband services. The City would recommend that the Court reject the proposed settlement, and suggest that, if the proposed transaction is eventually approved at all, in order to ameliorate customer confusion and disincentives to expand the FiOS footprint, ***at the very least*** any settlement should provide that neither VZW nor any of the cable defendants should be able to sell each others' services in any state where Verizon has either a FiOS footprint or a DSL footprint.

Put simply, the City is concerned that these transactions are designed to ensure that Verizon and Comcast collaborate and never compete in Boston, thereby effectively depriving our communities, citizens, small businesses, schools, hospitals and educational facilities the benefits

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Cable Communications still handles all cable related business for the City and is located in the Mayor's cabinet under the Chief Information Officer.

2 Applications were filed on December 16, 2011 by Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") and SpectrumCo, LLC ("SpectrumCo"), and on December 21, 2011 by Verizon Wireless and Cox TMI Wireless, LLC, a subsidiary of Cox Communications, Inc. ("Cox"), to assign spectrum licenses held by SpectrumCo and Cox Wireless to Verizon Wireless. See also, Public Notice, DA-12-67, WT Docket No. 12-4 (rel. Jan. 19, 2012); Order, DA-12-367, WT Docket No. 12-4, (rel. Mar. 8, 2012).

of video and broadband competition that is available in most of eastern Massachusetts' surrounding suburbs and in other parts of the country.

II. INTRODUCTION

Boston is a world-class city whose major industries include innovative technology, research, healthcare, education and hospitality. These industry sectors demand access to broadband to grow and succeed in their respective fields and their customers expect nothing less. Affordable broadband is critical to economic development, quality of life, and opportunity for the residents and small businesses in our City.

A. THE CITY OF BOSTON IS A STRONG PROPONENT OF BROADBAND DEPLOYMENT

The City of Boston has actively advocated for broadband investment and video competition throughout our city and particularly in under-served and lower-income neighborhoods. We encourage the introduction of new technologies and competition through innovative policies and investments. For example:

- Boston has invested over $18 million over the last five years in our city fiber network to support broadband for use by constituent services and our public schools.
- Boston developed informal and expedited franchising processes. In Boston, we renew, transfer, amend and dissolve franchises, quickly, as the situation(s) warrant, in order to be responsive to changes in law, regulation and/or market conditions.
- Boston has taken the lead in piloting an affordable wireless solution for our residents through the Boston Wi-Fi Project.

- The City streamlined access for broadband and wireless telecommunications businesses seeking to provide services to Boston's residents and businesses, establishing a single point of entry for telecommunications services applicants.
- Boston has negotiated agreements with providers such as RCN, Next G, American Tower and Extenet in order to introduce some measure of competition and new technologies in wireless communications.
- Boston is in the midst of an aggressive Boston Technology Opportunity Program designed to reach schoolchildren and families in need of technical skills and training, thanks to funding support from the American Recovery and Reinvestment Act.

Collectively, all of these efforts are designed to provide our citizens, neighborhoods and businesses with the resources necessary to succeed in a digital economy. Vital to our efforts is the development of a healthy and competitive market for broadband.

B. BOSTON LACKS A ROBUST AND COMPETITIVE MARKET FOR WIRELINE BROADBAND AND VIDEO SERVICES

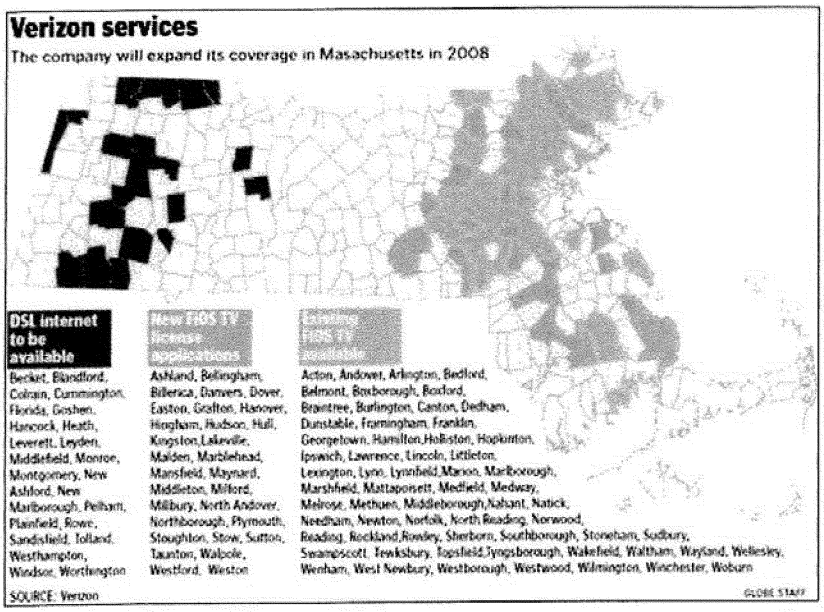
Verizon is the predominant landline telephone company serving the Boston area, and Comcast is the predominant cable operator. The City of Boston understands that advanced communications networks hold out the promise of video competition and the potential benefit to consumers of lower prices, improved customer service and new, expanded video and broadband services. Thus, when Verizon announced plans for the launch of its "nationwide" FiOS fiber build out, the City and its residents welcomed the news, knowing that in the past, cable companies rushed to build systems in densely populated cities and larger towns.

Unfortunately, Verizon chose not to build out its fiber network to offer FiOS services in Boston. Verizon, instead, focused its investment on securing cable franchises in lower density, suburban communities surrounding Boston. As Verizon invested in its fiber network in suburban

communities to offer competitive digital TV services, VoIP and faster Internet speeds, it also launched an aggressive regional marketing campaign. Boston residents, attracted by these advertised choices and competitive prices, cannot understand why these options are not available to them. Residents, frustrated with the lack of competition for cable services and skyrocketing prices, often call City Hall to complain.

The City reached out to Verizon repeatedly to discuss with company leadership the need for upgrades and new services over the last eight years, looking for any opportunity to negotiate a Verizon FiOS cable franchise. Our purpose has been to build a mutual dialogue to accommodate Verizon's entry in the new video market in order to bring more competition and increased broadband service offerings to Boston residents.

There is no compelling need to amend laws or avoid regulation; companies can do business in Boston at lightning speed. Yet, Verizon has declined the City's invitations to enter into cable franchise negotiations.



As illustrated in the preceding Boston Globe chart published in February, 2008,[3] Verizon chose to build out its FiOS network in the yellow and light blue areas which represent suburban communities. It chose *not* to provide FiOS service in Boston and all surrounding urban communities. Hence, a number of residents in those communities rightly perceive Verizon to be redlining, or at the very least cherry-picking. As the statewide map displays, urban Greater Boston is the hole in the Verizon FiOS donut.

Verizon's decision to bypass Boston in favor of surrounding suburban communities disproportionately affects minority and lower-income neighborhoods, small businesses, and seniors. It can have a deleterious effect on the ability to attract jobs and promote growth into the urban ring. We fear that without the broadband infrastructure and robust competition envisioned

3 Johnson, Carolyn Y., "Paying a Bundle for Cable Upgrade," The Boston Globe, Business Section, February 29, 2008.

in the Telecommunications Act of 1996, Boston, and the urban communities of eastern Massachusetts will suffer economically.

III. PROPOSED DEAL

In 2005, Verizon began building out its FiOS fiber network and now offers *wireline* video services and high speed internet service in certain markets (its FiOS footprint) in direct competition with the cable companies. In markets such as Boston where Verizon has not built out its FiOS network, it offers no video service, and a slower, and less competitive DSL internet service (DSL footprint).

The defendant cable companies acquired wireless spectrum (cellular) licenses from the FCC in 2006 but never developed cellular services. Late last year, VZW and the cable defendants reached a deal with two components: (1) *Spectrum Sale*: Cable companies will sell their wireless spectrum licenses to VZW; and (2) *commercial agreements*: (a) VZW and cable companies will act as sales agents of one another's services; (b) each of the cable companies may become resellers of VZW services; and (c) all of the companies (other than Cox) will enter into a technology joint venture to develop ways to integrate wired video, voice, and high-speed Internet with wireless technologies.

On August 16, 2012, the United States Department of Justice and State of New York announced a proposed settlement with the companies that includes modifications to some terms in the commercial agreements. This proposed settlement must be approved by the US District Court for the District of Columbia and interested parties such as the City of Boston were given this opportunity to offer comments to the court on this proposed settlement.

On August 23, 2012, the Federal Communications Commission released an order approving the applications to transfer the spectrum licenses from the cable defendants to VZW,

with some conditions related to implementation of the commercial agreements.[4] As part of its review, the FCC had sought comments from the public on the applications, and received opposition from a variety of sources including consumer groups, labor unions, and local governments, including the City of Boston. Further, the City supports the legal arguments of consumer and public interests organizations[5] that filed with the Federal Communications Commission to demonstrate that:

(i) the commercial agreements violate provisions of the Communications Act, including 47 U.S.C. § 572 (concerning joint ventures among cable operators and telephone companies) and 47 U.S.C. § 548 (concerning unfair methods of competition or unfair or deceptive acts or practices) and

(ii) the Commission has ample authority to take enforcement measures under those provisions.[6]

IV. BOSTON'S OPPOSITION

The City opposed the proposed deal in a filing to the FCC[7], and in particular expressed concern that the unparalleled scope and scale of the arrangements for joint marketing and

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[4] *In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses*; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses (WT Docket No. 12-4), Memorandum Opinion and Order and Declaratory Ruling FCC 12-95 (rel. Aug. 23, 2012). A petition for reconsideration was filed by NTCH, Inc. on September 24.

[5] Petition to Deny of Public Knowledge, Media Access Project, New America Foundation Open Technology Initiative, Benton Foundation, Access Humboldt, Center for Rural Strategies, Future of Music Coalition, National Consumer Law Center, on Behalf of Its Low-Income Clients, and Writers Guild of America, West, WT Docket No. 12-4,(filed Feb. 21, 2012)at 5 ("Petition to Deny").

[6] Petition to Deny at pages 36, 41-42, 45-46; RCA - The Competitive Carriers Association Petition to Condition or Otherwise Deny Transactions, WT Docket No. 12-4, (filed Feb. 21, 2012) at 41; Petition to Deny of the Rural Telecommunications Group, Inc., WT Docket No. 12-4 (filed Feb. 21, 2012) at 8.

[7] A copy of the City's filing is attached hereto.

collaboration in the commercial agreements would have negative impacts on competition in the City and elsewhere, and would not advance the goal of encouraging the private sector to build out competitive broadband networks and to expand wireless broadband. If Comcast and VZW are permitted to collaborate, consumers cannot realistically expect to benefit, as Comcast and Verizon will have even less incentive to compete on price for wireline services going forward. Verizon would also be less likely to build out its FiOS network in places such as Boston.[8]

The proposed settlement and the conditions in the FCC order approving the spectrum license transfers do not adequately address the City's concerns about this transaction. The City's opposition to the proposed settlement presented to the District Court would express the following concerns:

A. TRANSACTION UNREASONABLY RESTRAINS TRADE AND COMMERCE

Overall the transaction continues to unreasonably restrain trade and commerce because it permits a high level of cooperation and collaboration by the dominant players in the wireline and wireless services markets. The collaboration will dampen competition among them and create disincentives for further competitive network investment. It is particularly bad for broadband competition because it allows providers of two alternative broadband technologies to divide up the broadband market (VZW focused on wireless and cable defendants focused on wireline) and to collaborate in pricing and marketing strategies through exclusivity and cross-marketing

[8] A competitive market for video services in Boston has not developed. Recently, in response to an Emergency Petition[8] of the City for Recertification as a rate regulatory authority, the Federal Communications Commission overturned its former conclusion that a sufficient number of Bostonians would have a choice of wireline cable providers. (In re *Petition of the City of Boston For Recertification to Regulate the Basic Cable Service Rates of Comcast Cable Communications, LLC (*CSR 8488-R), Memorandum Opinion and Order (Apr. 9, 2012). The Emergency Petition is relevant to the present proceeding as well because it provides clear and compelling evidence of the consumer harms happening now in the City of Boston due to lack of robust competition, which will only get worse if Comcast and Verizon are permitted to join forces.

arrangements, and product development agreements so that the companies will remain the dominant players in their respective broadband markets avoiding direct competition with each other. For example, VZW will be able to require the cable defendants to sell VZW services exclusively (i.e., they cannot sell wireless services of Verizon's competitors) until at least December 2016 (as originally proposed in the commercial agreements, this exclusivity was for an unlimited term). Any period of exclusivity incentivizes Verizon to focus on investments in wireless broadband (through VZW) without risk that any of the cable defendants will offer a quad play with a competitor of VZW, and it incentivizes the cable defendants to focus on wireline broadband without risk that Verizon will make further investments in its wireline FiOS business that competes with the cable defendants. Indeed, by allowing the cable defendants to sell VZW exclusively and also allowing VZW to offer its own quad play with FiOS, VZW wins no matter which wireline provider is involved.

B. SETTLEMENT IS PRACTICALLY UNWORKABLE AND WILL CAUSE CUSTOMER CONFUSION

The proposed settlement is practically unworkable and will cause customer confusion over available services, and where services can be purchased, and will deter expansion of the FiOS footprint. For example, in the City of Boston:

- Comcast may sell VZW services.
- VZW is permitted to sell Comcast's service for a street address in Verizon's DSL footprint at least until December 2016 (then it would have to petition the Department of Justice to continue).
- VZW is not permitted to sell Comcast's service for a street address that is within the FiOS footprint or in a VZW store located in the FiOS footprint.

- Notwithstanding the above restrictions:
  - VZW may, in any VZW store (1) provide service and support for VZW equipment sold by Comcast and (2) provide information regarding the availability of Comcast service, provided that VZW does not enter into any agreement requiring it to provide and does not receive any compensation for providing such information in any VZW store where VZW is prohibited from selling Comcast service.
  - VZW may market Comcast service in national or regional advertising that is likely to reach street addresses in the FiOS footprint or DSL footprint provided that VZW does not specifically target advertising of Comcast service where it is prohibited from selling Comcast service.

V. RECOMMENDATION

The City would recommend that the Court reject the proposed settlement, and suggest that, if the proposed transaction is eventually approved at all, in order to ameliorate customer confusion and disincentives to expand the FiOS footprint, ***at the very least*** any settlement should provide that neither VZW nor any of the cable defendants should be able to sell each others' services in any state where Verizon has either a FiOS footprint or a DSL footprint. That would mean Comcast could not sell VZW service in the City, and VZW would not be able to sell Comcast cable service anywhere in Massachusetts (it could sell Verizon FiOS service). Other jurisdictions that would also be similarly affected because they are in the Verizon FiOS and/or DSL footprints include California, Connecticut, Delaware, Florida, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Texas, Virginia, and the District of Columbia.

VI. CONCLUSION

The proposed transaction could harm consumers in Boston and therefore is not in the public interest. The City urges the Court to deny the relief requested or in the alternative condition the terms of the approval as outlined above.

Respectfully submitted,

Mayor Thomas M. Menino
CITY OF BOSTON, MASSACHUSETTS

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FEDERAL REGISTER

Vol. 78 Thursday,

No. 55 March 21, 2013

Part III

The President

Executive Order 13638—Admendments to Executive Order 12777

Federal Register
Vol. 78, No. 55
Thursday, March 21, 2013

Presidential Documents

Title 3—

The President

Executive Order 13638 of March 15, 2013

Amendments to Executive Order 12777

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Section 4 of Executive Order 12777 of October 18, 1991, as amended (Implementation of Section 311 of the Federal Water Pollution Control Act of October 18, 1972, as Amended, and the Oil Pollution Act of 1990) is further amended by striking section 4 in its entirety and inserting in lieu thereof the following:

''**Sec. 4**. *Liability Limit Adjustment.* (a)(1) The following functions vested in the President by section 1004(d) of OPA are delegated to the Secretary of the department in which the Coast Guard is operating, acting in consultation with the Administrator, the Secretary of Transportation, the Secretary of the Interior, and the Attorney General:

(A) the adjustment of the limits of liability listed in section 1004(a) of OPA for vessels, onshore facilities, and deepwater ports subject to the DPA, to reflect significant increases in the Consumer Price Index;

(B) the establishment of limits of liability under section 1004(d)(1), with respect to classes or categories of marine transportation-related onshore facilities, and the adjustment of any such limits of liability established under section 1004(d)(1), and of any limits of liability established under section 1004(d)(2) with respect to deepwater ports subject to the DPA, to reflect significant increases in the Consumer Price Index; and

(C) the reporting to Congress on the desirability of adjusting limits of liability, with respect to vessels, marine transportation-related onshore facilities, and deepwater ports subject to the DPA.

(2) The Administrator and the Secretary of Transportation will provide necessary regulatory analysis support to ensure timely regulatory Consumer Price Index adjustments by the Secretary of the department in which the Coast Guard is operating of the limits of liability listed in section 1004(a) of OPA for onshore facilities under subparagraph (a)(1)(A) of this section.

(b) The following functions vested in the President by section 1004(d) of OPA are delegated to the Administrator, acting in consultation with the Secretary of the department in which the Coast Guard is operating, the Secretary of Transportation, the Secretary of the Interior, the Secretary of Energy, and the Attorney General:

(1) the establishment of limits of liability under section 1004(d)(1), with respect to classes or categories of non-transportation-related onshore facilities, and the adjustment of any such limits of liability established under section 1004(d)(1) by the Administrator to reflect significant increases in the Consumer Price Index; and

(2) the reporting to Congress on the desirability of adjusting limits of liability with respect to non-transportation-related onshore facilities.

(c) The following functions vested in the President by section 1004(d) of OPA are delegated to the Secretary of Transportation, acting in consultation with the Secretary of the department in which the Coast Guard is operating, the Administrator, the Secretary of the Interior, and the Attorney General:

(1) the establishment of limits of liability under section 1004(d)(1), with respect to classes or categories of non-marine transportation-related onshore

facilities, and the adjustment of any such limits of liability established under section 1004(d)(1) by the Secretary of Transportation to reflect significant increases in the Consumer Price Index; and

(2) the reporting to Congress on the desirability of adjusting limits of liability, with respect to non-marine transportation-related onshore facilities.

(d) The following functions vested in the President by section 1004(d) of OPA are delegated to the Secretary of the Interior, acting in consultation with the Secretary of the department in which the Coast Guard is operating, the Administrator, the Secretary of Transportation, and the Attorney General:

(1) the adjustment of limits of liability to reflect significant increases in the Consumer Price Index with respect to offshore facilities, including associated pipelines, other than deepwater ports subject to the DPA; and

(2) the reporting to Congress on the desirability of adjusting limits of liability with respect to offshore facilities, including associated pipelines, other than deepwater ports subject to the DPA.''

Sec. 2. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
March 15, 2013.

[FR Doc. 2013–06712
Filed 3–20–13; 11:15 am]
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Reader Aids

Federal Register

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