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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 AGRICULTURE

Rural Utilities Service

7 CFR Part 1739

RIN 0572–AC30

Community Connect Broadband Grant Program

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Utilities Service (RUS), a Rural Development agency of the United States Department of Agriculture (USDA), hereinafter referred to as RUS or the Agency, amends its regulations for the Community-Oriented Connectivity Broadband Grant Program (Community Connect Grant Program). The purpose of this regulatory change is to provide the Agency the ability to target limited resources to geographical as well as technological areas of need. This rule is not applicable to Community Connect grant applications filed for funding prior to the publication of a Notice of Funds Availability (NOFA) under this regulation.

DATES: This rule is effective June 3, 2013.

FOR FURTHER INFORMATION CONTACT: Kenneth Kuchno, Director, Broadband Division, USDA Rural Utilities Service, STOP 1599, 1400 Independence Avenue SW., Washington, DC 20250–1599, Telephone (202) 690–4673, Facsimile (202) 690–4389. Email address: *kenneth.kuchno@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) Program number assigned to the Community Connect Grant Program is 10.863. The Catalog is available on the Internet at *http://www.cfda.gov*.

Executive Order 12372

This program is not subject to the requirements of Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' as implemented under USDA's regulations at 7 CFR part 3015.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that are in conflict with this rule will be preempted. No retroactive effect will be given to this rule and, in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeal procedures, must be exhausted before an action against the Department or its agencies may be initiated.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with states is not required.

Regulatory Flexibility Certification

Pursuant to 5 U.S.C. 553(a) (2), this rule related to grants is exempt from the rulemaking requirements of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), including the requirement to provide prior notice and an opportunity for public comment. Because this rule is not subject to a requirement to provide prior notice and an opportunity for public comment pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable.

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provision of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments or the private sector. Therefore, this final rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act of 1995.

Environmental Impact Statement

This rule has been examined under Agency environmental regulations at 7 CFR part 1794. The Administrator has determined that this action is not a major Federal action significantly affecting the environment. Therefore, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an Environmental Impact Statement or Assessment is not required.

Paperwork Reduction Act of 1995

This rule contains no new reporting or recordkeeping burdens under OMB control number 0572–0127 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

E-Government Act Compliance

Rural Development is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Executive Order 13175

Executive Order 13175 imposes requirements on Rural Development in the development of regulatory policies that have tribal implications or preempt tribal laws. Rural Development determined that this rule may have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian tribes. Therefore, on January 16, 2013, Rural Development highlighted the Community Connect Grant Program (along with the Distance Learning and Telemedicine Grant Program) during its quarterly Tribal Consultation webinar and teleconference. Forty eight individuals participated in the event, of which 24 represented Tribes or Tribal

Telecommunication companies. Many comments received during the event were positive comments regarding the new Proposed Funded Service Territory process, Broadband Service and Broadband Grant Speeds being determined and updated through the NOFA process and the ability to use operating funds as match. It was asked that further consideration be given to carefully determine what services existing providers might be providing across Tribal lands and that Tribal sovereignty be factored in to the application process and scoring criteria. The teleconference was recorded and the recording and the transcript have become part of USDA Rural Development's Tribal Consultation record. Please contact Rural Development's Native American Coordinator at (720) 544–2911 or *AIAN@wdc.usda.gov* for more information regarding this Tribal Consultation or USDA Rural Development's Tribal Consultation process in general.

Background/Overview

The Rural Utilities Service, a Rural Development agency of the United States Department of Agriculture (the Agency) works to improve the quality of life in rural America by providing investment capital, in the form of loans and grants, for the deployment of rural telecommunications, broadband, electric, water and environmental infrastructure. Financial assistance is provided to rural utilities; municipalities; commercial corporations; limited liability companies; public utility districts; Indian tribes; and cooperative, nonprofit, limited-dividend, or mutual associations. In order to achieve the goal of increasing economic opportunity in rural America, the Agency finances infrastructure that enables access to seamless, nation-wide telecommunications and broadband networks. With access to the same advanced telecommunications networks of its urban counterparts, especially broadband networks designed to accommodate distance learning, telework, e-government and telemedicine, rural America will see improving educational opportunities, health care, economies, safety and security, and ultimately higher employment. Of particular concern to the Agency are communities where broadband service is not available and where population densities are such that the cost of deployment to them is so high that build-out of infrastructure is unlikely. The Agency is committed to helping rural communities gain access to affordable, reliable, advanced communications services, comparable to those available throughout the rest of the United States, to provide a healthy, safe and prosperous place to live and work.

The Community Connect Grant Program was started as a Pilot Program. After administering the program as a pilot program for two years, the Agency proposed rules for the program and on July 28, 2004, the program was formally implemented. The regulations were amended to clarify, among other things, which rural communities are eligible under the program. The main purpose of this grant program is the construction of broadband facilities in areas where no broadband exists today with a secondary benefit of providing for a community center that provides free broadband service to all critical community facilities in the proposed funded service area for a two year period.

Discussion of Changes

The new rule addresses several areas to streamline and improve the program for applicants and the Agency, with the goal of bringing broadband to unserved communities. The new rules provide flexibility to address the dynamic broadband needs of rural Americans and enhance the Agency's ability to target funds to areas where they are needed the most. The new rules also seek to make the application process easier for applicants and evaluators. For example, a single concise project summary and map can be used to inform USDA Rural Development State Directors of pending applications within their states as well as the general public. Major changes include:

1. *Proposed Funded Service Territory.* Since its inception, the Community Connect Grant Program only permitted applicants to use grant funds to serve a single community which included a place recognized by the census or the Rand McNally™ Atlas. This approach, while administratively simple did not accommodate some of the most rural communities which are not census designated places or recognized by a commercial Atlas. It also precluded applicants from developing new service territories in a logical and cost effective manner to maximize the benefit of the grant. The new rule will allow applicants to define their proposed funded service area by utilizing the web based RUS mapping tool. By allowing an applicant the ability to define the exact service area, it is important to note that all premises in the service area must be offered service at the Broadband Grant Speed. The NOFA will set the minimum and maximum dollar amounts per application.

2. *Matching Fund Simplification.* The current program requires applicants to provide a match equal to 15 percent of the requested funding to be used only for eligible grant purposes. The new rule maintains the current program's 15 percent matching requirement but clarifies that the match must be in cash and can also be used to fund operations of the project. This change gives applicants new flexibility on the use of matching funds and is administratively simpler for applicants, reviewers and the Agency. Clarifying that the match must be in cash available at closing, the new rule removes uncertainty related to valuing and qualifying in-kind contributions. Notwithstanding the 15 percent match, all applicants must be able to demonstrate that they have sufficient resources to construct, manage and sustain the project through and beyond completion.

3. *Scoring Simplification.* The current program scores and ranks applications on three criteria: (a) Rurality; (b) economic need; and (c) benefits. The metrics used for economic need (Median Household Income) and rurality (census and Rand McNally™) at times did not fully accommodate situations where there was a high need for assistance. The criteria may not have adequately measured need, for example, in a small community with substantial unemployment and a high cost of living, or in a community that was so small, rural and remote that the community was not recognized as a census designated place; or a community which is small and with very low-income, but in a county which as a whole has a high median household income. The new criteria focuses on ranking completed applications based on the community connectivity benefits of the project to the proposed funded service area. In making a final selection among and between applications with comparable rankings, the Administrator will take into consideration: (a) Service provided to communities in persistent poverty counties; (b) service provided to communities in out-migration communities; (c) the rurality of the proposed funded service area; (d) the speed of service provided by the project; (e) service to substantially underserved trust areas; (f) services provided to persons with disabilities; and (g) any other socio-economic factors that may be described in the NOFA to differentiate and rank applications.

Summary of Comments

In its Proposed Rule, published in the **Federal Register** on November 16, 2012,

(77 FR 68705), the agency requested comments regarding proposed changes to the Community Connect Grant Program. The agency received eighteen sets of comments from the following organization/individuals:

- *North-central Alabama Regional Council of Governments*
- *National Telecommunications Cooperative Association*
- *County of Nelson*
- *Hospital Sisters Health System*
- *National Association of Telecommunications Officers and Advisors*
- *Camino Fiber Network Cooperative, Inc.*
- *Plumas-Sierra Rural Electric Cooperative*
- *Palau National Communications Corporation*
- *jean public*
- *Puerto Rico Broadband Task Force*
- *Rural Wisconsin Health Cooperative*
- *W. Metts Engineering Company, Inc.*
- *Telecommunications Board of Puerto Rico*
- *Wireless Internet Service Providers Association*
- *Mescalero Apache Telecom, Inc.*
- *BEK Communications Cooperative*
- *Gila River Indian Community and Gila River Telecommunications, Inc.*
- *Associated Communications and Research Services*

These comments have been summarized and are addressed below:

Matching Funds

Comment: Several respondents took issue with eliminating the ability to use in-kind items to satisfy the matching requirement and requiring that the 15 percent match be satisfied by having cash on hand at the closing of the award. In addition, several respondents requested the elimination of the matching requirement. Some respondents asserted that by eliminating the use of in-kind items many potential applicants would not be able to raise the cash requirement and therefore would become ineligible for the program. Others commented that under certain circumstances the matching requirement should be waived all together.

Response: It should be noted that although in-kind items to satisfy the matching requirement will no longer be accepted, the purposes of the match have been expanded to allow the matching funds to be used for operating expenses as well as for funding eligible purposes. By allowing the matching funds to be used for operating expenses, the Agency is recognizing that applicants need to fund the expenses of day to day operations and this change in the program will give them credit for funds that are expended in this way. It must be recognized that for projects to succeed, a certain amount of cash reserves must be available to cover expenses and by requiring a cash match, these expenses can be covered while satisfying the matching requirements.

Community Center

Comment: One respondent stated that the requirement to provide free service at the Broadband Grant Speed for two years at the community center was not clearly defined. Another respondent had concerns with where the community center would be located under the new rules and suggested keeping the Census Designated Place or Rand McNally community a service area requirement.

Response: Although the Agency believes that the requirement for free service at the community center is well defined in the regulation, we will provide a more detailed description of the requirement in the Community Connect Application Guide that will be made available to all applicants when the next grant window is opened for accepting applications. In the early days of the Community Connect Program, the proposed service area could only consist of a single Census Designated Place. Unfortunately, this left many rural areas unable to qualify for a grant and the Agency implemented the ability of an applicant to use a community that was designated in a Rand McNally Atlas. Although using the Atlas made many more rural communities eligible for the grant, it still did not solve the problem. With the revised regulation, an applicant now has the ability to designate any eligible area as their proposed service area with the requirement that the community center must be located in the proposed service area. A community center is an important part of the Program and although its physical location is left up to the applicant as long as it stays in the proposed service area, the intent is that the applicant will place the center in the most easily accessible location to benefit as many residents as possible.

Area Eligibility

Comment: One respondent was concerned that if middle mile facilities exist in a certain area and are providing service to anchor institutions that the area in question may be ineligible for the grant funds. Another respondent commented that because broadband service can vary from resident to resident in an area as well as within a community that the requirement that the proposed service area have no broadband service be eliminated. Other respondents commented that using a census designated place or Rand McNally community makes places like Puerto Rico or Palau ineligible.

Response: If an area only has middle mile facilities available and service is not provided to residents and businesses in this area, the area is still eligible for grant funds. This also is the case if a business in an area has a T1 line from the local exchange carrier. For an area to be ineligible for consideration, businesses and residents in that area must have the ability to receive broadband service. Although the Agency realizes that an existing service provider for reasons of their own may not provide ubiquitous coverage in an area, if broadband service is available in an area, then that area is ineligible. The Community Connect Grant Program was implemented to get broadband service to areas without any type of broadband service and once this is accomplished we can then concentrate on filling in the holes that may exist in certain cases. Under the new regulation it is no longer a requirement that the proposed service area be a census designated place or a Rand McNally community. The new requirement is to identify the proposed service on the RUS mapping tool and places like Puerto Rico and Palau should no longer experience the issues they had in the past.

Application Requirements

Comment: Several respondents stated that the requirements for completing a grant application were too onerous and that this would deter potential applicants from submitting an application.

Response: The application process is intended to be a business plan that an applicant will follow if awarded a grant. To ensure that the requested amount of the grant is not too much or too little, we require that a detailed project budget be developed. To ensure that the project is sustainable, we require that projected financial statements along with an engineering design be submitted. The Agency recognizes that the application process takes some effort but for successful projects to be funded this is the minimum amount of information that must be submitted.

Service to Hospitals and Clinics

Comment: A couple of the respondents indicated that rural hospitals and clinics should receive the same two years of free service at the Broadband Grant Speed that the community center receives.

Response: As long as the rural hospital or clinic is open to the public, then these facilities are considered

Critical Community Facilities and all Critical Community Facilities in the proposed service area must be offered free service at the Broadband Grant Speed for two years.

Medically Underserved Areas

Comment: A number of respondents encouraged the use of other federal designations such as Medically Underserved Areas/Populations (MUA/P) and Health Professional Shortage Areas (HPSA) as eligibility criteria stating that these designations indicate the rural areas with the greatest health care needs and that broadband service helps alleviate these shortages.

Response: Although the Agency recognizes that a number of rural areas lack the necessary medical care and is directly addressing these issues with the Distance Learning and Telemedicine Grant Program, the Community Connect Grant Program was designed to bring broadband service to any area that is not currently receiving it. There are many different types of needs in rural areas and the Community Connect Grant Program was designed to place all applicants on a level playing field.

Eligible Grant Purposes

Comment: One respondent requested that technical assistance for the retention of consultants and experts for economic research, engineering, business planning and community outreach be made an eligible purpose.

Response: The Agency agrees that due diligence must be performed in completing the grant application/business plan but is looking for the applicant to fund this due diligence demonstrating a commitment to make the project successful. There are many different items that could be considered in providing funding to implement a broadband system and unfortunately funding is limited and certain items had to be eliminated from eligibility.

Scoring

Comment: One respondent recommended that higher scores be given for applicants that received funding under the American Recovery and Reinvestment Act (ARRA). Another respondent commented that the scoring criteria for receiving points for past experience in managing a broadband system should be enhanced. In addition to the above comments, a number of respondents also commented that the scoring was too subjective and that additional credit should be given to applicants that exceed the minimum requirements for receiving a grant such as providing voice or video services.

Response: Under the ARRA programs that provided funding for providing broadband service, thousands of applications were received. Due to the amount of funding that was made available; many of the ARRA applications could not be funded simply because there were not enough funds. To provide added scoring to a Community Connect applicant because they received an ARRA award would not be fair to the other ARRA applicants that did not receive an award. In addition, there are many existing companies that are providing services in rural areas that did not apply for ARRA funds and these companies should not be penalized for that decision. The scoring criteria for management experience adequately describes the requirements for receiving points. However, we agree that the criteria could be better explained and the associated application guide for the program will be enhanced to provide a clearer understanding of the evidence that needs to be submitted to receive points. Also, the scoring criteria was developed to allow the applicant and the Agency the most flexibility in determining the score the applications should receive and although we have used more objective scoring criteria in the past, we believe that the criteria now contained in the regulation captures the needs of the proposed service area. We also believe that the criteria will allow the best applications to be chosen. Although other services such as voice and video provide customers with additional choices, the purpose of the Community Connect Grant Program is to deliver broadband service to unserved areas and adding emphasis to providing other services will take away from this purpose.

Need for Program

Comment: One respondent commented that the Community Connect Program should not be funded because it was unfair to provide funding to rural areas that have low populations instead of areas in cities that have much greater populations.

Response: Although the Agency agrees that there are areas within large cities that do not have access to broadband, the requirements of the program limit the funding to rural areas. Without funding from the Community Connect Grant Program, some areas would have no chance of ever receiving broadband service.

Broadband Grant Speed

Comment: One respondent recommended that the definitions for Broadband Service and for the Broadband Grant Speed be set at 3 megabits per second downstream and 768 kilobits upstream while another respondent recommended that the Broadband Grant Speed be set 25 megabits down and 5 megabits up. In addition, another respondent recommended keeping the definition of broadband service at the existing level of 200 kilobits in both the upstream/downstream directions.

Response: As explained in the proposed regulation, the definitions for Broadband Service and the Broadband Grant Speed will be set in the Notice of Funds Availability (NOFA) that will be published annually. The Agency appreciates the recommendations submitted by the respondents and they will be taken into consideration when the NOFA is prepared. Although the 200/200 kilobit definition of broadband service has worked well for the program in the past and has identified areas that have no access to broadband service, this definition has become obsolete as technology has progressed. To ensure that rural areas have a level of broadband service that will promote economic development and provide residents and businesses with the speeds they need in today's world, the Agency developed the concept of the Broadband Grant Speed. The Broadband Grant Speed will be determined in a NOFA that announces the opening of the window for submitting applications and will be set at the level that is needed to ensure that rural America is not being left behind.

Native American Applicants

Comment: One respondent requested that applications submitted by a Tribal entity not have to define their service and that funds be awarded to the Tribal leadership to use to provide broadband service anywhere on the respective reservation where broadband service does not exist.

Response: The Proposed Funded Service Area process along with the web based RUS mapping tool will allow Tribes (and all applicants) to geographically establish the Proposed Funded Service Area. This could include an entire Reservation (if the entire Reservation is unserved or the portions of a Reservation that are unserved. As this is a nation-wide, competitive grant program it is not practical for any applicant to not be required to define its service area.

Construction and Advance Procedures

Comment: One respondent requested that formal construction and advance procedures be implemented for the Community Connect Grant Program.

Response: Formal construction procedures can provide a level of guidance that could benefit the applicants. The Agency strongly recommends that standard procedures such as those required for other RUS programs be followed. The types of procedures required by our other programs which can result in awards in the tens of millions of dollars could be so overwhelming to some of the small operations that routinely apply for the grants that those entities would elect not to apply. These same entities go to some of the most remote unserved areas and the Agency does not want to deter them from applying for a grant by making the construction requirements too onerous. We will assist all awardees in construction of their systems and make available to them the construction procedures from our other programs. Although the advance of funds procedures differs from the other RUS programs, the advance procedures used for the Community Connect Grant Program are sufficient and there is no need to revise this process.

Mobile Broadband Service

Comment: One respondent commented that the regulation was unclear if mobile carriers providing 3G or 4G met the definition of broadband service for service area eligibility and for providing service at the Broadband Grant Speed.

Response: The regulation differentiates between fixed and mobile service. Annually, a NOFA (which announces the opening of an application window) may set the requirements for fixed and mobile broadband service at different speeds. This is a clear indication that mobile broadband service can meet both the definition for Broadband Service that is used for determining if an area is eligible to receive a grant and the definition for Broadband Grant Speed which is the required speed that an awardee of a grant must provide to all residents and businesses in the proposed service area.

List of Subjects in 7 CFR Part 1739

Broadband; Grant programs—Communications; Rural Areas; Telecommunications; and Telephone.

■ For reasons set forth in the preamble, the Rural Utilities Service amends Chapter XVII of title 7 of the Code of Federal Regulations by revising part 1739 to read as follows:

PART 1739—BROADBAND GRANT PROGRAM

Subpart A—Community Connect Grant Program

Secs.
1739.1 Purpose.
1739.2 Funding availability and application dates and submission.
1739.3 Definitions.
1739.4–1739.8 [Reserved]
1739.9 USDA Rural Development State Director notification.
1739.10 Eligible applicant.
1739.11 Eligible Community Connect Competetive Grant Project.
1739.12 Eligible grant purposes.
1739.13 Ineligible grant purposes
1739.14 Matching contributions.
1739.15 Completed application.
1739.16 Review of grant applications.
1739.17 Scoring of applications.
1739.18 Grant documents.
1739.19 Reporting and oversight requirements.
1739.20 Audit requirements.
1739.21 OMB control number.

Subpart B [Reserved]

Authority: Title III, Pub. L. 108–199, 118 Stat. 3.

Subpart A—Community Connect Grant Program

§ 1739.1 Purpose.

(a) The provision of broadband service is vital to the economic development, education, health, and safety of rural Americans. The purpose of the Community Connect Grant Program is to provide financial assistance in the form of grants to eligible applicants that will provide, on a ''community-oriented connectivity'' basis, broadband service that fosters economic growth and delivers enhanced educational, health care, and public safety benefits. The Agency will give priority to rural areas that have the greatest need for broadband services, based on the criteria contained herein and in the Notice of Funds Availability (hereinafter referred to as NOFA) published in the **Federal Register**.

(b) Grant authority will be used for the deployment of service to all premises in eligible rural areas at the Broadband Grant Speed on a ''community-oriented connectivity'' basis. In addition to providing service to all premises the ''community-oriented connectivity'' concept will stimulate practical, everyday uses and applications of broadband by cultivating the deployment of new broadband services that improve economic development and provide enhanced educational and health care opportunities in rural areas. Such an approach will also give rural communities the opportunity to benefit from the advanced technologies that are necessary to achieve these goals.

§ 1739.2 Funding availability and application dates and submission.

(a) The Agency will periodically publish, (usually on an annual basis) in the **Federal Register**, a NOFA that will set forth the total amount of funding available; the maximum and minimum funding for each grant; funding priority; the application submission dates; and the appropriate addresses and agency contact information. The NOFA will also outline and explain the procedures for submission of applications, including electronic submissions. The Agency may publish more than one NOFA should additional funding become available.

(b) Notwithstanding paragraph (a) of this section, the Agency may, in response to a surplus of qualified eligible applications which could not be funded from the previous fiscal year, decline to publish a NOFA for the following fiscal year and fund said applications without further public notice.

§ 1739.3 Definitions.

As used in this subpart:

Agency or *RUS* shall mean the Rural Utilities Service, which administers the United States Department of Agriculture (USDA) Rural Development Utilities Programs.

Broadband Grant Speed means the minimum bandwidth described in the NOFA that an applicant must propose to deliver to every customer in the proposed funded service area in order for the Agency to approve a broadband grant. The Broadband Grant Speed may be different for fixed and mobile broadband services and from the minimum rate of data transmission required to determine the availability of broadband service when qualifying a service area.

Broadband service means any terrestrial technology having the capacity to provide transmission facilities that enable subscribers of the service to originate and receive high-quality voice, data, graphics, and video at the minimum rate of data transmission described in the NOFA. The broadband service speed may be different from the broadband grant speed for the Community Connect program.

Community Center means a building within the Proposed Funded Service Area that provides access to the public, or a section of a public building with at least two (2) Computer Access Points and wireless access, that is used for the

purposes of providing free access to and/or instruction in the use of broadband Internet service, and is of the appropriate size to accommodate this purpose. The community center must be open and accessible to area residents before, during, and after normal working hours and on Saturdays or Sunday.

Computer Access Point means a new computer terminal with access to service at the Broadband Grant Speed.

Critical Community Facilities means the Community Center; any public school, public education center, public library, public medical clinic, public hospital, community college, public university; or law enforcement, fire or ambulance station in the Proposed Funded Service Area.

Eligible applicant shall have the meaning as set forth in § 1739.10.

Eligible grant purposes shall have the meaning as set forth in § 1739.12.

Matching contribution means the applicant's qualified contribution to the Project, as outlined in § 1739.14 of this part.

Project means the delivery of service at the Broadband Grant Speed financed by the grant and Matching Contribution for the Proposed Funded Service Area.

Proposed Funded Service Area (PFSA) means the contiguous geographic area within an eligible Rural Area or eligible Rural Areas, in which the applicant proposes to provide service at the Broadband Grant Speed.

Rural area means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within:

(1) A city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or

(2) An urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

§§ 1739.4–1739.8 [Reserved]

§ 1735.9 USDA Rural Development State Director notification.

Applicants shall complete a notification form which will be a public document that the RUS provides to USDA Rural Development State Directors and others in the state(s) of the PFSA. The notification shall include a brief project description and the location of the PFSA.

§ 1739.10 Eligible applicant.

To be eligible for a Community Connect competitive grant, the applicant must:

(a) Be legally organized as an incorporated organization, an Indian tribe or tribal organization, as defined in 25 U.S.C. 450b(e), a state or local unit of government, or other legal entity, including cooperatives or private corporations or limited liability companies organized on a for-profit or not-for-profit basis.

(b) Have the legal capacity and authority to own and operate the broadband facilities as proposed in its application, to enter into contracts and to otherwise comply with applicable federal statutes and regulations.

(c) As required by the Office of Management and Budget (OMB), all applicants for grants must supply a Dun and Bradstreet Data Universal Numbering System (DUNS) number when applying. The Standard Form 424 (SF–424) contains a field for you to use when supplying your DUNS number. Obtaining a DUNS number costs nothing and requires a short telephone call to Dun and Bradstreet. Please see *http://www.grants.gov/applicants/request_duns_number.jsp* for more information on how to obtain a DUNS number or how to verify your organization's number.

(d) Register in the System for Award Management (SAM) (formerly Central Contractor Registry (CCR)).

(1) In accordance with 2 CFR part 25, applicants, whether applying electronically or by paper, must be registered in the SAM prior to submitting an application. Applicants may register for the SAM at *https://www.sam.gov/.*

(2) The SAM registration must remain active, with current information, at all times during which an entity has an application under consideration by an agency or has an active Federal Award. To remain registered in the SAM database after the initial registration, the applicant is required to review and update, on an annual basis from the date of initial registration or subsequent updates, its information in the SAM database to ensure it is current, accurate and complete.

§ 1739.11 Eligible Community Connect Competitive Grant Project.

To be eligible for a Community Connect competitive grant, the Project must:

(a) Serve a PFSA in which Broadband Service does not currently exist;

(b) Offer service at the Broadband Grant Speed to all residential and business customers within the PFSA ;

(c) Offer free service at the Broadband Grant Speed to all Critical Community Facilities located within the PFSA for at least 2 years starting from the time service becomes available to each Critical Community Facility;

(d) Provide a Community Center with at least two (2) Computer Access Points and wireless access at the Broadband Grant Speed, free of all charges to all users for at least 2 years; and

(e) Not overlap with the service areas of current RUS borrowers and grantees.

§ 1739.12 Eligible grant purposes.

Grant funds may be used to finance the following:

(a) The construction, acquisition, or leasing of facilities, including spectrum, land or buildings, used to deploy service at the Broadband Grant Speed to all residential and business customers located within the PFSA and all participating Critical Community Facilities, including funding for up to ten Computer Access Points to be used in the Community Center. Buildings constructed with grants funds must reside on property owned by the awardee. Leasing costs will only be covered through the advance of funds period included in the award documents;

(b) The improvement, expansion, construction, or acquisition of a Community Center and provision of Computer Access Points. Grant funds for the Community Center will be limited to ten percent of the requested grant amount. If a community center is constructed with grant funds, the center must reside on property owned by the awardee;

(c) The cost of providing the necessary bandwidth for service free of charge to the Critical Community Facilities for 2 years.

§ 1739.13 Ineligible grant purposes.

Operating expenses not specifically permitted in § 1739.12.

§ 1739.14 Matching contributions.

(a) At the time of closing of the award, the awardee must contribute or demonstrate available cash reserves in an account(s) of the awardee equal to at least 15% of the grant. Matching contributions must be used solely for the Project and shall not include any financial assistance from federal sources unless there is a federal statutory exception specifically authorizing the federal financial assistance to be considered as such. An applicant must provide evidence of its ability to comply with this requirement in its application.

(b) At the end of every calendar quarter, the award must submit a

schedule to RUS that identifies how the match contribution was used to support the project until the total contribution is expended.

§ 1739.15 Completed application.

Applications should be prepared in conformance with the provisions of this part and all applicable USDA regulations, including 7 CFR parts 3015, 3016, and 3019. Applicants must also conform to the requirements of the individual NOFA to be published when funds are available for the program and are advised to use the Agency's Application Guide for this program, found at the Agency's Web site. Applicants must submit one paper copy and one electronic copy of the application. The application guide contains instructions and forms, as well as other important information needed to prepare an application and may be updated periodically. Paper copies of the application guide can be requested by contacting the, Director, Broadband Division at the following address: Stop 1599, South Agriculture Building, Room 2868, Washington, DC 20250. Completed applications must include the following documentation, studies, reports and information, in form and substance satisfactory to the Agency:

(a) *An Application for Federal Assistance.* A completed Standard Form 424;

(b) *An executive summary of the Project.* A general project overview that addresses the following categories:

(1) A description of why the Project is needed;

(2) A description of the applicant;

(3) An explanation of the total Project costs;

(4) A general overview of the broadband telecommunications system to be developed, including the types of equipment, technologies, and facilities to be used;

(5) Documentation describing the procedures used to determine the unavailability of existing Broadband Service; and

(6) A list of the Critical Community Facilities that will take service from the Applicant at the Broadband Grant Speed, and evidence that any remaining Critical Community Facility located in the PFSA has rejected the offer;

(c) *Scoring Criteria Documentation.* A narrative, with documentation where necessary, addressing the elements listed in the scoring criteria of § 1739.17;

(d) *System design.* A system design of the Project that is economical and practical, including a detailed description of the facilities to be funded, technical specifications, data rates, and costs. In addition, a network diagram detailing the proposed system must be provided. The system design must also address the environmental requirements specified in 7 CFR 1794;

(e) *Service Area Demographics.* The following information about the PFSA:

(1) A map, submitted electronically through RUS' web-based Mapping Tool, which identifies the Rural Area boundaries of the PFSA; and

(2) The total population, number of households, and number of businesses located within the PFSA;

(f) *Scope of work.* A description of the scope of work, which at a minimum must include:

(1) The specific activities and services to be performed under the Project;

(2) Who will carry out the activities and services;

(3) A construction build-out schedule and project milestones, showing the time-frames for accomplishing the Project objectives and activities on a quarterly basis; and

(4) A budget for all capital and administrative expenditures reflecting the line item costs for Eligible Grant Purposes and other sources of funds necessary to complete the Project;

(g) *Community-oriented connectivity plan.* A community-oriented connectivity plan consisting of the following:

(1) A listing of all participating Critical Community Facilities to be connected. The applicant must also provide documentation that it has consulted with the appropriate agent of every Critical Community Facility in the PFSA, and must provide statements from each one as to its willingness to participate, or not to participate, in the proposed Project;

(2) A description of the services the applicant will make available to local residents and businesses; and

(3) A list of any other telecommunications provider (including interexchange carriers, cable television operators, enhanced service providers, wireless service providers and providers of satellite services) that is participating in the delivery of services and a description of the consultations and the anticipated role of such provider in the Project;

(h) *Financial information and sustainability.* A narrative description demonstrating the sustainability of the Project: from the commencement of construction to completion, and beyond the grant period; the sufficiency of resources; how and when the matching requirement is met; and the expertise necessary to undertake and complete the Project. The following financial information is required:

(1) If the applicant is an existing company, it must provide complete copies of audited financial statements, if available, for the two fiscal years preceding the application submission. If audited statements are unavailable, the applicant must submit unaudited financial statements for those fiscal years. Applications from start-up entities must, at minimum, provide an opening balance sheet dated within 30 days of the application submission date; and

(2) Annual financial projections in the form of balance sheets, income statements, and cash flow statements for a forecast period of five years, which prove the sustainability of the Project for that period and beyond. These projections must be inclusive of the applicant's existing operations and the Project, and must be supported by a detailed narrative that fully explains the methodology and assumptions used to develop the projections, including details on the number of subscribers projected to take the applicant's services. Applicants submitting multiple applications for funding must demonstrate that each Project is feasible and sustainable on its own, funds are available to cover each of the matching requirements and that all Projects for which funding is being requested are financially feasible as a whole;

(i) *Statement of experience.* A statement of experience which includes information on the owners' and principal employees' relevant work experience that would ensure the success of the Project. The applicant must also provide a written narrative demonstrating its capability and experience, if any, in operating a broadband telecommunications system;

(j) *Legal authority.* Evidence of the applicant's legal authority and existence, and its ability to enter into a grant agreement with the RUS, and to perform the activities proposed under the grant application;

(k) *Additional funding.* Evidence that funding agreements have been attained, if the Project requires funding commitment(s) from sources other than the grant. An applicant submitting multiple applications for funding must demonstrate its financial wherewithal to support all applications, if accepted, and that it can simultaneously complete and operate all of the Projects under consideration. Additionally, commitments for outside funding must be explicit that they will be available if all applications are not funded;

(l) *Federal compliance.* Evidence of compliance with other federal statutes and regulations including, but not limited to the following:

(1) 7 CFR part 15, subpart A—Nondiscrimination in Federally Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964;

(2) 7 CFR part 3015—Uniform Federal Assistance Regulations;

(3) 2 CFR part 417—Nonprocurement Debarment and Suspension;

(4) 7 CFR part 3018—New Restrictions on Lobbying;

(5) 2 CFR part 421—Requirements for Drug-Free Workplace (Financial Assistance);

(6) Certification regarding Architectural Barriers;

(7) Certification regarding Flood Hazard Precautions;

(8) An environmental report/questionare, in accordance with 7 CFR part 1794;

(9) A certification that grant funds will not be used to duplicate lines, facilities, or systems providing Broadband Service;

(10) Federal Obligation Certification on Delinquent Debt; and

(11) Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants.

§ 1739.16 Review of grant applications.

(a) All applications for grants must be delivered to the Agency at the address and by the date specified in the NOFA (*see* § 1739.2) to be eligible for funding. The Agency will review each application for conformance with the provisions of this part, and may contact the applicant for clarification of information in the application.

(b) Incomplete applications as of the deadline for submission will not be considered. If an application is determined to be incomplete, the applicant will be notified in writing and the application will be returned with no further action.

(c) If the Agency determines that the Project is technically or financially infeasible or unsustainable, the Agency will notify the applicant, in writing, and the application will be returned with no further action.

(d) Applications conforming with this part will be evaluated competitively by the Agency and will be ranked in accordance with § 1739.17. Applications will then be awarded generally in rank order until all grant funds are expended, subject to paragraphs (e) and (f) of this section.

(e) In addition to scoring, the Agency may take geographic distribution into consideration when making final award determinations.

(f) An award may be made out of rank order if a higher ranked application would require an award that exceeded available funding or would consume a disproportionate amount of funds available relative to its ranking.

(g) The Agency reserves the right to offer an applicant a lower amount than proposed in the application.

§ 1739.17 Scoring of applications.

The ranking of the ''community-oriented connectivity'' benefits of the Project will be based on documentation in support of the need for services, benefits derived from the proposed services, characteristics of the PFSA, local community involvement in planning and implementation of the Project, and the level of experience of the management team. In ranking applications the Agency will consider the following criteria based on a scale of 100 possible points:

(a) An analysis of the challenges of the following criteria, laid out on a community-wide basis, and how the Project proposes to address these issues (up to 50 points):

(1) The economic characteristics;

(2) Educational challenges;

(3) Health care needs; and

(4) Public safety issues;

(b) The extent of the Project's planning, development, and support by local residents, institutions, and Critical Community Facilities. Documentation must include evidence of community-wide involvement, as exemplified by community meetings, public forums, and surveys. In addition, applicants should provide evidence of local residents' participation in the Project planning and development (up to 40 points).

(c) The level of experience and past success of operating broadband systems for the management team. (up to 10 points)

(d) In making a final selection among and between applications with comparable rankings and geographic distribution, the Administrator may take into consideration the characteristics of the PFSA. Only information provided in the application will be considered. Applicants should therefore specifically address each of the following criteria to differentiate their applications:

(1) Persistent poverty counties that will be served within the PFSA;

(2) Out-migration Communities that will be served within the PFSA;

(3) The rurality of the PFSA;

(4) The speed of service provided by the project;

(5) Substantially underserved trust areas that will be served within the PFSA;

(6) Community members with disabilities that will be served within the PFSA; and

(7) Any other additional factors that may be outlined in the NOFA.

§ 1739.18 Grant documents.

The terms and conditions of grants shall be set forth in grant documents prepared by the Agency. The documents shall require the applicant to own all equipment and facilities financed by the grant. Among other matters, the Agency may prescribe conditions to the advance of funds that address concerns regarding the Project feasibility and sustainability. The Agency may also prescribe terms and conditions applicable to the construction and operation of the Project and the delivery of service at the Broadband Grant Speed to eligible Rural Areas, as well as other terms and conditions applicable to the individual Project. Dividend distributions will not be allowed until all grant funds and matching contributions have been expended.

§ 1739.19 Reporting and oversight requirements.

(a) A project performance activity report will be required of all recipients on an annual basis until the Project is complete and the funds are expended by the applicant. The reporting period will start with the calendar year the award is made and continue for every calendar year through the term of the award. The report must be submitted by January 31 of the following year of the reporting period. Recipients are to submit an original and one copy of all project performance reports, including, but not limited to, the following:

(1) A comparison of actual accomplishments to the objectives established for that period;

(2) A description of any problems, delays, or adverse conditions which have occurred, or are anticipated, and which may affect the attainment of overall Project objectives, prevent the meeting of time schedules or objectives, or preclude the attainment of particular Project work elements during established time periods. This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation; and

(3) Objectives and timetable established for the next reporting period.

(b) A final project performance report must be provided by the recipient. It must provide an evaluation of the success of the Project in meeting the objectives of the program. The final report may serve as the last annual report.

(c) The Agency will monitor recipients, as it determines necessary, to assure that Projects are completed in

accordance with the approved scope of work and that the grant is expended for Eligible Grant Purposes.

(d) Recipients shall diligently monitor performance to ensure that time schedules are being met, projected work within designated time periods is being accomplished, and other performance objectives are being achieved.

(e) The applicant must have the necessary processes and systems in place to comply with the reporting requirements for first-tier sub-awards and executive compensation under the Federal Funding Accountability and Transparency Act of 2006 in the event the applicant receives funding unless such applicant is exempt from such reporting requirements pursuant to 2 CFR 170.110(b). The reporting requirements under the Transparency Act pursuant to 2 CFR part 170 are as follows:

(1) First Tier Sub-Awards of $25,000 or more in non-Recovery Act funds (unless they are exempt under 2 CFR part 170) must be reported by the Recipient to *http://www.fsrs.gov* no later than the end of the month following the month the obligation was made.

(2) The Total Compensation of the Recipient's Executives (5 most highly compensated executives) must be reported by the Recipient (if the Recipient meets the criteria under 2 CFR part 170) to *http://www.sam.gov* by the end of the month following the month in which the award was made.

(3) The Total Compensation of the Subrecipient's Executives (5 most highly compensated executives) must be reported by the Subrecipient (if the Subrecipient meets the criteria under 2 CFR part 170) to the Recipient by the end of the month following the month in which the subaward was made.

§ 1739.20 Audit requirements.

A grant recipient shall provide the Agency with an audit for each year in which a portion of the financial assistance is expended, in accordance with the following:

(a) If the recipient is a for-profit entity, an existing Telecommunications or Electric Borrower with the Agency, or any other entity not covered by the following paragraph, the recipient shall provide an independent audit report in accordance with 7 CFR part 1773, ''Policy on Audits of the Agency's Borrowers.'' Please note that the first audit submitted to the Agency and all subsequent audits must be comparative audits as described in 7 CFR part 1773.

(b) If the recipient is a Tribal, State or local government, or non-profit organization, the recipient shall provide an audit in accordance with OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.''

§ 1739.21 OMB control number.

The information collection requirements in this part are approved by the Office of Management and Budget (OMB) and assigned OMB control number 0572–0127.

Subpart B [Reserved]

Dated: April 8, 2013.

John Charles Padalino,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2013–10502 Filed 5–2–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

10 CFR Part 719

48 CFR Parts 931, 952, and 970

RIN 1990–AA37

Contractor Legal Management Requirements; Acquisition Regulations

AGENCY: Office of General Counsel, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy revises existing regulations covering contractor legal management requirements. Conforming amendments are also made to the Department of Energy Acquisition Regulation (DEAR). The regulations provide rules for handling of legal matters and associated costs by certain contractors whose contracts exceed $100,000,000 as well as legal counsel retained directly by the Department for matters in which costs exceed $100,000.

DATES: *Effective date:* July 2, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Eric Mulch, Attorney-Adviser, U.S. Department of Energy, Office of General Counsel, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–5746. Email: *eric.mulch@hq.doe.gov*.

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I. Background

The Department's contracts that include cost reimbursable elements generally allow reimbursement of legal costs, including the costs of litigation, if the costs are reasonable and incurred in accordance with the applicable cost principles and contract clauses. Consequently, the Department has an ongoing obligation to monitor and control the legal costs that it reimburses.

The Department has a long history of overseeing aspects of its contractors' management of legal matters and associated costs. This practice was formalized in 1994 when the Department published an interim Acquisition Letter as an interim policy in the **Federal Register** on August 31, 1994 (59 FR 44981). The interim Acquisition Letter was finalized as a Policy Statement on April 3, 1996 (61 FR 14763). This Policy Statement was followed by a formal rulemaking that added part 719, Contractor Legal Management Requirements, to Title 10 of the Code of Federal Regulations with an effective date of April 23, 2001 (66 FR 4616, 66 FR 19717).

After a decade operating in accordance with the 2001 rulemaking, the Department determined that it should review, update and revise the rule. Therefore, it did so and issued the results in a Notice of Proposed Rulemaking (NOPR) on December 28, 2011 (76 FR 81408). The NOPR requested public comments no later than February 27, 2012. The public comment period was reopened on March 2, 2012 and extended until March 16, 2012 (77 FR 12754).

Today's final rule revises the current contractor legal management requirements found in part 719, in Title 10 of the Code of Federal Regulations. The revisions reflect lessons learned by the Department during the years since implementing part 719. The part establishes regulations to monitor and control legal costs and to provide guidance to aid contractors and the Department in making determinations regarding the reasonableness of outside counsel costs, including the costs associated with litigation. Today's amendments to part 719 and the associated portions of the Department of

Energy Acquisition Regulation (DEAR) are designed to clarify and streamline existing requirements, improve efficiency of contractor legal management, and facilitate oversight over the expenditure of taxpayer dollars.

Contracting Officers must include the changes of this Final Rule in solicitations issued on or after the effective date of this rule. Contracting Officers may, at their discretion, include the changes of this Final Rule in solicitations issued before the effective date of this rule, provided award of the resulting contract(s) occurs on or after the effective date.

Contracting Officers must apply the changes of this Final Rule to affected contracts, prospectively, by including them in those contracts by bilateral modifications. The changes are to become effective on the date the modifications are executed. Contracting Officers are to attempt to execute modifications within 60 days of the publication in the **Federal Register** of this Final Rule. Affected contracts are all management and operating contracts and other contracts that currently contain DEAR 931.205–33 or otherwise reference the Department's litigation management procedures and cost guidelines. DEAR 931.205–33 requires litigation and other legal expenses be incurred per 10 CFR Part 719, Contractor Legal Management Requirements, as a condition of allowability.

Contracting Officers must also incorporate the changes of this Final Rule into affected contracts before: extending them, exercising options under them, or adding additional term to them per award term provisions.

II. Public Comments

The Department of Energy received public comments from fifteen respondents concerning the NOPR. Commenters were divided in their reaction to the proposed rule. Many of the commenters expressed concerns about the enlarged scope of the regulations, while one commenter praised the Department's efforts to increase oversight of legal costs. The Department carefully considered each comment and made numerous changes to today's final rule based upon concerns raised by the responses to the NOPR.

A short summary of the comments received and the Department of Energy's responses are set forth below. Comments from multiple responses were combined where the comments addressed similar issues and presented similar concerns. The comments are listed under the proposed part 719 subheading to which they pertain in order to ease readability.

§ 719.2 What are the definitions of terms used in this part?

Comment 1: One commenter suggested that the monetary threshold for establishing a legal matter as a significant matter should be raised from $100,000 to $250,000.

Response 1: The Department believes the current threshold has been workable and efficient. We are aware of no evidence to the contrary, much less any showing that the existing threshold has significantly burdened contractors or their counsel. Moreover, the Department's experience has shown that the existing level has protected the public fisc by enabling the Department to identify and eliminate duplicative and other unnecessary outside counsel expenses that we would not have been in a position to detect under the suggested higher threshold.

Comment 2: One commenter suggested that the definition of Department Counsel be revised to clarify the distinction between DOE and NNSA field offices.

Response 2: The Department believes that the proposed definition, identical in pertinent part to the definition included in the previous version of the rule, is sufficiently clear.

Comment 3: One commenter suggested revising the definition of litigation to make it clear that, for purposes of the rule, the term applies only if the proceeding relates to a contract between the contractor and the Department. The commenter also suggested that the definition recognize that contractors may become parties in litigation in relation to a Department contract in territorial, District of Columbia, tribal or foreign courts or administrative bodies.

Response 3: The Department amends the definition in section 719.2 to implement the commenter's suggestions.

Comment 4: One commenter suggested that proceedings before state or federal administrative bodies or arbitrators be removed from the definition of litigation. The commenter stated that the definition was too broad and that there would be added expense due to the ''onerous requirements that apply to litigation.''

Response 4: The Department declines to remove matters before states or federal administrative bodies or arbitrators from the definition of litigation. The Department has limited the requirements for matters in litigation by not requiring submission of an engagement letter or Staffing and Resource Plan unless the matter in litigation is expected to exceed specified monetary thresholds. An engagement letter must be submitted for a matter in litigation only if retained legal counsel is expected to provide $25,000 or more in services. A Staffing and Resource Plan must be submitted only if it is anticipated that retained legal counsel costs will exceed $100,000.

Comment 5: Multiple commenters expressed concern regarding the proposed rule's definition of legal matter. They stated that inclusion of an ''aggregate of legal issues associated with a particular subject area'' within the definition would result in overly broad application of certain requirements tied to significant matters.

Response 5: The Department agrees with these comments and removes the previous definition of legal matter from today's rule. Where used, the term legal matter should be understood to carry its common meaning.

Comment 6: Several commenters suggested that the Department should include only an objective methodology for defining significant matters.

Response 6: Although the Department believes that Departmental authority to determine when a matter is to be considered significant is necessary, today's final rule includes a requirement that the Department notify the contractor in writing of all matters considered significant unless they cross the monetary threshold contained in section 719.2.

Comment 7: Several commenters expressed concern regarding the proposed rule's definition of a significant matter that triggers the Staffing and Resource Plan requirements under section 719.15 when the matter is deemed significant by Department Counsel. These commenters criticized the subjective nature of this determination. One commenter noted that contractors may find it necessary to burden Department Counsel with requests for determinations on matters that are not clearly significant in order to manage the threat of unallowable costs.

Response 7: The Department believes that the ability to define a matter as significant is essential to Departmental monitoring and managing contractor legal costs, but understands the need to have a clear identification of what constitutes a significant matter. Today's rule revises the definition of significant matter to state that a matter is significant when it is a legal matter that involves significant issues as determined by Department Counsel and identified to a contractor in writing, and where the amount of any legal costs,

over the life of the matter, is expected to exceed $100,000. Therefore, the final rule deletes section 719.16(d) of the proposed rule which requires that a contractor consult with Department Counsel when it is unclear whether a matter is significant.

§ 719.3 What contracts are covered by the part?

Comment 8: One commenter suggested that the Department include language further explaining the threshold requirements for applicability of the part.

Response 8: Based on experience administering the previous version of the part, the Department believes that further elaboration of the thresholds in section 719.3 is unnecessary.

Comment 9: One commenter stated that the interplay among sections 719.3, .4, and .5 is confusing and suggested that 719.4 and .5 be deleted.

Response 9: The Department declines to follow this suggestion. The Department believes that section 719.4(b) (which permits the Department to make the part applicable to a particular contract by inserting a specific contract clause requiring compliance) is necessary to ensure that the Department has the ability to make this part applicable to a contract that would otherwise be exempt. The Department believes that section 719.5 aids the public in understanding the applicability of the part.

§ 719.4 Are law firms that are retained by contract by the Department covered by this part?

Comment 10: One commenter suggested that section 719.4 be revised to specifically state which party is to determine whether costs are expected to exceed $100,000.

Response 10: The Department agrees with the commenter and today's rule states that the Department will determine whether costs are expected to exceed $100,000 and that the Department will provide notice of this determination to retained legal counsel.

§ 719.6 Are there any types of legal matters not included in the coverage of this part?

Comment 11: One commenter suggested that subcontractor bankruptcy matters be added to the list of legal matters to which the part does not apply in section 719.6.

Response 11: The Department declines to follow this suggestion because subcontractor bankruptcy actions are not so commonplace as to fall within the same category as routine intellectual property law support services and routine workers and unemployment compensation matters.

Comment 12: One commenter requested clarification as to whether routine workers compensation matters excluded from the purview of part 719 would be excluded if such matters are handled through a retrospective insurance policy.

Response 12: See the Department's responses to comments related to section 719.45 regarding retrospective insurance carriers.

Comment 13: Several commenters requested that the Department reverse its proposal to include labor arbitrations within the purview of part 719. Some commenters stated that treating labor arbitrations like other litigation for purposes of part 719 coverage will inappropriately insert the Department in the bargaining relationship between the contractor and the union.

Response 13: Labor arbitrations that are handled by in-house counsel for the contractor will not be subject to the majority of the requirements of part 719. In addition, labor arbitrations that are expected to result in less than $25,000 in retained legal counsel costs do not require the contractor to execute an engagement letter.

As a matter of course, part 719 requirements will not apply to routine, low cost labor arbitrations; high cost arbitrations will be subject to the same litigation oversight requirements as other types of contractor litigation. In addition, departmental oversight over expenditure of these legal costs in no way places the Department in the bargaining relationship between a contractor and a union. In labor arbitrations, as with other litigation, the contractor represents itself in the matter and the Department reimburses the contractor for reasonable, allowable, and allocable costs associated with the arbitration.

§ 719.7 Is there a procedure for exceptions or deviations from this part?

Comment 14: One commenter stated that the proposed rule fails to acknowledge legal management innovations adopted by the contractor community since part 719 was first published in 2001. The commenter proposed that part 719 be amended to include a provision allowing Department Management and Operating contractors to be exempted from the majority of part 719's approval requirements if the contractor demonstrates a management approach consistent with the best practices and contractor assurance principles identified in individual contracts and DOE Order 226.1B.

Response 14: The Department acknowledges advancements in the larger DOE contractor community's legal cost management practices. Section 719.7 provides Departmental flexibility to approve contractor request for exceptions or deviations from part 719. No changes to the part are necessary.

Comment 15: One commenter suggested that there should be a deemed approval of requests for exceptions or deviations filed per section 719.7, if the Department does not respond to the contractor's request within 30 days from receipt of the request. The commenter also suggested that when such requests are denied, the General Counsel and Senior Procurement Executive should be required to provide a written rationale for denial.

Response 15: The Department does not believe that deemed approval of requests for exceptions or deviations from the regulations is appropriate. However, the Department agrees that a written response to such requests is appropriate and amends today's rule to provide for such a response by the General Counsel or his or her delegee. The response requirement is not intended to require a justification for the Department's exercise of its discretion.

§ 719.8 Does the provision of protected documents from the contractor to the Department constitute a waiver of privilege?

Comment 16: Several commenters noted that the statement regarding application of privilege to documents exchanged between the Department and the contractors will apply only when the law of the relevant jurisdiction recognizes such a privilege.

Response 16: Section 719.8 includes the following limitation: ''[t]o the extent documents associated with compliance with this part . . . are protected from disclosure to third parties because the items constitute attorney work product and/or involve attorney client communications. . . .'' This language recognizes that the common interest applies only when the underlying documents are protected by a privilege and when the relevant jurisdiction recognizes the common interest under the facts presented by DOE contractors.

Comment 17: One commenter noted that section 719.8 asserts that privilege is not waived by the sharing of documents with the Department is undermined when contractors are not able to rely on DOE approvals and authorizations to determine cost allowability.

Response 17: The proposed revisions to part 719 do not change the allowability analysis performed by

Contracting Officers. Whether the Department's and contractor's interests are sufficiently aligned to support a finding of common interest for purposes of protecting items from disclosure is an analysis that will be performed by a court of competent jurisdiction as issues arise.

Comment 18: One commenter noted the statement in section 719.8 that the common interest is ''rooted'' in the reimbursement of allowable costs excludes other sources of the common interest, such as mission completion.

Response 18: To the extent that proposed section 719.8 implies that there is only one basis for the common interest between contractors and the Department, this misconception is clarified in the final rule. Today's final rule states that the common interest between the parties is primarily rooted in the Department's reimbursement of contractors for allowable costs incurred when litigation is threatened or initiated against contractors, but that other factors may also support a determination that the Department and the contractor share a common interest.

Comment 19: One commenter suggested that section 719.8 should address how the privilege would apply and who is authorized to waive the privilege.

Response 19: The parties authorized to waive the privilege and the operation of the privilege will be evaluated on a case-by-case basis. In some cases, a third party suing the contractor may assert that the privilege protecting certain documents from disclosure is waived because the documents were provided to an alleged outside party, the Department. Whether the privilege would operate in that circumstance depends on a host of details surrounding the disclosure and the underlying documents. Therefore, in the view of the Department, no additional details need to be added to the regulation.

Comment 20: One commenter noted that the interests of the Department and a contractor may diverge at some point. For example, interests may diverge where an action could lead to government action against the contractor. The commenter suggested adding language to section 719.8 that would permit the contractor to withhold privileged information when it is reasonable to anticipate eventual divergence of interests.

Response 20: Contractors are not permitted by this part to withhold documents required to be submitted pursuant to this part because the contractor anticipates that the interest of the Department and the contractor in a litigation matter may diverge. Section 719.40 makes clear that adherence to part 719, including provision of documents such as Staffing and Resource Plans and settlement memoranda as appropriate, is a prerequisite to allowability. Failure to provide information required by part 719 may result in the denial of reimbursement of associated costs.

Comment 21: One commenter suggested that the Department require written common interest agreements before requesting privileged information from contractors.

Response 21: The Department declines to adopt this suggestion. Written common interest agreements may be helpful in some cases to emphasize that the parties' exchange of documents on a specific matter occurred in furtherance of their common interest, particularly if the matter is in litigation or if litigation is imminent. However, it is the view of the Department that it is not necessary to require the parties to enter into a common interest agreement every time that the parties exchange potentially sensitive documents or communications. Such a requirement would potentially disrupt site operations by slowing the delivery of mission deliverables from the contractor to the government. Moreover, requiring the use of common interest agreements in all circumstances involving the sharing of potentially privileged information might undercut the ability of DOE and its contractors to protect the privilege when the parties did not enter into an agreement.

§ 719.10 Who must submit a Legal Management Plan?

Comment 22: One commenter questioned the continued wisdom of requiring contractor submission of a Legal Management Plan stating that it has been the commenter's experience that the plan is not often referenced by the Department. The commenter notes that frequent interaction between Department counsel and in-house counsel for the contractor obviates the need for a written Legal Management Plan.

Response 22: The Legal Management Plan documents critical information allowing the Department to guide practices and manage costs. The Department notes further that Legal Management Plans are commonplace among businesses. The Legal Management Plan assists Department Counsel in understanding the contractor's internal procedures, litigation protocols and processes to manage costs. Legal Management Plans are submitted following the award of a contract and revised only upon request of the Contracting Officer. The Department believes that the benefit of requiring submission of the plans outweighs any burden associated with compliance with this requirement.

§ 719.11 When must a Legal Management Plan be submitted or revised?

Comment 23: Several commenters suggested that the Department should be required to have a reason or justification for requesting a revised Legal Management Plan and should provide such reason or justification to the contractor with such a request.

Response 23: The Department agrees in part and today's final rule states that a request for a revised plan shall include an explanation for the request. However, the explanation requirement is not intended to require a justification for the Department's exercise of its discretion.

Comment 24: One commenter suggested that language be inserted at the end of section 719.11(b) allowing the Department to grant an extension of the deadline for submitting a revised Legal Management Plan. The commenter also suggested that the section state that all reasonable requests for extensions will not be denied.

Response 24: The Department agrees that that Department Counsel should have the authority to extend the deadline for submitting a revised Legal Management Plan and today's rule reflects this change. The Department declines to include the suggested statement concerning the acceptance of reasonable requests. The Department believes that Department Counsel must maintain the discretion to accept or reject a request for deadline extension to ensure proper management of contractor legal costs.

Comment 25: One commenter suggested that section 719.11(b), requiring contractors to submit a revised Legal Management Plan upon request of the contracting officer, should be deleted because it is unnecessary and burdensome.

Response 25: The Department declines to accept the suggestion. The ability to request a revised plan is necessary to ensure proper management of contractor legal costs.

§ 719.12 What information must be included in the Legal Management Plan?

Comment 26: Several commenters stated that the requirement in section 719.12(a) that the Legal Management Plan include a description of in-house counsel resources does not provide any benefit to the government and should be

eliminated. Some of these commenters questioned whether Department Counsel would be making determinations on whether in-house counsel would be qualified to handle a particular matter, thereby assuming the role of managing in-house counsel. Multiple commenters stated that the fact that a contractor has in-house counsel with experience in a specific area should not be determinative of whether engaging outside counsel is appropriate. Multiple commenters stated that as a contractor's in-house staff change, their levels of expertise will change and the Legal Management Plan will be quickly out of date.

Response 26: The Department believes that requiring a contractor to provide a description of in-house counsel resources is essential to developing an understanding of the contractor's internal legal resources. Although not determinative on its own, having information concerning the areas of expertise among a contractor's in-house resources is essential when evaluating the reasonableness of outside counsel use. Neither the submission of such information nor the existence of contractor in-house expertise precludes reimbursement of contractor outside counsel costs in appropriate situations. The Department believes that the information required to be included in a Legal Management Plan required by section 719.12(a) is necessary to ensure proper management of contractor legal costs. However, the Department appreciates the commenters' concerns regarding the required listing of ''levels of experience of each legal staff member.'' Today's rule eliminates this requirement from the section.

Comment 27: One commenter recommended deletion of subsection (d), which requires an outline of the factors that the contractor will use in selecting outside counsel.

Response 27: The Department believes that the information requested under subsection (d) causes minimal burden and benefits the Department by providing the rationale for the selection of outside counsel. No change is made to today's final rule.

Comment 28: Several commenters suggested that section 719.12(k)'s requirement that the Legal Management Plan include a description of procedures for providing the earliest possible notification to the Department of the likely initiation of any legal matter concerning certain topics which are of general importance to the Department, should be revised or eliminated. Several commenters noted that the language in section 719.21(k) creates unnecessary ambiguity. Specifically, one commenter stated that the term ''likely initiation'' did not specify the triggering initiator. The commenter noted that if a third party was ''likely initiating'' litigation it is unlikely that the contractor would be aware of it and if the contractor was ''likely initiating'' litigation it would be required to get Department approval under 719.30. Another commenter complained that the information requested was overly burdensome. One commenter suggested that this paragraph should include an expanded definition of ''classified information'' to ensure proper handling of such information.

Response 28: The Department agrees that removal of section 719.12(k) is appropriate. Other requirements ensure that the Department is timely notified of impending legal matters and therefore this subsection has been removed from the final rule. Also, requirements regarding the handing of classified information are fully addressed in statutory and regulatory provisions governing such information.

Comment 29: Several commenters suggested that section 719.12(l) be eliminated because other regulations and contract provisions prohibit a contractor from submitting unallowable costs for reimbursement, and therefore it adds no value.

Response 29: The Department agrees that section 719.12(l) is duplicative of other prohibitions regarding submission of unallowable costs for reimbursement. Today's rule removes this section.

§ 719.13 Who at the Department receives and reviews the Legal Management Plan?

Comment 30: One commenter stated that section 719.13 should make plain that the Legal Management Plan is to be routed through the Contracting Officer.

Response 30: The Department has carefully considered the assignment of Departmental responsibilities under part 719 and believes that Departmental Counsel receipt of the Legal Management Plan is appropriate. Departmental Counsel will appropriately coordinate their efforts with the cognizant Contracting Officer.

§ 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?

Comment 31: Multiple commenters objected to the proposed deletion of the subsection allowing contractors to file a letter or other communication with the General Counsel disputing a Departmental Legal Management Plan determination of inadequacy or noncompliance, noting that this process may avoid contract disputes.

Response 31: The Department amends the final rule to permit contractors to file a letter with the General Counsel disputing a deficiency determination.

§ 719.15 What are the requirements for a Staffing and Resource Plan?

Comment 32: One commenter noted that section 719.15(e) makes reference to the budget developed in paragraph (c) of the section, but that the particularized budget requirement for the matter in litigation is set forth in paragraph (d).

Response 32: The Department recognizes this error and today's final rule corrects the section.

Comment 33: Several commenters addressed the requirement that contractors submit Staffing and Resource Plans for significant matters. They noted that these plans must describe, among other things, the major phases likely to be involved in the handling of the matter. The commenters stated that requiring the plan for all significant matters is impractical because the definition of Significant Matter includes any legal matter where the amount of legal costs over the lifetime of the matter is expected to exceed $100,000. Because legal matter is defined to include an aggregate of legal issues associated with a particular subject area, the commenters are concerned that Staffing and Resource Plans will be required for series of discrete, unrelated issues which do not lend themselves to the preparation of such a plan.

Response 33: The Department agrees that the application of the requirement to provide a Staffing and Resource Plan is most appropriate for matters in litigation. Therefore section 719.15(a) is changed so that it applies only to significant matters in litigation.

Comment 34: Several commenters suggested that section 719.5(e) be changed to require contractor counsel to notify the Department of potential costs in excess of the Staffing and Resource Plan estimates instead of prohibiting the incurrence of such costs and requiring DOE approval. Several commenters suggested that the requirement for pre-approval of over-budget costs should be deleted because it is impractical in the context of litigation, and litigation may be compromised if the contractor is required to go back to the Department for approval before incurring additional expenses. Some commenters expressed concern that advance approval for over-budget costs will lead to highly inflated budget estimates.

Response 34: The Department agrees with some of the commenters that this

requirement should be changed from one of advance approval to advance notice. Under today's final rule the contractor must notify Department Counsel before incurring retained legal costs in excess of the budget developed pursuant to paragraph (d).

§ 719.16 When must the Staffing and Resource Plan be submitted?

Comment 35: One commenter suggested that language be inserted in section 719.16(a) allowing the Department to grant an extension to the deadline for submitting a Staffing and Resource Plan. The commenter also suggested that the section include a requirement that no reasonable requests for extensions will be denied.

Response 35: The Department agrees that Department Counsel should have the authority to extend the deadline for submitting a revised Staffing and Resource Plan and today's rule reflects this fact. The Department declines to include the suggested statement concerning the acceptance of reasonable requests. The Department believes that Department Counsel must maintain the discretion to accept or reject a request for deadline extension to ensure proper management of contractor legal costs.

Comment 36: Multiple commenters suggested that the right to dispute Department Counsel's stated objections to a Staffing and Resource Plan to the General Counsel, which was deleted in the proposed rule, be retained. The commenters noted that this process may avoid contract disputes.

Response 36: The Department amends the final rule to permit contractors to file a letter with the General Counsel disputing a stated objection.

Comment 37: One commenter stated that requiring a plan be submitted within 30 days after DOE determines that a matter is to be considered a Significant Matter is unrealistic, noting that a contractor may not even have hired outside counsel within the 30 day period. The commenter further objected to the period allotted for DOE review of the plan, noting that waiting 30 days for DOE approval is not realistic during ongoing litigation.

Response 37: The Department notes that a Staffing and Resource Plan is required to be filed within 30 days after the filing of an answer or a dispositive motion in lieu of an answer or within 30 days after a determination that associated costs are expected to exceed $100,000. These triggers should allow adequate time to prepare the required plan. The Department further believes that any concerns regarding the timeframe for contractor submission of the plan are adequately addressed by the addition of the option for Department Counsel to extend the deadline. Regarding the 30 day deadline for Department Counsel to state objections to the plan, the Department notes that there is no approval requirement and the regulation does not prohibit the contractor from taking any action during the 30 day period during which Department Counsel may state objections to the plan.

§ 719.17 Are there any budgetary requirements?

Comment 38: One commenter expressed concern about the interplay between the definition of significant matters and the words ''existing or anticipated significant matters'' in the proposed rule. The commenter noticed that the use of the word anticipated was confusing and could create problems during implementation.

Response 38: The Department agrees that the language ''existing or anticipated'' is not helpful, and today's final rule removes the words ''existing'' and ''anticipated.''

Comment 39: One commenter objected to the provision in section 719.17(c) requiring the submission of a report comparing its budgeted and actual legal costs at the conclusion of the budget period. The commenter stated that the Department has access to the information that would be reflected in the report.

Response 39: The Department believes that the required report will benefit its efforts to monitor and manage contractor legal costs. The contractor is in the best position to create the required report given that not all information regarding costs incurred during a particular budget period may have been provided to the Department within 30 days of the end of the budget period. Today's final rule retains this requirement.

§ 719.20 When must an engagement letter be submitted to Department Counsel?

Comment 40: Multiple commenters expressed concern with the requirement that contractors submit to Department Counsel the terms of proposed engagement letters between the contractor and proposed retained legal counsel when the proposed legal services are expected to meet or exceed $25,000. The commenters noted that the previous version of the regulation required submission of executed, rather than proposed, engagement letters and characterized the proposed change as requiring that contractors obtain Department preapproval before executing an engagement letter. Several commenters stated that preapproval of engagement letters would unnecessarily burden contractors and delay the hiring of outside counsel. The commenters noted that Department preapproval of engagement letters is unnecessary because section 719.21 prescribes in great detail the information to be included in the engagement letter.

Response 40: The Department has considered the comments and agrees that it need not review proposed engagement letters. Section 719.21 provides clear guidance on requirements for these letters and preapproval may unnecessarily delay engagement of outside counsel. Today's final rule is amended to require the submission of executed, rather than proposed, engagement letters when retained counsel is expected to provide $25,000 or more in legal services for a particular matter.

Comment 41: One commenter urged the Department to raise the $25,000 threshold in section 719.20 that triggers the contractor obligation to obtain an engagement letter from retained legal counsel. The commenter noted that $25,000 is the amount included in this regulation in 2001, and that this figure is unreasonably low given the increase in litigation costs over the last years. Another commenter stated that it is unclear when initiation of the engagement letter process will be expected if contractor counsel engages outside counsel for ad hoc advisory services.

Response 41: It is the view of the Department that obtaining an engagement letter from retained legal counsel that sets forth basic agreements regarding billing, invoice and record retention is a good practice and it is not an onerous requirement; rather, it is standard practice for companies hiring outside counsel and often required by State legal ethics rules. Also, section 719.20 states that contractors must submit the engagement letter ''when the proposed retained counsel is expected to provide $25,000 or more in legal services for a particular matter.'' It is the view of the Department that contractor counsel should form a good faith judgment whether a given matter will involve $25,000 or more of legal expenses.

§ 719.21 What are the required elements of an engagement letter?

Comment 42: Several commenters noted that section 719.21(b)(6) should be clarified to specifically state that the initial assessment of the legal matter, along with a commitment to provide updates as necessary, must be provided

by retained legal counsel rather than contractor counsel.

Response 42: The items set forth in section 719.21(b) describe the obligations of retained legal counsel. However, to ensure clarity, the text of section 719.21(b)(6) is changed to specify that the initial assessment and updates are the responsibility of retained legal counsel.

Comment 43: One commenter objected to the fact that the engagement letter requirements at section 719.21(b)(4) require the contractor to obtain agreement from retained legal counsel to maintain all records for six years and three months after the final payment or after final case disposition, whichever is later. The commenter noted that the current regulations require the engagement letter to state retained legal counsel will maintain all records for three years and further noted that additional storage costs will be incurred because of the extended record maintenance period.

Response 43: The requirement that retained legal counsel's records for a particular case must be maintained for six years, three months, aligns with the Contract Disputes Act statute of limitations. There is no change to the proposed record retention period in today's final rule.

Comment 44: One commenter noted that the required engagement letter elements are overly prescriptive and should be eliminated.

Response 44: The Department disagrees; obtaining an engagement letter from retained legal counsel that sets forth basic agreements regarding billing, invoices, and record retention reflects best practices for any company obtaining legal services.

Comment 45: One commenter recommended that an addition be made to the engagement letter requirements in section 719.21, requiring retained legal counsel to affirm that (s)he has read section 719.8 regarding waiver of privilege, and that provision of records to the Government is in no way intended to constitute a waiver of any applicable privilege.

Response 45: Section 719.21(b)(2) contains a requirement that the engagement letter from retained legal counsel must include a statement acknowledging that provision of records to the Government is not a waiver of applicable legal privilege, protection or immunity with respect to disclosure of these records to third parties. No additional acknowledgement requirement is necessary.

Comment 46: Several commenters suggested changes to section 719.21(b)(11), which sets forth the requirement that all engagement letters contain a statement that retained legal counsel will provide a certification concerning costs submitted for reimbursement. Several commenters suggested that the portion of the certification described in section 719.21(b)(11) affirming that ''the costs and charges set forth herein are necessary'' should read instead ''the costs and charges set forth herein are reasonable, appropriate and in conformance with 10 CFR 719 and the client engagement letter covering this invoice.'' In addition, the commenters suggested that section 719.21(b)(11) be changed from ''[i]nvoices must be submitted in conformance with the model bill format . . .'' to ''[i]nvoices must be submitted in conformance with the substance of the model bill format. . . .''

Response 46: The Department agrees with the commenters in part. The certification language in section 719.21(b)(11) in today's final rule reads ''the costs and charges set forth herein are appropriate and related to the representation of the client'' to reinforce that retained legal counsel will certify that all billed items were necessary to represent its client, the contractor. With respect to the suggestion that the certification specifically state that retained legal counsel affirms that charges set forth are in conformance with 10 CFR part 719, it is the contractor, not retained legal counsel, that must adhere to 10 CFR part 719. Section 719.21(a) reminds the DOE contracting community that the obligation to adhere to 10 CFR part 719 is placed on the contractors: ''[t]he engagement letter must require retained legal counsel to assist the contractor in complying with this part and any supplemental guidance distributed under this part.'' With respect to the comment that the invoices should be submitted in conformance with the substance of the model bill, the language of section 719.21(b)(11) in today's final rule clarifies that retained legal counsel must submit all information included in the model bill format of Appendix A to 10 CFR part 719, but that the invoice need not mirror the model bill. The modified language reads: ''[i]nvoices must contain all elements (e.g., date of service, description of service, name of attorney) set forth in the model bill format in Appendix A to this part.''

§ 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?

Comment 47: Several commenters objected to the proposed requirement in that contractors obtain prior authorization from Department Counsel if the contractor wishes to file a counterclaim in a matter in litigation. The commenters asserted that counterclaims are fundamentally different from initiating litigation insofar as counterclaims do not start a lawsuit; rather, they are asserted or waived when a contractor is sued. Several commenters objected to this new requirement on its face and urged that if it is not removed entirely the regulation should, at the very least, require Department Counsel to respond to the contractor's request within a finite period of time. The commenters expressed concern that a lack of a timely response by Department Counsel may result in a waiver of the contractor's right to file counterclaims.

Response 47: The Department recognizes that contractors may need to file counterclaims in a short time frame. Today's final rule removes the requirement that contractors obtain Department Counsel approval before filing counterclaims.

Comment 48: Several commenters noted that section 719.30 states that contractors must obtain prior written authorization from Department Counsel to initiate litigation and counterclaims but that 719.30(b) confuses matters by implying the contracting officer would communicate the Department's decision on whether the contractor may initiate or appeal adverse decisions.

Response 48: The Department agrees that proposed section 719.30(b) creates an internal inconsistency. Today's final rule deletes proposed section 719.30(b) because it confuses the identity of the individual responsible for communicating approval of initiation of litigation to the contractor.

Comment 49: One commenter suggested that section 719.30(a)(10) be modified to state that the Department must benefit from approved litigation and that benefits to the contractor should not be factored in when considering requests to approve litigation.

Response 49: The Department declines to modify today's final rule to incorporate the commenter's suggestion. The language of the proposed rule provides the Department with the information needed to use its discretion in determining whether to approve contractor initiation of litigation.

§ 719.31 When must the contractor initiate litigation against third parties?

Comment 50: One commenter noted that a contractor's counsel may be acting in violation of ethical responsibilities to the client if the attorney follows Departmental direction to engage in litigation that is not meritorious.

Response 50: We reject any suggestion that the Department would direct a contractor to initiate unmeritorious litigation to fulfill its contractual obligations. Resolution of hypothetical future disagreements concerning contractors' obligations in such circumstances is beyond the purview of these regulations. Any contractor concerns should be directed to Department Counsel.

Comment 51: Several commenters noted that the provision in section 719.31 requiring contractors to initiate litigation against third parties upon the request of the contracting officer should be deleted because it does not specifically confirm that reasonable costs arising from such litigation will be allowable.

Response 52: The Department believes that section 719.31 merely reserves to the government the right to direct the contractor to engage in litigation that it deems to be in the best interest of the Department. The allowability of litigation costs, including costs associated with litigation that the Department directs the contractor to undertake, will be evaluated by the contracting officer for reasonableness in light of the circumstances in the same manner as other costs incurred under the contract. Therefore, no blanket statement regarding the allowability of these costs is appropriate. No change to section 719.31 is necessary.

Comment 52: One commenter noted that the Department should add a discussion to the rule describing the effect of initiating litigation on the contractor and the Department, and stating why initiation of litigation would prove beneficial to the Department.

Response 52: The Department declines to implement the commenter's suggestion. The circumstances under which contractor initiation of litigation may be beneficial to the government will vary, but would normally be rooted in the government's interest in prudent expenditure of public funds (e.g., requiring a cost reimbursement contractor to file a lawsuit against a subcontractor when a positive outcome in the lawsuit would result in cost recapture for the government). Section 719.31 preserves all options so that the government may assert its right, among others, to cost recovery vis-a-vis the contractors that it reimburses.

§ 719.32 What must the contractor do when it receives notice that it is a party to litigation?

Comment 53: Several commenters noted that the Department should articulate why contractor litigation is subject to extra scrutiny in this regulation, suggesting instead that litigation should be treated like other contractor purchases that involve less government oversight.

Response 53: Contractor litigation costs can significantly affect the Department's financial resources. In addition, litigation against contractors often directly affects the reputation of the Department and, directly or indirectly, its legal position. In light of these facts, the Department believes it is appropriate to subject contractor litigation to scrutiny that is not applied to contractor purchases of other goods and services.

Comment 54: One commenter suggested that ''DOE/NNSA-approved'' should be stricken and instead ''Department Counsel-approved'' should be inserted in section 719.32(c)(1).

Response 54: The Department agrees to modify today's final rule to state that Department representatives will collaborate with contractor in-house counsel or Department Counsel approved outside counsel. This change is consistent with 719.32(b), which contemplates that the contractor shall proceed with litigation as directed from time to time by Department Counsel.

Comment 55: Several commenters suggested changing ''claim'' in section 719.32(c), (c)(1), and (c)(2) to ''legal proceeding'' because the remainder of 719.32 regulates a ''legal proceeding.''

Response 55: The Department agrees that the term ''legal proceeding'' used at the start of section 719.32 in (a) should be used throughout this subpart to ensure consistency.

§ 719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?

Comment 56: A number of commenters asserted that the $25,000 settlement agreement approval threshold is too low. Several commenters suggested that the settlement approval authority threshold be increased to at least $100,000. Several commenters also noted the lack of a finite deadline for the Department to respond to the contractor's request to settle a lawsuit. In addition, several commenters noted that 719.33's statement that Departmental approval to settle a case does not mean that the settlement amount or associated legal costs will be determined to be allowable is a departure from longstanding DOE practice.

Response 56: The Department believes that the $25,000 settlement agreement approval threshold is appropriate and no change is necessary. As noted previously, lawsuits against DOE/NNSA contractors have the potential to significantly affect DOE/NNSA budgetary resources and often bring additional non-monetary sensitivities. The Department believes it is appropriate to review and authorize settlement of cases for $25,000 or more. In addition, the vast majority of existing Legal Management Plans require Department Counsel approval of settlements for any monetary value and, therefore, section 719.33 does not represent a radical departure from existing practice. With respect to the request for a deadline for Department Counsel to reply to a request for authority to enter into a settlement agreement, the Department declines to include such a deadline. The Department understands the need for expeditious review of settlement requests and Department Counsel will endeavor to approve settlement requests as soon as is practicable upon receipt. With respect to the assertions that in the past, approval to settle was granted simultaneously with a determination on allowability, the Department acknowledges that in some instances, in the past, Contracting Officers made explicit allowability determinations at the same time that Department Counsel notified the contractor that it could settle a matter. Under today's final rule, contracting officers may still, in their discretion, make simultaneous settlement approval and cost allowability determinations. However, it should be noted that existing part 719 Appendix 5.2(B) makes clear that in some cases the final determination of allowability of legal costs cannot be made until a matter is fully resolved. In addition, 48 CFR (FAR) 31.201–3, clearly states that no presumption of reasonableness is attached to the incurrence of costs by a contractor. Therefore, the proposed statement in section 719.33 that the Departmental cost allowability determination is distinct from a determination regarding settlement approval reiterates a concept that has been reflected since part 719's initial publication and is a well-established cost reimbursement contracting principle. In addition, at the time the contractor seeks settlement authority from Department Counsel, the

contractor is in a position of superior knowledge regarding the underlying facts that may factor into a determination of the reasonableness of the costs, which may be revealed subsequent to the grant of settlement authority by Department Counsel to the contractor.

§ 719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?

Comment 57: Two commenters noted that plaintiffs' counsel with whom they are engaging in settlement discussions might not be willing to share the type of information required to be provided to the Department under section 719.34(g), such as the proposed amount to be provided to each plaintiff. The commenters noted that inability to furnish information to the DOE for this reason should not be considered a violation of the regulation.

Response 57: The Department recognizes that when a contractor is sued, plaintiff's counsel may not share with the contractor the monetary amount to be provided to each plaintiff. However, the Department believes no change is necessary because the first sentence of section 719.34 states that the contractor must provide a list of items in its settlement authority request ''that includes the following information, as applicable.'' The Department believes that use of the term ''as applicable'' accounts for the circumstance when a plaintiff's counsel simply will not reveal to the contractor how much each plaintiff will receive pursuant to the contemplated settlement agreement. Therefore, no change is required.

Comment 58: Two commenters noted that section 719.34's requirement that the contractor submit several documents to Department Counsel to inform the decision as to whether settlement authority should be granted puts the attorney client/work product privilege at risk.

Response 58: The Department declines to make any change to section 719.34 based on this comment. As stated in section 719.8, it is the view of the Department that otherwise privileged documents provided to the Department pursuant to part 719 are protected from disclosure to third parties because the Department and the contractors share a common interest in the litigation.

Comment 59: One commenter noted that the requirement in section 719.34(f) for contractors to provide information about all of the terms of the settlement agreement, including non-monetary terms, is intrusive and, further, the contractors have the contractual authority to manage their workforces, including handling nonmonetary settlement terms. The commenter also stated that the general requirement in section 719.34 to provide a settlement memorandum is unnecessary.

Response 59: The Department believes that contractor provision of all of the terms associated with a settlement proposal assists the Department in fully understanding and evaluating the contractor's settlement request. This subpart does not limit the contractor's ability to manage its workforce. No change is necessary.

§ 719.35 When must the contractor provide a copy of the executed settlement agreement?

Comment 60: Several commenters noted that the requirement in section 719.35 to provide an executed copy of the settlement agreement should be eliminated because the agreement may be subject to disclosure pursuant to FOIA. The commenters also noted that the requirement to submit the settlement agreement within seven days of execution was unnecessary.

Response 60: The Department discloses all documents subject to the Freedom of Information Act to promote the goals of transparency and accountability in government. The release of settlement agreements in the possession of the Department, both draft and executed, will be governed by FOIA. The benefit of Department Counsel review of all relevant provisions of a settlement agreement (e.g., to assist in a determination of the reasonableness of the underlying costs) outweighs the burden associated with potential disclosure of settlement agreements pursuant to FOIA. It is the view of the Department that it is not unduly burdensome for contractors to transmit a settlement agreement within seven days of execution. Therefore, no change to the time period is necessary.

§ 719.40 What effect do the regulations of this part have on cost allowability?

Comment 61: Several commenters objected to the language in section 719.40, which states that compliance with part 719 is a prerequisite for the allowability of legal costs. Some commenters asked whether the Department intends to establish a new standard for determining the allowability of legal costs.

Response 61: The purpose of the language in section 719.40 is to clarify language regarding cost allowability issues previously appearing at section 5.0 of the Appendix to the part, which was deleted in the proposed rule. Compliance with part 719 has always been one of several considerations in determining the allowability of legal costs and is not sufficient by itself to determine that costs are allowable. Another consideration is compliance with the other contract terms and conditions, including the standards for allowability articulated in FAR part 31 and DEAR part 931. Nevertheless, in order to ensure clarity, the following language is added to the last sentence of the section: ''In accordance with 48 CFR (FAR) part 31 and (DEAR) part 931 and all other applicable contract terms and conditions.''

Comment 62: One commenter recommended adding a ''mechanism for the contractor to challenge determinations that could increase potentially unreimbursed liabilities under the Disputes Clause.''

Response 62: The Department believes that the Contract Disputes Act referenced in the Disputes Clause of DOE contracts provides the legal mechanism for contractors to challenge Department decisions regarding cost allowability.

§ 719.41 How does the Department determine whether fees are reasonable?

Comment 63: One commenter recommends amending paragraph (b) to read: ''(b) Whether lower rates from other firms providing comparable services at comparable competency and experience levels were available.'' Another commenter recommended deleting this section because it could be misconstrued and understood to mean that the contractor must always use the least expensive option.

Response 63: The Department believes that in routine and unspecialized cases it is often unnecessary to engage law firms that charge higher than ordinary fees even where such law firms may be considered to have more or better experience in similar matters. The Department expects contractors to engage law firms that provide competent legal services at a good value. Therefore, a modified version of the suggested language is added to today's final rule to make it clear that the government expects contractors to engage outside counsel who are appropriately competent and experienced and who offer competitive rates.

§ 719.44 What categories of costs require advance approval?

Comment 64: Several commenters requested that the Department clarify section 719.44 by stating that it only

applies to costs incurred by retained legal counsel.

Response 64: The Department agrees that this section applies to certain costs incurred by retained counsel and not costs associated with in-house counsel. The Department has revised this section accordingly.

Comment 65: One commenter suggested that contractors' determinations regarding the reasonableness of outside counsel fee increases during the course of ongoing litigation action should be sufficient and recommended that requiring Department approval of such increases is unnecessary.

Response 65: Because litigation often lasts for long periods of time, the Department believes that it is important for it to approve fee increases in order to maintain effective cost control. The Department does not believe that obtaining Department approval for a fee increase in the middle of an action is likely to be an impediment to the progress of the action because sufficient notice of a fee increase should be given by outside counsel before it becomes effective, thereby providing ample time for the contractor to obtain DOE approval.

Comment 66: One commenter recommended that section 719.44(a)(1) be deleted, or in the alternative, the use of e-discovery vendors, commercially available software, and web-based review and production databases should be excluded from its purview. The commenter stated that the use of software analytics is standard industry practice and therefore the provision has outlived its usefulness. The commenter also objected to the language stating that the Department be given ''dominion over any computers or any general application software.'' The commenter expressed a concern that e-discovery vendors would object to the term and that it may violate the terms of software licenses.

Response 66: The Department declines to accept the commenter's proposals for section 719.44(a)(1). The regulation covers only computers, software, and databases purchased or created for specific matters. With respect to the commenter's objection to the Department's request for ''dominion'' over computers or software, this section does not involve access to all of the information on contractor counsel's computers, only the information related to the particular matters covered by the rule.

Comment 67: One commenter suggests deleting the requirement for DOE approval for two or more attorneys to attend depositions, the use of law clerks, and the retention of expert witnesses. These approvals were described as unduly burdensome and not cost-effective because contractors can effectively manage such costs.

Response 67: The Department believes that it is appropriate to require approval for these types of costs in order to maintain effective cost control. No change is required.

Comment 68: One commenter suggests an increase of the $5,000 threshold in subpart (a)(2) to $25,000 to reflect increases in costs of materials and non-attorney services over the last decade.

Response 68: The Department has removed the requirement for preapproval of charges for materials or non-attorney services exceeding $5,000.

Comment 69: One commenter suggested that any time the Department approves a fee increase for retained counsel, the approved increase should be deemed reasonable and allowable unless unallowable under some other applicable contract term or cost principle.

Response 69: Approval by the Department of a fee increase is one factor in determining the reasonableness of legal costs that include such a fee. However, when determining whether legal costs are allowable, factors other than the fee amount that must be considered and determined to be reasonable. The Department declines to modify today's final rule based upon the commenter's suggestion.

§ 719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?

Comment 70: Some commenters objected to the already-existing monitoring requirements applicable to legal costs incurred by subcontractors whose contracts provide for the reimbursement of legal costs.

Response 70: Through these regulations, the Department seeks to achieve an appropriate balance of Department oversight, contractor oversight, and the flexibility to allow subcontractors to handle legal matters with an appropriate degree of discretion. The general requirement for contractors to monitor legal costs incurred by their cost-reimbursement subcontractors is not new, and the Department considers it necessary to retain this requirement in order to ensure that all costs reimbursed to the contractor are reasonable and allowable, including pass-through costs incurred by lower-tier contractors and service providers.

Comment 71: Many commenters objected to the proposed requirements applicable to legal matters handled by retrospective insurance carriers. In the notice of proposed rulemaking, the Department proposed requirements applicable to all subcontractors as well as additional requirements applicable only to retrospective insurance carriers. The proposed rule would have required contractors to obtain from retrospective insurance carriers a Staffing and Resource Plan for all legal matters that are expected to reach or exceed $100,000 in cost, and engagement letters when insurance carriers retain the services of outside counsel for $25,000 or more. Contractors would also have needed to obtain approval from Department Counsel before authorizing retrospective insurance carriers to make settlements in amounts of $25,000 or more.

Many commenters expressed concern that these requirements would conflict with the existing cost and litigation controls and protocols used by retrospective insurance carriers and would lead to increases in premiums or possibly result in insurance carriers being unwilling to provide DOE contractors with retrospective insurance policies. The commenters noted that DOE has had a long-standing policy of encouraging the use of retrospective insurance carriers as a way to gain cost-effective claims-handling expertise and that including these requirements would potentially undermine the Department's objectives with respect to the use of retrospective insurance carriers. Some commenters also recommended that if DOE wishes to promulgate these additional requirements, DOE should directly negotiate with the insurance industry. Additionally, a number of commenters suggested that part 719's new retrospective insurance requirements conflict with the Department's policies on retrospective insurance articulated in DOE Order 350.1. Finally, one commenter objected to the section's characterization of retrospective insurance carriers as ''subcontractors.'' The commenter questioned the implications of this characterization.

Most comments urged the elimination of these new provisions, but some suggested in the alternative that DOE limit the application of the new requirements by excluding workers compensation and general liability policies from part 719. The comments also requested clarification on whether or not routine workers compensation matters handled by retrospective insurance carriers were meant to be excluded from the new requirements.

Response 71: The Department has fully considered the comments and has determined that many of the observations have merit. The Department recognizes the claims-handling expertise of retrospective insurance carriers and agrees that the proposed requirements could result in unnecessary redundancies in the insurance carriers' existing litigation management procedures and potentially result in higher premiums. However, the Department does not agree that the section should be eliminated in its entirety or that the Department should directly contract for retrospective insurance services. The Department believes that it is necessary for both the contractor and the Department to monitor the progress of certain legal matters handled by subcontractors whose contracts provide for the reimbursement of legal costs. Therefore, in light of the Department's objectives and the comments received, the Department has decided to modify the proposed rule as follows:

(1) The regulation includes a requirement that contractors employ a monitoring system for all significant matters handled by subcontractors other than retrospective insurance carriers whose legal costs will be reimbursed by the Department to ensure that both the contractor and the Department are regularly apprised of developments in the progress of significant matters.

(2) The regulation does not include a requirement that retrospective insurance carriers provide Staffing and Resource Plans or engagement letters.

(3) A requirement to provide the Department with cost information associated with legal matters handled by retrospective insurance carriers and other subcontractors upon request was added to facilitate determining cost allowability as necessary.

(4) Proposed section 719.46(g) discussing audits was deleted because it is redundant to the statement in section 719.46 regarding the Government right to audit costs.

(5) The requirement for contractors to provide the Department with cost and status updates for significant matters handled by subcontractors was retained in order to ensure that the Department is fully informed of the progress of significant matters and costs associated with such matters. However, this requirement no longer applies to significant matters handled by retrospective insurance carriers, except upon the written request by the Department.

(6) The regulation requires subcontractors, including retrospective insurance carriers, to obtain permission to enter into settlement agreements that exceed certain thresholds. The Department has determined that the appropriate settlement threshold for retrospective insurance carriers is $100,000, and the appropriate threshold for other subcontractors is $25,000.

The settlement threshold of $100,000 for retrospective insurance carriers is appropriate because it is recognized that insurance carriers bring certain claims-handling expertise. Additionally, settlements or payments by retrospective insurance carriers that are $100,000 or more represent a very small portion of the total claims handled by retrospective insurance carriers under DOE contracts. Therefore, it is anticipated that the $100,000 settlement approval requirement threshold will be triggered only occasionally.

The settlement approval threshold of $25,000 for subcontractors is appropriate because it is consistent with the requirement applicable to DOE prime contractors and because other subcontractors do not have the same expertise in handling claims or other legal matters that retrospective insurance carriers have.

Finally, the Department notes that coverage exclusions set forth in section 719.6 are applicable to the requirements of section 719.45.

§ 719.50 What authority does Department counsel have?

Comment 72: Two commenters noted that Department Counsel should be authorized Contracting Officer's Representatives (COR).

Response 72: The Department notes that the rule, as drafted, contemplates Department Counsel serving as authorized CORs for contracts subject to the part.

§ 719.51 What information must be forwarded to the General Counsel's office concerning contractor submissions to Department Counsel under this part?

Comment 73: One commenter stated that the requirement in section 719.51 that Department Counsel forward certain information to the General Counsel's office is overly burdensome.

Response 73: The Department disagrees. Moreover, the requirement relates to internal Department procedures, not contractor obligations.

§ 719.52 What types of field actions must be coordinated with the General Counsel?

Comment 74: One commenter recommended deletion of section 719.52 to the extent that it requires General Counsel approval for any exception or deviation from the part.

Response 74: The Department declines to follow this suggestion and today's rule requires General Counsel approval of deviations or exceptions to the part to ensure a coordinated approach to contractor legal management across the DOE complex.

Appendix A to Part 719—Guidance for Legal Resource Management

Comment 75: One commenter recommended deletion of the language concerning alternative dispute resolution. The commenter suggested prescriptive guidance on ADR has no value because each matter is case-specific.

Response 75: The new language merely encourages the contractor to consult with the Department's Office of Conflict Prevention and Resolution to evaluate whether a matter may be effectively and efficiently resolved by alternative dispute resolution. No change is necessary to the Appendix language.

Comment 76: One commenter objected to the limitation on copying charges to ten cents per page, because it has not been changed in the last 15 years.

Response 76: Today's rule eliminates the ten cents per page example from Note 2 to the Appendix and inserts ''number of pages times cost per page'' in its place.

Title 48—Federal Acquisition Regulations System

Part 970—DOE Management and Operating Contracts

Comment 77: One commenter inquired about the intended effect of deleting former subparagraph (i) of 48 CFR 970.5228–1. This paragraph stated that a contractor has the burden of proof to establish that costs are allowable and reasonable if, after an initial review of the facts, the Contracting Officer challenges a specific cost or informs the contractor that there is reason to believe that the cost results from willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

Response 77: The Department determined that this subparagraph is duplicative and unnecessary as FAR 31.201–3, Determining reasonableness, provides that the contractor holds the burden of proof if a cost is challenged by the contracting officer or COR.

Comment 78: One commenter asked what the Department intended when revising the direction in 48 CFR 952.231–71 and 970.5228–1 previously

at paragraph (j)(1) and in the proposed rule at (g)(1) regarding contractor handling of litigation costs. Specifically, the commenter asked what the Department means by requiring such costs to be ''excluded'' and whether the revised language expressed the presumption that litigation costs are unallowable.

Response 78: The Department appreciates the commenter's concern and understands that the revised language, when read in conjunction with FAR 31.201–6, Accounting for unallowable costs, may be read as indicating a presumption of unallowability. No such presumption is intended and the Department revises today's final rule to delete the term ''excluded'' from 48 CFR 952.231–71 and 970.5228–1 paragraph (j)(1). Paragraphs (g)(1) of the two clauses now mirror the language included at 48 CFR 31.205–47. The paragraphs state in pertinent part: ''All litigation costs, including counsel fees, judgments and settlements shall be segregated and accounted for by the contractor separately.''

General Comments

Comment 79: One commenter expressed concerns regarding the varying requirements that the contractor seek approvals and provide submissions to Department Counsel, the Contracting Officer, or both. The commenter suggests that the Department require Contracting Officers to designate Department Counsel as the single point of contact for part 719 requirements.

Response 79: The Department acknowledges the varying requirements identified by the commenter and today's final rule consistently identifies Department Counsel as the primary point of contractor contact for purposes of part 719.

Comment 80: One commenter suggested that Management and Operating contractors should not be subject to part 719 and instead should have a separate regulation for litigation expenses. The commenter noted the differences between Management and Operating contractors and other cost reimbursement contractors as significant and deserving of separate regulations.

Response 80: The Department does not believe that separate regulations for Management and Operations contractors and other cost reimbursement contractors are necessary or prudent. Part 719 provides an appropriate level of oversight for all contractors who are subject to its provisions.

Comment 81: One commenter suggested that the Department rescind part 719 and convert the substance of the part to a Department-issued manual. The commenter recommends that such a manual contain best management practices for legal management and that DOE issue the manual as a guide to be applied with skill and judgment of Department Counsel and contractor counsel through a graded approach depending on the experience level of contractor counsel. The commenter suggests that the proposed manual co-exist with a required Legal Management Plan developed and administered jointly by the contractor and the Department, compliance with which would be specifically required by a new contract clause. The commenter suggests that the Department should rely on 48 CFR 31.205–33 in determining cost allowability and consider allocating a portion of the contractor's fee to the ''management effectiveness'' section of the contractor's annual Performance Evaluation Management Plan, with fee deductions occurring for those contractors who do not manage their Legal Management Plan and/or litigation as provided in the Performance Evaluation Management Plan.

Response 81: The Department disagrees with the commenter's proposal that the regulation be rescinded and its substance converted to a manual of best practices. The Department believes that a uniform rule provides for consistency in oversight and control of contractor legal management and associated costs across the DOE complex. Of the possible approaches to contractor legal management, the Department believes that today's rule as amended in response to public comments strikes an appropriate balance and provides the best approach.

Comment 82: One commenter suggested that the regulations be applied only to contractor legal matters for which costs are expected to exceed $100,000. The commenter recommended that this will align treatment of contractor and Department retained counsel. Another commenter suggested that the Federal Acquisition Regulation Simplified Acquisition Threshold be used as a threshold under which legal matters could be handled with autonomy by the contractor.

Response 82: These recommendations would effectively raise all thresholds for requirements under the part to a minimum of $100,000. As explained herein, the Department believes that lower thresholds for various requirements are necessary to facilitate control of legal costs. Additionally, the distinction between applicability of the part to contractor and Department-retained counsel is justified because the Department has direct control of its costs in these matters as the represented client.

Comment 83: One commenter suggested that the proposed rule would increase costs and improperly increases oversight and administrative burdens. This commenter recommended that DOE withdraw the proposed rule, restart the rulemaking process, and proceed with increased contractor engagement.

Response 83: The Department has engaged contractors regarding the subject of today's rule during the years spent administering the regulations that previously appeared at 10 CFR part 719. The Department has carefully considered the comments received in response to the Notice of Proposed Rulemaking and believes that today's rule appropriately balances the benefits and burdens related to contractor legal management requirements.

Comment 84: Multiple commenters expressed that the proposed rule is contrary to the Department's general governance reform efforts and that the part increases the level of control over contractor legal management. One commenter stated that the proposed rule fails to acknowledge legal management innovations adopted by the contractor community since the part was first published in 2001 and is not properly innovative in its approach to the legal management landscape. Multiple commenters stated that the revisions to the part would increase burdens placed on the contractors and correspondingly increase costs. Multiple commenters stated that DOE and NNSA field counsel should have been more involved in the rulemaking process. Commenters also stated that the proposed rule goes beyond the recommendation of the 2009 Office of Inspector General Report regarding contractor litigation costs that was offered by the Department as one impetus for today's revision.

Response 84: The Department believes that today's rule provides for the correct amount of contractor and department-retained counsel oversight. The regulation reduces or eliminates several requirements contained in the previous version and adds only limited requirements necessary to ensure proper stewardship of taxpayer dollars. Certain requirements included in the regulation for the first time with today's rule (e.g., Department approval of contractor settlements in section 719.33) are simply codifications of contractual requirements. Additionally, the Department has carefully considered the comments received in response to the proposed rule and has deleted a number of proposed requirements. For example,

the requirements in Subpart E regarding retrospective insurance carriers have been significantly reduced. Today's final rule is the result of significant efforts to balance the needs of the Department with those of its contractors. Although the 2009 Inspector General Report was one impetus for today's final rule, it was not the only reason for the revision. The Department believes that the thorough review conducted by the Department and today's revisions to the rule will result in better management of retained legal counsel and contractor legal costs.

Comment 85: One commenter suggested broadly that the language regarding costs previously included in part 719 be restored. The commenter suggested that the primary purpose of the proposed revisions was to change the Department's approach to allowability of legal costs, but the Department failed to state this purpose.

Response 85: The Department disagrees with the commenter's characterization of the revisions to part 719. As discussed in the NOPR (76 FR 8148), the primary purposes of the revisions are to amend the requirements related to management of contractor legal costs to clarify and streamline existing requirements, improve efficiency of contractor legal management, and facilitate oversight of the expenditure of taxpayer dollars.

Comment 86: One commenter suggested revising the statement of authority underlying the part to include additional statutory citations.

Response 86: The Department declines to revise the statement of authority for the part. The current statement is accurate and sufficient.

III. Summary of Final Rule

Subpart A, sections 719.1–719.8, includes general provisions, defines important terms, and addresses applicability of the part. Section 719.2 defines terms used throughout the part. Today's final rule no longer includes a definition of legal matter because respondents noted that it caused confusion about the applicability of the part. The definitions of *litigation, retrospective insurance, significant matters,* and *Staffing and Resource Plan* were also modified in the final rule based on commenter concerns. The definition of *significant matter* now includes language requiring the Department to notify a contractor in writing if the Department determines a matter is significant.

Section 719.3 continues to cover all outside legal costs incurred under the Department's Management and Operating (M&O) contracts, non-management and operating cost reimbursement contracts exceeding $100,000,000, and non-Management and Operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000. Today's final rule retains the proposed expansion of applicability of the part; however, it now also references section 719.5 to make it clear that the part does not apply to contracts under which the Department does not reimburse legal costs even if they otherwise meet the criteria described in section 719.3. Sections 719.3 and 719.4 continue to apply this part to legal counsel retained directly by the Department where the legal costs over the life of the matter are expected to exceed $100,000.

Sections 719.5 and 719.6 describe types of contracts and legal matters not covered by this part and no significant changes were made to the NOPR in today's final rule. Procedures for exceptions or deviations from the part are set out in section 719.7. Today's final rule provides that, where a deviation or exception is requested, the General Counsel will provide a written response. Section 719.8 states that the sharing of certain information between contractors and the Department does not waive any applicable privilege, and today's final rule adds more potential bases for the privilege.

Subpart B, sections 719.10–719.17, describes the requirements for submission of a Legal Management Plan, Staffing and Resource Plan, and annual legal budget. Sections 719.10–719.14 concern the requirement for a Legal Management Plan. Today's final rule clarifies that requests for revised Legal Management Plans shall include an explanation and that the deadline for revised Legal Management Plans may be extended. Today's final rule removes two requirements from the Legal Management Plan under proposed section 719.12. The contractor no longer needs to provide a description of procedures for providing notification of the likely initiation of a legal matter to the Department or a description of procedures the contractor uses to ensure unallowable costs are not submitted for reimbursement. Section 719.14, concerning the adequacy of Legal Management Plans, is modified in today's final rule to allow the contractor the option of filing a letter disputing the determination of a deficiency.

Sections 719.15–719.17 explain the requirements associated with the Staffing and Resource Plan and budgets. Changes were made to 719.15 to limit the Staffing and Resource Plan requirement to litigation matters and to eliminate the need for contractors to obtain prior approval before incurring legal costs in excess of the budget. The contractor must still notify the Department before exceeding budget costs.

Subpart C, sections 719.20–719.21, describes the requirements for engagement letters. Contractors must submit executed engagement letters to Department Counsel when legal services are expected to exceed $25,000, as described in section 719.20. Section 719.21 describes the required elements of an engagement letter.

Subpart D, sections 719.30–719.35, describes the requirements related to contractor initiation of offensive or defensive litigation, including appeals, and for contractor settlement of legal matters. Current part 719 addresses initiation and defense of litigation in the Appendix to the part. Today's final rule deletes these portions of the Appendix and modifies and moves requirements regarding initiation and notification of litigation to subpart D. The regulations also modify and move requirements related to initiation and notification of litigation from the DEAR Insurance—Litigation and Claims clauses, 48 CFR 952.231–71 and 48 CFR 970.5228–1, to part 719, subpart D, in order to clarify the requirements and streamline the regulations. In today's final rule, the Department, of its own accord, decides to no longer assume the authority to prevent the contractor from initiating or defending litigation, including appeals, but the Department requires notice before litigation is initiated and maintains the right to authorize offensive litigation for which the contractor seeks reimbursement.

Section 719.33 requires a contractor to obtain permission from Department Counsel to enter a settlement agreement requiring contractor payment of $25,000 or more. Previously this requirement was included in contractor Legal Management Plans. Section 719.34 lists documentation that must be submitted with a contractor's request to settle a matter, and 719.35 provides contractors with a deadline for submitting executed settlement agreements to the Department.

Subpart E, sections 719.40–719.47, describes the policies and limitations for reimbursement of legal costs associated with retained legal counsel. Section 719.40 makes it clear that compliance with part 719 is a prerequisite for allowability of legal costs. Sections 719.42–719.44 describe categories of costs that are unallowable, require special treatment or need advance approval.

Section 719.45 describes special requirements related to subcontractors, including retrospective insurance carriers. These requirements are significantly modified from the Notice of Proposed Rulemaking. Retrospective insurance carriers must get prior approval from contractors if settlement payment is likely to reach $100,000 or more and subcontractors must get prior approval if settlement payment is likely to reach $25,000 or more. The contractor must obtain Department approval before authorizing payments to claimants exceeding the settlement thresholds.

Subpart F, sections 719.50–719.52, discusses the roles and responsibilities of Department Counsel. Section 719.50 describes the limitations on Department Counsel authority. Sections 719.51 and 719.52 set forth parameters for Department Counsel coordination with Department of Energy and National Nuclear Security Administration Offices of General Counsel.

The Appendix to part 719 discusses expectations related to alternative dispute resolution. The Appendix also makes clear that there is no presumption of reasonableness attached to incurrence of costs by a contractor and notes that the reasons underlying incurrence of a legal cost may affect its allowability. The Attachment to part 719 includes a model bill format for contractor use.

The Department is also making corresponding changes to the DEAR. The clause prescription at 48 CFR 931.205–19 is revised to prescribe insertion of the clause at 48 CFR 952.231–71 in (1) non-Management and Operating cost reimbursement contracts exceeding $100,000,000, and (2) non-Management and Operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000. The clause prescription at 48 CFR 970.2803–2 is revised to prescribe insertion of the clause at 48 CFR 970.5228–1 in all Management and Operating contracts. Both prescriptions are revised to clarify that the prescribed clauses are to be inserted instead of the clause at 48 CFR 52.228–7. The Insurance—litigation and claims clauses at 48 CFR 952.231–71 and 48 CFR 970.5228–1 are revised to reflect the above described consolidation of requirements related to initiation and notification of litigation in subpart D of part 719. Other changes to the clauses are included to simplify and clarify their requirements. Paragraph (a) of both DEAR clauses requires compliance with 10 CFR part 719 ''if applicable,'' recognizing that the clause sometimes may be included in contracts which do not provide for the reimbursement of legal costs subject to 10 CFR part 719. The cost principle at 48 CFR 931.205–33 is revised to reflect the amended applicability of the DEAR Insurance—litigation and claims clauses and to clarify the requirement for contractor compliance with part 719 when the part is applicable to a particular contract.

IV. Procedural Requirements

A. Review Under Executive Orders 12866 and 13563

This regulatory action has been determined not to be a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, 58 FR 51735, October 4, 1993. Accordingly, this rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. DOE has also reviewed this rule pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to, and explicitly reaffirms, the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's final rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729, February 7, 1996, imposes on executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by Section 3(a), Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or that it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, these regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq., requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment and is likely to have a significant economic impact on a substantial number of small entities unless the agency certifies that

the rule will not have a significant economic impact on a substantial number of small entities. DOE certified at the time of the proposed rule that this rulemaking would not have a significant economic impact on a substantial number of small entities. No comments were received regarding that certification. As a result, DOE adopts as final that certification and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

The final rule requires each covered contractor to submit a Legal Management Plan that describes the contractor's practices for managing legal matters for which it procures the services of retained legal counsel. Under certain circumstances Staffing and Resource Plans, annual legal budgets, and engagement letters are required to be submitted to the Department. Documentation related to initiation of litigation and settlement of legal matters also may be required. This collection of information is required for the Department to determine whether to approve reimbursement of contractors' litigation and other legal expenses.

Under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection has been reviewed and assigned a control number by Office of Management and Budget (OMB). OMB approved the information collection associated with this final rule under OMB Control Number 1910–5115.

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this final rule falls into a class of actions that would not individually, or cumulatively, have significant impact on the human environment, as determined by DOE's regulations, 10 CFR part 1021, Subpart D, implementing the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 et seq. Specifically, this rule is categorically excluded from NEPA review because today's rule is strictly procedural (categorical exclusion A6). Therefore, this rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 13132

Executive Order 13132, 64 FR 43255, August 4, 1999, imposes certain requirements on agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it would not preempt state law and 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. No further action is required by Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires a federal agency to perform a detailed assessment of costs and benefits of any rule imposing a federal mandate with costs to state, local or tribal governments, or to the private sector, of $100 million or more in any single year. This rule does not impose a federal mandate on state, local or tribal governments or on the private sector.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, requires federal agencies to issue a Family Policymaking Assessment for any rule or policy that may affect family well-being. This rule would have no impact on family well-being.

I. Review Under Executive Order 13211

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355, May 22, 2001, requires federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001, 44 U.S.C. 3516, note, provides for agencies to review most disseminations of information to the public under implementing guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452, February 22, 2002, and DOE's guidelines were published at 67 FR 62446, October 7, 2002. DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Congressional Notification

As required by 5 U.S.C. 801, the Department will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this rule. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

10 CFR Part 719

Government contracts, Legal services, Reporting and recordkeeping requirements.

48 CFR Parts 931, 952, and 970

Government contracts, Government procurement.

Issued in Washington, DC, on April 25, 2013.

Daniel B. Poneman,

Acting Secretary of Energy.

For the reasons set out in the preamble, the Department of Energy (DOE) amends Chapter III of Title 10 and Chapter IX of Title 48 of the Code of Federal Regulations as set forth below:

TITLE 10—ENERGY

Chapter III—Department of Energy

■ 1. Part 719 is revised to read as follows:

PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS

Sec.

Subpart A—General Provisions

719.1 What is the purpose of this part?
719.2 What are the definitions of terms used in this part?
719.3 What contracts are covered by this part?
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Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget

719.10 Who must submit a Legal Management Plan?
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719.12 What information must be included in the Legal Management Plan?
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Subpart C—Engagement Letter

719.20 When must an engagement letter be submitted to Department Counsel?
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Subpart D—Requests from Contractor Counsel to Initiate, Defend, and Settle Legal Matters

719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?
719.31 When must the contractor initiate litigation against third parties?
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719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?
719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?
719.35 When must the contractor provide a copy of an executed settlement agreement?

Subpart E—Reimbursement of Costs Subject to this Part

719.40 What effect do the regulations of this part have on cost allowability?
719.41 How does the Department determine whether fees are reasonable?
719.42 What categories of costs are unallowable?
719.43 What is the treatment of travel costs?
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719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?
719.46 Are costs covered by this part subject to audit?
719.47 What happens when more than one contractor is a party to a matter?

Subpart F—Department Counsel

719.50 What authority does Department Counsel have?
719.51 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department Counsel under this part?
719.52 What types of field actions must be coordinated with the General Counsel?

Appendix A to Part 719—Guidance for Legal Resource Management

Authority: 42 U.S.C. 2201, 5814, 5815 and 7101, et seq.; 50 U.S.C. 2401, et seq.

Subpart A—General Provisions

§ 719.1 What is the purpose of this part?

This part facilitates management of retained legal counsel and contractor legal costs, including litigation and legal matter costs. It requires the contractor to develop a Legal Management Plan, to document the analysis used to decide when to utilize outside counsel, and to document what law firm or individual attorney will be engaged as outside counsel. This part also requires the contractor to document the terms of the engagement with retained legal counsel. Payment of Department-retained law firm invoices and reimbursement of contractor legal costs under covered contracts are subject to compliance with this part.

§ 719.2 What are the definitions of terms used in this part?

For purposes of this part:

Alternative dispute resolution includes, but is not limited to, processes such as mediation, neutral evaluation, mini-trials and arbitration.

Contractor means any person or entity with whom the Department contracts for the acquisition of goods or services.

Covered contracts means those contracts described in § 719.3 of this part.

Days means calendar days.

Department means the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA).

Department Counsel means the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or for Department retained legal counsel, for purposes of this part.

General Counsel means the DOE General Counsel for DOE legal matters and the NNSA General Counsel for NNSA legal matters.

Legal costs means, but is not limited to, administrative expenses associated with the provision of legal services by retained legal counsel; the costs of legal services provided by retained legal counsel; the costs of the services, if the services are procured in connection with a legal matter, of accountants, consultants, experts or others retained by the contractor or by retained legal counsel; and any similar costs incurred by retained legal counsel or in connection with the services of retained legal counsel.

Legal Management Plan means a document required by subpart B of this part describing the contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel.

Litigation means a proceeding arising under or related to a contract between the contractor and the Department to which the contractor is a party in a State, tribal, territorial, foreign, or federal court or before an administrative body or an arbitrator.

Retained legal counsel means a licensed attorney working in the private sector who is retained by a contractor or the Department to provide legal services.

Retrospective insurance means any insurance policy under which the premium is not fixed but is subject to adjustments to reimburse the insurance carrier for actual losses incurred or paid (e.g. claims, settlements, damages, and legal costs). Retrospective insurance includes service-type insurance policies as described in 48 CFR 928.370.

Settlement agreement means a written agreement between a contractor and one or more parties pursuant to which one or more parties waives the right to pursue a legal claim in exchange for something of value.

Significant matters means legal matters involving significant issues as determined by Department Counsel and identified to a contractor in writing, and any legal matters where the amount of any legal costs, over the life of the matter, is expected to exceed $100,000.

Staffing and Resource Plan means a statement prepared in accordance with

subpart B of this part by retained legal counsel that describes the method for managing a Significant Matter in litigation.

§ 719.3 What contracts are covered by this part?

(a) Unless excluded under § 719.5, this part covers the following three categories of contracts:

(1) All management and operating contracts;

(2) Non-management and operating cost reimbursement contracts exceeding $100,000,000; and

(3) Non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000).

(b) This part also covers contracts otherwise not covered by paragraph (a) of this section but which contain a clause requiring compliance with this part.

(c) This part also covers any contract the Department awards directly to retained legal counsel exceeding $100,000.

§ 719.4 Are law firms that are retained by contract by the Department covered by this part?

Legal counsel retained under fixed rate or other type of contract or other agreement by the Department to provide legal services must comply with the following if the legal costs over the life of the matter for which counsel has been retained are expected by the Department to exceed $100,000 and retained legal counsel are so notified by the Department:

(a) Requirements related to Staffing and Resource Plans in subpart B of this part;

(b) Cost guidelines in subpart E of this part; and

(c) Engagement letter requirements in subpart C of this part if the retained legal counsel subcontracts legal work valued at $25,000 or more (e.g., a law firm retained by the Department subcontracts with another law firm to provide $26,000 in discovery-related legal work).

§ 719.5 What contracts are not covered by this part?

This part does not cover any contract under which the Department is not responsible for directly reimbursing the contractor for legal costs, such as fixed price contracts.

§ 719.6 Are there any types of legal matters not included in the coverage of this part?

Legal matters not covered by this part include:

(a) Matters handled by counsel retained by an insurance carrier, except under retrospective insurance in accordance with § 719.45;

(b) Routine intellectual property law support services; and

(c) Routine workers and unemployment compensation matters.

§ 719.7 Is there a procedure for exceptions or deviations from this part?

(a) Requests for exceptions or deviations from this part must be made in writing to Department Counsel and approved by the General Counsel. If an alternate procedure is proposed for compliance with an individual requirement in this part, that procedure must be included in the written request by the contractor. The General Counsel or his/her delegee shall provide a written response to such requests; however the response shall not require a justification of the Department's exercise of its discretion.

(b) The General Counsel may authorize exceptions or deviations requested under paragraph (a) of this section. The General Counsel may also establish exceptions to this part based on current field office and contractor practices that satisfy the purpose of these requirements.

(c) Exceptions to this part that are also a deviation from the Department of Energy Acquisition Regulation (DEAR) cost principles (see subpart D of this part) must be approved in accordance with applicable DOE procurement policy. See, e.g., DOE Acquisition Guide chapter 1.1, requiring approval by the Senior Procurement Executive of DOE or NNSA as applicable. In any event, the written request from a contractor for a deviation from a cost principle relating to this part must be submitted to the contracting officer, with a copy provided to Department Counsel.

§ 719.8 Does the provision of protected documents from the contractor to the Department constitute a waiver of privilege?

Contractors are required to provide detailed information about third-party claims and litigation to the Department. The Department and its contractors typically share common legal and strategic interests relating to pending or threatened litigation. The common interest between the parties is primarily rooted in the fact that the Department reimburses contractors for allowable costs incurred when litigation is threatened or initiated against contractors. However, other sources of the common interest between the Department and its contractors may include, but are not limited to, an interest in completion of the agency's important mission work and an interest in safe and efficient operation of the Department's facilities. To the extent documents associated with compliance with this part (e.g., Staffing and Resource Plans, invoices, engagement letters, settlement authority requests, and draft pleadings) are protected from disclosure to third parties because the items constitute attorney work product and/or involve attorney client communications, the contractor's provision of these items to the Department does not constitute a waiver of privilege. As long as the Department and the contractor share a common interest in the outcome of legal matters, this mutual legal interest permits the parties to share privileged material without waiving any applicable privilege.

Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget

§ 719.10. Who must submit a Legal Management Plan?

Contractors who are parties to contracts identified under § 719.3(a) and (b) must submit a Legal Management Plan.

§ 719.11 When must a Legal Management Plan be submitted or revised?

(a) Contractors must submit a Legal Management Plan to Department Counsel within 60 days following award of the contract. The deadline for submitting the Legal Management Plan may be extended by Department Counsel.

(b) Contractors must submit a revised Legal Management Plan upon request of Department Counsel within 60 days of receipt of the Department Counsel's request. The request for a revised Legal Management Plan shall include an explanation of the request. The deadline for submitting the Legal Management Plan may be extended by the Department Counsel.

§ 719.12 What information must be included in the Legal Management Plan?

The Legal Management Plan must include the following items:

(a) A description of the contractor's in-house counsel resources at the time the Legal Management Plan is submitted, including areas of expertise and an explanation of the types of matters expected to be handled in-house.

(b) A description of the legal matters that may necessitate engagement of retained legal counsel.

(c) A description of the factors the contractor will consider in determining whether to handle a particular matter utilizing retained legal counsel.

(d) An outline of the factors the contractor must consider in selecting retained legal counsel, including:

(1) Cost;

(2) Past performance of previously retained counsel;

(3) Particular expertise in a specific area of the law;

(4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;

(5) Location of retained legal counsel relative to:

(i) The site involved in the matter,

(ii) Any forum in which the matter will be processed, and

(iii) The location where a significant portion of the work will be performed;

(6) Experience as an advocate in alternative dispute resolution procedures such as mediation;

(7) Actual or potential conflicts of interest; and

(8) The means and rate of compensation (e.g., hourly billing, fixed fee, blended fees).

(e) A description of the system that the contractor will use to review each matter in litigation to determine whether and when alternative dispute resolution is appropriate.

(f) A description of the role of in-house counsel in cost management.

(g) A description of the contractor's process for review and approval of invoices for legal costs.

(h) A description of the contractor's strategy for interaction with, and supervision of, retained legal counsel.

(i) A description of the procedures the contractor will employ in order to seek timely approval from Department Counsel to settle any legal matters as required by § 719.34 of this part;

(j) A description of the contractor's strategy for keeping Department Counsel apprised of all legal matters covered by this part (e.g., regularly scheduled meetings and written communications).

§ 719.13 Who at the Department receives and reviews the Legal Management Plan?

Contractors must submit a Legal Management Plan to Department Counsel. If the contractor has not been notified of the assignment of Department Counsel, the contractor must submit the Legal Management Plan to the contracting officer and the DOE Deputy General Counsel for Litigation and Enforcement or the NNSA Deputy General Counsel as appropriate.

§ 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?

The Contracting Officer or Department Counsel will notify the contractor of any non-compliance or inadequate information relating to requirements in § 719.12 within 30 days of the contractor's submission of the plan. The contractor must either correct matters identified within 30 days of notification or file a letter with the General Counsel disputing the determination of a deficiency.

§ 719.15 What are the requirements for a Staffing and Resource Plan?

(a) For significant matters in litigation, the contractor must require retained legal counsel to prepare a Staffing and Resource Plan. The contractor must then forward the Staffing and Resource Plan to Department Counsel.

(b) Retained legal counsel retained directly by the Department subject to this part must prepare a Staffing and Resource Plan and forward it to Department Counsel.

(c) A Staffing and Resource Plan must describe the following:

(1) Major phases likely to be involved in the handling of the matter;

(2) Timing and sequence of such phases;

(3) Projected cost for each phase of the representation; and

(4) Detailed description of resources that the retained legal counsel intends to devote to the representation.

(d) A Staffing and Resource Plan must include a budget, broken down by phases, including at a minimum the following phases:

(1) Matter assessment, development and administration;

(2) Pretrial pleadings and motions;

(3) Discovery;

(4) Trial preparation and trial; and

(5) Appeal.

(e) The contractor must notify Department Counsel before incurring retained legal counsel costs in excess of costs listed in the budget developed pursuant to paragraph (d) of this section.

§ 719.16 When must the Staffing and Resource Plan be submitted?

(a) The contractor or retained legal counsel must submit the Staffing and Resource Plan to Department Counsel within 30 days after the filing of an answer or a dispositive motion in lieu of an answer, 30 days after a determination that the cost is expected to exceed $100,000, or 30 days after notification from Department Counsel that a matter is considered significant, whichever is sooner. The deadline for submitting the Staffing and Resource Plan may be extended by Department Counsel.

(b) Department Counsel may state objections to the Staffing and Resource Plan within 30 days of receipt of a Staffing and Resource Plan. When an objection is stated, the contractor or retained legal counsel must either revise the Staffing and Resource Plan to satisfy the objection within 30 days or file a letter with the General Counsel disputing the objection.

(c) Contractors must require retained legal counsel to update Staffing and Resource Plans annually or more frequently if there are significant changes in the matter. The contractor must submit the Staffing and Resource Plan updates to Department Counsel. Similarly, Department retained legal counsel must submit to Department Counsel annual Staffing and Resource Plan updates or more frequent updates if there are significant changes in the matter.

§ 719.17 Are there any budgetary requirements?

(a) Contractors required to submit a Legal Management Plan must also submit an annual legal budget to Department Counsel.

(b) The annual legal budget must include cost projections for significant matters at a level of detail reflective of the types of billable activities and the stage of each such matter.

(c) For informational purposes for both the contractor and Department Counsel, the contractor must submit a report to Department Counsel comparing its budgeted and actual legal costs within 30 days of the conclusion of the period covered by each annual legal budget. The Department recognizes, however, that there may be departures from the annual budget beyond the control of the contractor.

Subpart C—Engagement Letter

§ 719.20 When must an engagement letter be submitted to Department Counsel?

Contractors must submit a copy of an executed engagement letter between it and retained legal counsel to Department Counsel when the retained counsel is expected to provide $25,000 or more in legal services for a particular matter. A copy of the executed engagement letter must be submitted to Department Counsel upon execution.

§ 719.21 What are the required elements of an engagement letter?

(a) The engagement letter must require retained legal counsel to assist

the contractor in complying with this part and any supplemental guidance distributed under this part.

(b) At a minimum, the engagement letter must include the following:

(1) A process for review and documented approval of all billing by a contractor representative including the timing and scope of billing reviews.

(2) A statement that provision of records to the Government is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties. An exemption for specific records may be obtained where contractors can demonstrate that a particular situation may provide grounds for a waiver.

(3) A requirement that the contractor, the Department, and the Government Accountability Office have the right, upon request, and at reasonable times and locations to inspect, copy, and audit all records documenting billable fees and costs.

(4) A statement that all records must be retained for a period of six (6) years and three (3) months after the final payment or after final case disposition, whichever is later.

(5) Identification of all attorneys and staff who are assigned to the matter and the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary adjustments in staffing levels or identified attorneys.

(6) An initial assessment of the matter by retained legal counsel, along with a commitment to provide updates as necessary.

(7) A description of billing procedures, including frequency of billing and billing statement format.

(8) A statement setting forth an agreement that the retained legal counsel will prepare a Staffing and Resource Plan in accordance with the requirements of § 719.15.

(9) A statement setting forth an agreement to consider alternative dispute resolution at the earliest possible stage and thereafter as appropriate where litigation is involved.

(10) A statement setting forth an agreement that retained legal counsel must comply with the cost guidelines in subpart E of this part.

(11) A statement setting forth an agreement that retained legal counsel will provide a certification concerning the costs submitted for reimbursement. The certification that must be included in bills or invoices submitted by retained legal counsel must appear as follows: ''Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set forth in the Department of Energy's regulation and guidance on contractor legal management requirements, and that the costs and charges set forth herein are appropriate and related to the representation of the client.'' The certification must be signed and dated by a representative of the retained legal counsel. Invoices must contain all elements (e.g., date of service, description of service, name of attorney, etc.) set forth in the model bill format in Appendix A to this part.

(12) A statement setting forth agreement to identify and address promptly any professional conflicts of interest.

(c) There may be additional requirements for an engagement letter based on the needs of the contractor or the Departmental element requiring the services of the Department retained legal counsel.

Subpart D—Requests From Contractor Counsel To Initiate, Defend, and Settle Legal Matters

§ 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?

(a) The contractor must provide written notice to Department Counsel prior to initiating litigation or appealing from adverse decisions.

(b) The contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department Counsel.

(c) The following information must be provided to Department Counsel by the contractor prior to initiating litigation or appealing an adverse decision:

(1) Identification of the proposed parties;

(2) The nature of the proposed action;

(3) Relief sought;

(4) Venue;

(5) Proposed representation and reason for selection;

(6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;

(7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;

(8) Whether, for any reason, the contractor will assume any part of the costs of the action;

(9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and

(10) A discussion regarding why initiating litigation would prove beneficial to the contractor and to the Department.

§ 719.31 When must the contractor initiate litigation against third parties?

The contractor must initiate litigation, upon the request of the contracting officer, against third parties including proceedings before administrative agencies, in connection with the contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by Department Counsel.

§ 719.32 What must the contractor do when it receives notice that it is a party to litigation?

(a) The contractor shall give the contracting officer and Department Counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency and any claim which will be handled by a retrospective insurance carrier if costs (including Legal costs, settlements, claims paid, damages, etc.) are likely to be $100,000 or more, filed against the contractor arising out of the performance of the contract and shall provide a copy of all relevant filings and any other documents that may be requested by the contracting officer and/or Department Counsel. The Department Counsel will direct the contractor as to:

(1) Whether the contractor must authorize the Government to defend the action;

(2) Whether the Government will take charge of the action; or

(3) Whether the Government must receive an assignment of the contractor's rights.

(b) The contractor shall proceed with such litigation in good faith and as directed from time to time by the Department Counsel.

(c) If the costs and expenses associated with the legal proceeding against the contractor are potentially allowable under the contract, the contractor shall:

(1) Authorize Department representatives to collaborate with contractor in-house counsel or Department Counsel-approved outside counsel in settling or defending the legal proceeding; or counsel for any associated insurance carrier in settling

or defending the claim if retrospective insurance applies or the amount of liability claimed exceeds the amount of insurance coverage; and

(2) Authorize Department representatives to settle the legal proceeding or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, except where the liability is covered by bond or is insured by an insurance policy other than retrospective insurance.

§ 719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?

The contractor must obtain permission from Department Counsel to enter a settlement agreement if the settlement agreement requires contractor payment of $25,000 or more. Obtaining this approval does not represent a determination that the settlement amount and/or the legal costs incurred in connection with the underlying legal matter will be determined to be allowable.

§ 719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?

The contractor must provide a written statement to the Department Counsel that includes the following information, as applicable:

(a) The amount of any proposed monetary settlement payment.

(b) Titles and docket numbers associated with the case(s) for which the contractor is seeking approval to settle;

(c) The procedural history of the case(s) or issue(s);

(d) A narrative description of the legal claims or allegations at issue in the matter and any background information that explains events that precipitated the initiation of the matter;

(e) A description of the history of the settlement discussions;

(f) A description of the terms of the proposed settlement agreement or requested settlement authority and the rationale for the contractor entering into the proposed agreement;

(g) If the proposed total monetary settlement amount would be allocated among multiple plaintiffs, a list of the plaintiffs and the amount of money each would receive pursuant to the proposed settlement agreement as well as an explanation as to why the settlement amount is different for any particular plaintiff, if appropriate;

(h) A description as to why settlement of the matter is in the best interest of the Department; and

(i) Any additional supporting documents requested by Department Counsel.

§ 719.35 When must the contractor provide a copy of an executed settlement agreement?

A contractor must provide a copy of an executed settlement agreement within seven (7) days of execution.

Subpart E—Reimbursement of Costs Subject to This Part

§ 719.40 What effect do the regulations of this part have on cost allowability?

Contractor and retained legal counsel compliance with this part is a prerequisite for allowability of legal costs. However, compliance with this part does not guarantee that legal costs will be determined to be allowable. Only the contracting officer has the authority to determine allowability of costs in accordance with 48 CFR (FAR) part 31 and (DEAR) part 931 and all other applicable contract terms and conditions.

§ 719.41 How does the Department determine whether fees are reasonable?

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider among other things:

(a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;

(b) Whether lower rates from other firms providing comparable services, at appropriate competency and experience levels, were available;

(c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were considered; and

(d) The complexity of the legal matter and the expertise of the law firm in this area.

§ 719.42 What categories of costs are unallowable?

(a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31 and 48 CFR (DEAR) part 931 and 48 CFR 970.31. See also 41 U.S.C. 4304.

(b) Costs that are customarily or already included in billed hourly rates are not separately reimbursable.

(c) Interest charges that a contractor incurs on any outstanding (unpaid) bills from retained legal counsel are not reimbursable.

§ 719.43 What is the treatment of travel costs?

(a) Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR 31.205–46, or 48 CFR (DEAR) 970.3102–05–46, as appropriate, to be reimbursable.

(b) Travel time may be allowed at a full hourly rate for the portion of time during which retained legal counsel performs legal work for which it was retained; any remaining travel time shall be reimbursed at 50 percent of the full hourly rate, except that in no event will travel time spent working for other clients be allowable. Also, for long distance travel that could be completed by various methods of transportation, e.g., car, train, or plane, costs charged by retained legal counsel or any agent of retained legal counsel will be considered reasonable only if the individuals charge no more travel time than it would take to utilize the fastest mode of transportation that is cost-effective. For example, if retained legal counsel travels for 10 hours by train when a cost-effective flight that would take two hours to get to the same destination is available, the attorney may charge a maximum of two hours for the time spent traveling.

§ 719.44 What categories of costs require advance approval?

(a) To be considered for reimbursement, costs incurred by retained legal counsel for the following require advance written approval from Department Counsel or the submission of subsequent specific justification to Department Counsel when circumstances out of the contractor's control make advance approval unobtainable:

(1) Computers or general application software, or non-routine computerized databases, if they are specifically created for a particular matter. For costs associated with the creation and use of computerized databases, contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and cost-effective. Use of databases originally created by the Department or its contractors for other purposes, but that can be used to assist a contractor or retained legal counsel in connection with a particular matter, should be considered. Contractors and retained legal counsel must ensure that DOE is provided the discretion to obtain unlimited access to and dominion over any computers or general application software, or non-routine computerized databases specifically created for a particular matter;

(2) Secretarial and support services, word processing, or temporary support personnel;

(3) Attendance by more than one attorney at a deposition, court hearing or interview;

(4) Expert witnesses and consultants;

(5) Trade publications, books, treatises, background materials, and other similar documents;

(6) Professional or educational seminars and conferences;

(7) Preparation of bills or time spent responding to questions about bills from either the Department or the contractor;

(8) Food and beverages when the attorney or consultant is not on travel status and away from the home office;

(9) Pro hac vice admissions; and

(10) Time charged for law students' or interns' services.

(b) Requests for fee increases by retained legal counsel, other than those under contract directly with the Department, must be sent in writing to the contractor, who will review the request for reasonableness. If the contractor determines the request is reasonable, the contractor must seek approval for the increase from Department Counsel before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two year period.

§ 719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?

(a) The contractor shall establish a monitoring system for significant matters in litigation which are handled by subcontractors other than retrospective insurance carriers whose contracts provide for the reimbursement of legal costs. The purpose of this monitoring system is to enable the contractor to be regularly informed of the progress of the Significant Matter, to monitor the associated costs and help ensure that they are reasonable, and to report on the progress of the Significant Matter and the associated costs to Department Counsel.

(b) The contractor shall require retrospective insurance carriers and other subcontractors whose contracts provide for the reimbursement of legal costs to request prior permission from the contractor to enter into a settlement agreement with, or make any payments to, claimants or third-parties if:

(1) In the case of a subcontractor other than a retrospective insurance carrier, the settlement or payment amount is likely to reach $25,000 or more; or

(2) In the case of a retrospective insurance carrier, the settlement or payment amount is likely to reach $100,000 or more.

(c) The contractor shall require the insurance carrier or other subcontractor to submit all documentation described in § 719.34 and to provide the contractor with a copy of the executed settlement agreement within seven days of execution, which the contractor will promptly forward to Department Counsel. The contractor shall not authorize the subcontractor to enter into a settlement agreement or make a payment to a claimant or third-party that is likely to reach or exceed the above-stated threshold amounts without first obtaining the approval of the Department Counsel.

(d) Upon request from Department Counsel, the Contracting Officer, or other authorized representative of the Department, the contractor shall provide detailed cost information regarding particular legal matters handled by retrospective insurance carriers or other subcontractors whose contracts provide for the reimbursement of legal costs.

(e) The contractor shall provide reviewed costs and status updates for all significant matters in litigation handled by subcontractors whose contracts provide for the reimbursement of legal costs in accordance with § 719.51. The contractor is not required to provide cost and status updates for matters handled by retrospective insurance carriers except upon the written request of the cognizant Contracting Officer or Department Counsel.

§ 719.46 Are costs covered by this part subject to audit?

All costs covered by this part are subject to audit by the Department, its designated representative, or the Government Accountability Office. *See* § 719.21.

§ 719.47 What happens when more than one contractor is a party to a matter?

(a) If more than one contractor is a party in a particular matter and the issues involved are similar for all the contractors, a single legal counsel designated by the General Counsel must either represent all of the contractors or serve as lead counsel, when the rights of the contractors and the Government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.

(b) If a contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of contractors, or serve as lead counsel, then the legal costs of such contractor are not reimbursable by the Department, unless the contractor demonstrates that it was reasonable for the contractor to incur such expenses.

Subpart F—Department Counsel

§ 719.50 What authority does Department Counsel have?

(a) Department Counsel will receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters.

(b) Actions by Department Counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority shall not be construed to include the authority to execute or modify the contract or resolve any contract dispute arising under the contract. Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR 1.602–1, and contracting officer's representatives at 48 CFR (DEAR) 942.270–1. The clause, Technical Direction, 48 CFR (DEAR) 952.242–70, also discusses the responsibilities and authority of a contracting officer's representative.

§ 719.51 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department Counsel under this part?

Department Counsel must submit through the General Counsel reporting system, the reviewed costs and status updates for all matters involving retained counsel, including but not limited to contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

§ 719.52 What types of field actions must be coordinated with the General Counsel?

(a) Requests from contractors for exceptions or deviations from this part must be submitted to the contracting officer and Department Counsel, and approved by the General Counsel or his/her delegee.

(b) Requests from contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of national significance to the Department or of broad applicability to the Government that might adversely impact its operations are involved must be coordinated by Department Counsel with the General Counsel or his/her delegee.

(c) Department Counsel must inform the General Counsel of any Significant Matter, as defined in this part, and must coordinate any action involving a Significant Matter with the General Counsel, or his/her delegee, as directed by the General Counsel or his/her delegee.

Appendix A to Part 719—Guidance for Legal Resource Management

Management and Administration of Outside Legal Services

1.0 Alternative Dispute Resolution
2.0 Cost Allowability Issues
2.1 Underlying Cause for Incurrence of Costs
Attachment—Contractor Litigation and Legal Costs, Model Bill Format

Management and Administration of Outside Legal Services

This guidance is intended to assist contractors, contracting officers and retained legal counsel in managing the costs of outside legal services.

1.0 Alternative Dispute Resolution

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, e.g., before a case is filed, during pre-discovery, after initial discovery and during pretrial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or Department Counsel if an ADR liaison has not been appointed. Contractors, contractor counsel, and Department Counsel are also encouraged to consult with the Department's Director of the Office of Conflict Prevention and Resolution. The Department anticipates that mediation will be the principal and most common method of alternative dispute resolution. Agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, et seq.) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

2.0 Cost Allowability Issues

A determination of cost reasonableness depends on a variety of considerations and circumstances. 48 CFR 31.201–3 establishes that no presumption of reasonableness is attached to the incurrence of costs by a contractor.

2.1 Underlying Cause for Incurrence of Costs

While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate issue. The reason for the contractor incurring costs may affect the allowability of the contractor's legal costs. In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional reimbursements or withholds any payment pending the outcome, legal costs ultimately reimbursed by the Department must comply with the applicable cost principles, the terms of the contract, and part 719.

Attachment—Contractor Litigation and Legal Costs, Model Bill Format

1. Model Bill Format

I—FOR FEES

Date of service	Description of service	Name or initials of attorney	Approved rate	Time charged	Amount (rate × time)
(See Note 1 to this table).					

II—FOR DISBURSEMENTS

Date	Description of disbursement	Amount
(See Note 1 to this table).		

Note 1—Description of Service: All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g., subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

Note 2—Description of Disbursement: Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable Department policies on reimbursement of contractor legal costs and the terms of engagement between the contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (i.e., number of pages times the price per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (e.g., bulk or certified mail); court reporters; expert witness fees; filing fees; outside copying or binding charges; temporary help (assuming prior approval).

Note 3—Receipts: Receipts for all expenses equal to or above $75 must be attached.

TITLE 48—FEDERAL ACQUISITION REGULATIONS SYSTEM

Chapter 9—Department of Energy

PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 2. The authority citation for part 931 continues to read as follows:

Authority: 42 U.S.C. 7101, et seq.; 50 U.S.C. 2401, et seq.

■ 3. Section 931.205–19 is revised to read as follows:

931.205–19 Insurance and indemnification.

(f) The contracting officer shall insert the clause at 952.231–71, Insurance-litigation and claims, instead of the clause at 48 CFR 52.228–7, in

(1) Non-management and operating cost reimbursement contracts exceeding $100,000,000, and

(2) Non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000 (e.g. contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000.

■ 4. Section 931.205–33 is revised to read as follows:

931.205–33 Professional and consultant service costs.

(g) If the clause at 48 CFR 952.231–71 or the clause at 48 CFR 970.5228–1 is included in the contract, or the contract is a non-management and operating contract exceeding $100,000,000 that includes cost reimbursable elements exceeding $10,000,000 (for example, contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000), litigation and other legal costs are only allowable if both: incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements; and not otherwise made unallowable by law, regulation, or the terms of the contract.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. The authority citation for part 952 continues to read as follows:

Authority: 42 U.S.C. 7101 et seq. and 50 U.S.C. 2401 et seq.

■ 6. Section 952.231–71 is revised to read as follows:

952.231–71 Insurance-litigation and claims.

As prescribed in 931.205–19(f), insert the following clause in applicable non-management and operating contracts:

Insurance—Litigation and Claims (JUL 2013)

(a) The contractor must comply with 10 CFR part 719, contractor Legal Management Requirements, if applicable.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the limitation of cost or limitation of funds clause of this contract.

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f)(1) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgment and settlements—

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by contractor managerial personnel's—

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term ''contractor's managerial personnel'' is defined in the Property clause in this contract.

(g)(1) All litigation costs, including counsel fees, judgments and settlements shall be segregated and accounted for by the contractor separately. If the Contracting Officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

■ 7. The authority citation for part 970 continues to read as follows:

Authority: 42 U.S.C. 2201: 2282a: 2282b: 2282c: 42 U.S.C. 7101 et seq.: 50 U.S.C. 2401, et seq.

■ 8. Section 970.2803–2 is revised to read as follows:

970.2803–2 Contract clause.

The contracting officer shall insert the clause at 970.5228–1, Insurance—Litigation and Claims, instead of the clause at 48 CFR 52.228–7, in all management and operating contracts. Paragraphs (f)(3)(C) and (g)(2) of that clause apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

■ 9. Section 970.5228–1 is revised to read as follows:

970.5228–1 Insurance—litigation and claims.

As prescribed in 970.2803–2, insert the following clause:

Insurance—Litigation and Claims (JUL 2013)

(a) The contractor must comply with 10 CFR part 719, Contractor Legal Management Requirements, if applicable.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the clause of this contract entitled ''Obligation of Funds.''

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f)(1) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgments and settlements—

(i) Which are otherwise unallowable by law or the provisions of this contract,

including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by contractor managerial personnel's—

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term ''contractor's managerial personnel'' is defined in the Property clause in this contract.

(g)(1) All litigation costs, including counsel fees, judgments and settlements shall be segregated and accounted for by the contractor separately. If the Contracting Officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

[FR Doc. 2013–10485 Filed 5–2–13; 8:45 am]

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2012–0039]

RIN 3170–AA28

Truth in Lending (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) issues this final rule to amend Regulation Z, which implements the Truth in Lending Act (TILA), and the official interpretations to the regulation. Regulation Z generally prohibits a card issuer from opening a credit card account for a consumer, or increasing the credit limit applicable to a credit card account, unless the card issuer considers the consumer's ability to make the required payments under the terms of such account. Regulation Z currently requires that issuers consider the consumer's independent ability to pay, regardless of the consumer's age; in contrast, TILA expressly requires consideration of an independent ability to pay only for applicants who are under the age of 21. The final rule amends Regulation Z to remove the requirement that issuers consider the consumer's independent ability to pay for applicants who are 21 or older, and permits issuers to consider income and assets to which such consumers have a reasonable expectation of access.

DATES: The rule is effective on May 3, 2013. Compliance with the rule is required by November 4, 2013. Card issuers may, at their option, comply with the final rule prior to this date.

FOR FURTHER INFORMATION CONTACT: Krista P. Ayoub and Andrea Pruitt Edmonds, Senior Counsels, Office of Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552, at (202) 435–7000.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

The Credit Card Accountability Responsibility and Disclosure Act (Credit Card Act) was enacted in 2009 as an amendment to the Truth in Lending Act (TILA) to address concerns that certain practices in the credit card industry were not transparent or fair to consumers. As amended, TILA section 150 generally prohibits a card issuer from opening a credit card account or increasing a line of credit for any consumer unless it considers the consumer's ability to make the required payments under the terms of the account. TILA section 127(c)(8) establishes special requirements for consumers under 21 and, among other things, prohibits a card issuer from extending credit to younger consumers unless the consumer's written application is cosigned by a person 21 or older with the means to make the required payments, or the card issuer has financial information that indicates the consumer's independent ability to make the required payments under the terms of the account. The statutory requirements in TILA sections 150 and 127(c)(8) are implemented in section 1026.51(a) and (b) of Regulation Z, respectively. Notwithstanding TILA's different ability-to-pay standards for consumers based on age, Regulation Z currently applies the independent ability-to-pay standard to all consumers, regardless of age.

The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to amend § 1026.51 and the official interpretations to the regulation to address concerns that, in light of the statutory framework established by TILA sections 150 and 127(c)(8), current § 1026.51(a) may be unduly limiting the ability of certain individuals 21 or older, including spouses or partners who do not work outside the home, to obtain credit. The final rule takes effect on the date of publication in the **Federal Register** and all covered persons must come into compliance with the final rule no later than six months from the effective date, although covered persons may come into compliance before that date.

The final rule has four main elements. First, the final rule generally removes references to an ''independent'' ability-to-pay standard from § 1026.51(a)(1) and associated commentary. As a result, card issuers are no longer required to consider whether consumers age 21 or older have an independent ability to pay; instead, card issuers are now required by Regulation Z to consider the consumer's ability to pay. Second, in determining a consumer's ability to pay, the final rule permits issuers to consider income or assets to which an applicant or accountholder who is 21 or older—and thus subject to § 1026.51(a) rather than § 1026.51(b) □ has a reasonable expectation of access. The final rule clarifies by examples in the commentary those circumstances in which the expectation of access is deemed to be reasonable or unreasonable. Third, the final rule continues to require in § 1026.51(b)(1)(i) that consumers under the age of 21 without a cosigner or similar party who is 21 years or older have an independent ability to pay, consistent with TILA section 127(c)(8). Finally, the final rule clarifies that application of the independent ability-to-pay standard to consumers under 21, consistent with Regulation Z, does not violate the Regulation B prohibition against age-based discrimination.

II. Background

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act) was signed into law on May 22, 2009.[1] The Credit Card Act primarily amended the Truth in Lending Act (TILA) and instituted new substantive and disclosure requirements to establish fair and transparent

[1] Public Law 111–24, 123 Stat. 1734 (2009).

practices for open-end consumer credit plans.

The Credit Card Act added TILA section 150, which states that ''[a] card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account.'' [2] The Credit Card Act also added TILA section 127(c)(8), which applies special requirements for consumers under the age of 21. Section 127(c)(8)(A) provides that ''[n]o credit card may be issued to, or open end consumer credit plan established by or on behalf of, a consumer who has not attained the age of 21, unless the consumer has submitted a written application to the card issuer'' that meets certain specific requirements.[3] Section 127(c)(8)(B) sets forth those requirements and provides that ''an application to open a credit card account by a consumer who has not attained the age of 21 as of the date of submission of the application shall require . . . (i) the signature of a cosigner, including the parent, legal guardian, spouse, or any other individual who has attained the age of 21 having a means to repay debts incurred by the consumer in connection with the account, indicating joint liability for debts incurred by the consumer in connection with the account before the consumer has attained the age of 21; or. . . (ii) submission by the consumer of financial information, including through an application, indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account.'' [4]

On January 12, 2010, the Board of Governors of the Federal Reserve System (Board) issued a final rule (January 2010 Final Rule) implementing new TILA Sections 150 and 127(c)(8) in a new 12 CFR 226.51.[5] The general rule in § 226.51(a) provided, in part, that ''[a] card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and current obligations.'' [6] Consistent with the statute, § 226.51(b) set forth a special rule for consumers who are less than 21 years old and provided, in part, that a card issuer may not open a credit card account for a consumer less than 21 years old unless the consumer has submitted a written application and the card issuer has either: (i) Financial information indicating the consumer has an independent ability to make the required minimum periodic payments on the proposed extension of credit in connection with the account; or (ii) a signed agreement of a cosigner, guarantor, or joint applicant that meets certain conditions.[7] Accordingly, consistent with the statute, the Board's rule required that consumers under 21 years of age demonstrate an independent ability to pay, while the general rule applicable to consumers 21 or older did not impose a similar independence requirement. The Board's rule became effective on February 22, 2010.

On March 18, 2011, the Board issued a final rule (March 2011 Final Rule) amending § 226.51(a) to apply the independent ability-to-pay requirement to all consumers, regardless of age.[8] The Board adopted this change, in part, in response to concerns regarding card issuers prompting applicants to provide ''household income'' on credit card applications. To address this specific concern, in addition to adopting an independent ability-to-pay requirement for consumers who are age 21 and older, the Board clarified in amended comment 51(a)(1)–4.iii that consideration of information regarding a consumer's household income does not by itself satisfy the requirement in § 226.51(a) to consider the consumer's independent ability to pay. The Board stated that in its view it would be inconsistent with the language and intent of TILA section 150 to permit card issuers to establish a consumer's ability to pay based on the income or assets of individuals who are not responsible for making payments on the account.[9] The Board's amendments to § 226.51 became effective on October 1, 2011.[10]

Rulemaking authority for TILA sections 150 and 127(c)(8) transferred to the Bureau on July 21, 2011, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[11] On December 22, 2011, the Bureau issued an interim final rule to reflect its assumption of rulemaking authority over Regulation Z.[12] The interim final rule made only technical changes to Regulation Z, such as noting the Bureau's authority and renumbering Regulation Z as 12 CFR Part 1026.[13]

Since the Bureau's assumption of responsibility for TILA and Regulation Z, members of Congress, card issuers, trade associations, and consumers have expressed concerns about § 1026.51 and the implementation of the ability-to-pay provisions of the Credit Card Act. In particular, they objected to the Board's extension of the ''independent'' ability-to-pay standard in TILA section 127(c)(8) to consumers who are 21 or older, and expressed specific concerns about the impact of the Board's March 2011 Final Rule on the ability of spouses and partners who do not work outside the home to obtain credit card accounts. These groups urged the Bureau to further study or reconsider the application of the ''independent'' standard set forth in TILA section 127(c)(8)—which, they noted, the statute applies only to consumers who are under 21—more generally to consumers who are 21 and older.[14]

In order to address any potential unintended adverse impact of the current rule on certain individuals age 21 or older, including spouses and partners who do not work outside the home, to obtain credit, the Bureau published proposed amendments to portions of the regulations and accompanying commentary on November 7, 2012 (November 2012 Proposal).[15] In the proposal, the Bureau stated that it believes that the most appropriate reading of TILA sections 150 and 127(c)(8) is that the ''independent'' ability-to-pay standard set forth in section 127(c)(8) was intended to apply only to consumers who are under the age of 21. The Bureau also stated that it believes that § 1026.51(a), as currently in effect, may unduly limit the ability of certain

[2] 15 U.S.C. 1665e.

[3] 15 U.S.C. 1637(c)(8)(A).

[4] 15 U.S.C. 1637(c)(8)(B).

[5] *See* 75 FR 7658, 7719–7724, 7818–7819, 7900–7901 (Feb. 22, 2010).

[6] *Id.* at 7818.

[7] *Id.*

[8] 76 FR 22948, 22974–22977 (Apr. 25, 2011). The Board proposed this provision for comment in November 2010. 75 FR 67458, 67473–67475 (Nov. 2, 2010).

[9] 76 FR 22948, 23020–23021.

[10] *Id.* at 22948.

[11] Public Law 111–203, 124 Stat. 1376 (2010).

[12] 76 FR 79768 (Dec. 22, 2011).

[13] Accordingly, the provision addressed in this proposal is cited as 12 CFR 1026.51.

[14] *See, e.g.,* Written Statement of Ashley Boyd, MomsRising, U.S. House Subcommittee on Financial Institutions and Consumer Credit Hearing on ''An Examination of the Federal Reserve's Final Rule on the CARD Act's 'Ability to Repay' Requirement'' (June 6, 2012), *available at http://financialservices.house.gov/uploadedfiles/hhrg-112-ba15-wstate-aboyd-20120606.pdf;* Letter from Representatives Maloney, Slaughter, Bachus, and Frank to Raj Date (December 5, 2011), *available at http://maloney.house.gov/press-release/reps-maloney-slaughter-bachus-and-frank-call-cfpb-study-impact-credit-card-act%E2%80%99s-.*

[15] *See* 77 FR 66748 (Nov. 7, 2012).

individuals who are 21 or older to obtain credit. The Bureau proposed amendments to Regulation Z that it believes are more consistent with the plain language and intent of the Credit Card Act.

In response to the proposal, the Bureau received over 300 comments from individual consumers, consumer groups, trade groups, retailers, banks, credit unions, card issuers, and other financial institutions. Based on a review of these comments and its own analysis, the Bureau adopts the amendments to § 1026.51 substantially as proposed, with several edits and clarifications to address issues raised by the commenters.

III. Legal Authority

The Bureau issues this final rule pursuant to its authority under TILA, the Dodd-Frank Act, and the Credit Card Act. Effective July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies. The term ''consumer financial protection functions'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' [16] TILA is a Federal consumer financial law.[17] Accordingly, effective July 21, 2011, except with respect to persons excluded from the Bureau's rulemaking authority by sections 1027 and 1029 of the Dodd-Frank Act, the authority of the Board to issue regulations pursuant to TILA transferred to the Bureau.

TILA, as amended by the Dodd-Frank Act, authorizes the Bureau to ''prescribe regulations to carry out the purposes of [TILA].'' [18] These ''regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions,'' that in the Bureau's judgment are ''necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.'' [19]

The Credit Card Act primarily amended TILA. Section 2 of the Credit Card Act authorizes the Bureau to ''issue such rules and publish such model forms as it considers necessary to carry out this Act and the amendments made by this Act.'' [20]

IV. Section-by-Section Analysis

Section 1026.51 Ability To Pay

51(a) General Rule

Overview

The Bureau is amending 12 CFR 1026.51 and the official interpretations to the regulation in order to address concerns that, in light of the statutory framework established by TILA sections 150 and 127(c)(8), current § 1026.51(a) may be unduly limiting the ability of certain individuals 21 or older, including spouses or partners who do not work outside the home, to obtain credit.

The Proposal

Section 1026.51(a) sets forth the general ability-to-pay rule that implements TILA section 150.[21] Currently, § 1026.51(a)(1)(i) provides that a card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any limit applicable to such account, unless the card issuer considers the consumer's independent ability to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and current obligations. Section 1026.51(a)(1)(ii) further provides that card issuers must establish and maintain reasonable written policies and procedures to consider a consumer's independent income or assets and current obligations, and that such policies and procedures must include consideration of at least one of: the ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations. Finally, § 1026.51(a)(1)(ii) states that it would be unreasonable for a card issuer not to review any information about a consumer's income or assets and current obligations, or to issue a credit card to a consumer who does not have any independent income or assets. Comments 51(a)(1)(i)–1 through 51(a)(1)(i)–6 set forth additional guidance on compliance with the requirements of § 1026.51(a)(1).

The Bureau proposed to amend § 1026.51(a) in two related respects. First, the Bureau proposed to remove all references to an ''independent'' ability to pay from § 1026.51(a)(1) and the associated commentary. Second, the Bureau proposed to permit issuers to consider income or assets to which an applicant or accountholder who is 21 or older—and thus subject to § 1026.51(a) rather than § 1026.51(b)—has a reasonable expectation of access. The Bureau's proposal would have clarified by examples in the commentary those circumstances in which the expectation of access is deemed to be reasonable or unreasonable.

The Bureau's November 2012 Proposal noted that the independence requirement was added to § 1026.51(a), and thus made applicable to applicants 21 or older, in the Board's March 2011 Final Rule. In the **SUPPLEMENTARY INFORMATION** to the March 2011 Final Rule, the Board acknowledged concerns from members of Congress, card issuers, trade associations, and consumers that application of an ''independent income'' standard might restrict access to credit for consumers who do not work outside the home, including certain married women.[22] Ultimately, however, the Board concluded that application of this standard would not diminish access to credit for this population of married women and others who do not work outside the home.[23] In particular, the Board suggested that permitting an issuer to solicit an applicant's ''income'' and make credit decisions on that basis would protect credit access for these populations.

The Bureau noted in the November 2012 Proposal that information made available to it after the March 2011 Final Rule went into effect raised several questions about the Board's assumption in this respect. Specifically, the Bureau has become aware that several issuers have denied card applications from individuals with high credit scores based on the applicant's stated income. Credit bureau data, including data regarding payment history and size of payment obligations, suggested that some of these applicants had demonstrable access to funding sources. Although the Bureau did not have direct evidence of precisely who the unsuccessful applicants are, indirect evidence suggested a meaningful proportion of these denials may have

[16] Public Law 111–203, 124 Stat. 1376 (2010), section 1061(a)(1). Effective on the designated transfer date, the Bureau was also granted ''all powers and duties'' vested in each of the Federal agencies, relating to the consumer financial protection functions, on the day before the designated transfer date. *Id.* section 1061(b)(1).

[17] Public Law 111–203, section 1002(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws''); *id.* section 1002(12) (defining ''enumerated consumer laws'' to include TILA).

[18] Public Law 111–203, section 1100A(2); 15 U.S.C. 1604(a).

[19] *Id.*

[20] Credit Card Act § 2.

[21] TILA section 127(c)(8), which sets forth a special rule for consumers who have not attained the age of 21, is implemented in § 1026.51(b) of Regulation Z.

[22] 76 FR 22948, 22976.

[23] *Id.*

involved applicants who do not work outside the home but who have a spouse or partner who does work outside the home. The Bureau based this conclusion on summary data from a number of issuers on denials of credit card applications from otherwise creditworthy individuals due to the applicants' stated income.

The Bureau also stated that it does not believe that TILA section 150 requires consideration of the ''independent'' ability to pay for applicants who are 21 or older. TILA section 150 refers to ''the ability of the consumer to make the required payments under the terms of the account'' and does not expressly include an independence requirement. In contrast, TILA section 127(c)(8)(B)(ii), which sets forth analogous requirements that apply to consumers who are under 21, expressly requires that the consumer submit financial information, through a written application, that indicates ''an independent means of repaying any obligation arising from the proposed extension of credit . . . .'' The Bureau believes that the better reading of TILA section 150, in light of TILA section 127(c)(8), is that it does not impose an independence requirement in the ability-to-pay provision for consumers who are 21 or older.[24]

The Bureau noted that the Board came to the contrary conclusion that, because TILA section 150 requires card issuers to consider ''the ability of *the consumer* to make the required payments'' (emphasis added), Congress intended card issuers to consider only the ability to pay of the consumer or consumers who are responsible for making payments on the account.[25] The Board further noted that, to the extent that card issuers extend credit based on the income of persons who are not liable on the account, it would be consistent with the purposes of TILA section 150 to restrict this practice.[26]

In issuing its proposal, the Bureau agreed with the Board that the application of an overly broad standard under TILA section 150 could undermine the purposes of the statute by permitting issuers to open accounts for consumers based on income or assets of other individuals in cases where reliance on such income or assets would not reasonably reflect the consumer's ability to use such income or assets to make payments on a credit card debt. Therefore, as discussed below, the Bureau proposed additional guidance to clarify when reliance on a third party's income or assets would be considered unreasonable and, accordingly, could not be used to satisfy § 1026.51(a). However, the Bureau also believed that there are other situations in which card issuers could reasonably rely on the income or assets of a third party in assessing an applicant's ability to pay. The Bureau maintained that nothing in the text of TILA section 150 suggests that it was intended to impose a blanket prohibition on extending credit in the latter circumstances; rather, the plain language of TILA section 150 suggests that it was intended to impose a more flexible standard than the independent ability-to-pay requirement of TILA section 127(c)(8)(B)(ii).

Accordingly, given the likely impact of the Board's March 2011 Final Rule on the access to credit for spouses or partners who do not work outside the home, and based on the Bureau's statutory interpretation of TILA sections 127(c)(8) and 150, the proposed rule would have removed references to an ''independent'' ability to pay from § 1026.51(a)(1) and the commentary to § 1026.51(a)(1).

Although the Bureau stated that it believes that removing the independent ability-to-pay requirement from § 1026.51(a)(1) would best promote consistency with the statute and would help to mitigate any unintended impacts of the rule on spouses or partners who do not work outside the home, the Bureau also stated that it was important to clarify in more detail the income or assets on which a card issuer may rely in order to comply with § 1026.51(a). Therefore, the Bureau proposed to amend § 1026.51(a)(1)(ii) to clarify that the consideration of a consumer's income or assets may include any income or assets to which the consumer has a reasonable expectation of access. The Bureau believes that the purposes of TILA section 150 would be best effectuated by placing limitations on the income or assets on which an issuer may rely when opening new credit card accounts, or increasing credit limits, for consumers who are 21 or older; accordingly, the proposed rule and proposed commentary would have clarified that there are certain sources of income or assets on which it would be unreasonable for an issuer to rely.[27]

Current comment 51(a)(1)–4 sets forth guidance regarding the consideration of income and assets under § 1026.51(a). The proposed rule would have replaced current comment 51(a)(1)–4 with new comments 51(a)(1)–4 through –6; current comments 51(a)(1)–5 and –6 would have been renumbered as comments 51(a)(1)–7 and –8. Amended comment 51(a)(1)(i)–4 generally would have incorporated portions of existing comment 51(a)(1)–4.ii, which provides guidance on the income or assets that may be considered for purposes of § 1026.51(a), with reorganization for clarity. In addition, for consistency with proposed § 1026.51(a)(1)(ii), proposed comment 51(a)(1)–4 would have been revised to expressly provide that a card issuer may consider any income and assets to which an applicant, accountholder, cosigner, or guarantor who is or will be liable for debts incurred on the account has a reasonable expectation of access.

Proposed comment 51(a)(1)–5 generally would have incorporated portions of existing comment 51(a)(1)–4.i and –4.iii, which provide guidance on the sources of information about a consumer's income and assets on which a card issuer may rely. Currently, comment 51(a)(1)–4.iii provides that if a card issuer requests on its application forms that applicants provide their income without reference to household income (such as by requesting ''income'' or ''salary''), the card issuer may rely on the information provided by applicants to satisfy the requirements of § 1026.51(a). Proposed comment 51(a)(1)–5.i similarly would have provided that card issuers may rely on information provided by applicants in response to a request for ''salary,'' ''income,'' or ''assets.'' In addition, proposed comment 51(a)(1)–5.i would have clarified that, for purposes of § 1026.51(a), card issuers also may rely on information provided by applicants in response to a request for ''available income,'' ''accessible income,'' or other language requesting that the applicant provide information regarding current or reasonably expected income and/or assets or any income and/or assets to which the applicant has a reasonable expectation of access.

The Bureau noted that it was retaining in proposed comment 51(a)(1)–5.i

[24] The Bureau noted that TILA section 127(c)(8) itself also sets forth two different ability-to-pay standards, depending on the age of the individual; the Bureau stated that it believes that this further suggests that Congress did not intend to apply an independent ability-to-pay requirement to individuals who are 21 or older. Section 127(c)(8)(B)(i) sets forth the standard that applies to an individual age 21 or older who is serving as a cosigner or otherwise assuming liability on an account being opened by a consumer who is under 21. Section 127(c)(8)(B)(i) states that such over-21 cosigner or similar party must ''hav[e] a means to repay debts incurred by the consumer in connection with the account. In contract, as discussed above, section 127(c)(8)(B)(ii) requires the under-21 consumer to submit financial information ''indicating an independent means of repaying any obligation arising from the proposed extension of credit in connection with the account.''

[25] *See* 76 FR 22975.

[26] *See id.*

[27] The Bureau also proposed several nonsubstantive, technical changes to § 1026.51(a)(1)(ii) for clarity.

existing guidance regarding requests by issuers for ''household income.'' Proposed comment 51(a)(1)–5.i would have stated that card issuers may not rely solely on information provided in response to a request for ''household income''; rather, the card issuer would need to obtain additional information about the applicant's income (such as by contacting the applicant). The Bureau believed that it would be inappropriate to permit an issuer to rely on the income of one or more third parties when opening a credit card account for a consumer merely because the applicant(s) and the other individual(s) share a residence. For example, a household might consist of two roommates who do not have access to one another's income or assets. The Bureau believed that in this case it generally would be inappropriate to permit one roommate to rely on the income or assets of the other; however, given that they share a household, it is possible that one roommate applicant might interpret the request for ''household income'' to include the other roommate's income.

Proposed comment 51(a)(1)–6 would have provided further clarification regarding when it is permissible to consider a household member's income for purposes of § 1026.51(a).[28] Proposed comment 51(a)(1)–6 would have set forth four illustrative examples regarding the consideration of a household member's income. Three of the proposed examples would have described circumstances in which the Bureau believes that the applicant has a reasonable expectation of access to a household member's income. Proposed comment 51(a)(1)–6.i would have noted that if a household member's salary is deposited into a joint account shared with the applicant, an issuer is permitted to consider that salary as the applicant's income for purposes of § 1026.51(a). Proposed comment 51(a)(1)–6.ii would have assumed that the household member regularly transfers a portion of his or her salary, which in the first instance is directly deposited into an account to which the applicant does not have access, from that account into a second account to which the applicant does have access. The applicant then uses the account to which he or she has access for the payment of household or other expenses. Proposed comment 51(a)(1)–6.ii would have permitted an issuer to consider the portion of the salary deposited into the account to which the applicant has access as the applicant's income for purposes of § 1026.51(a). The third example in proposed comment 51(a)(1)–6.iii would have assumed that no portion of the household member's salary is deposited into an account to which the applicant has access. However, the household member regularly uses that salary to pay for the applicant's expenses. The proposed example would have clarified that an issuer is permitted to consider the household member's salary as the applicant's income for purposes of § 1026.51(a) because the applicant has a reasonable expectation of access to that salary.

The final example in proposed comment 51(a)(1)–6.iv would have described a situation in which the consumer's expectation of access would not be deemed to be reasonable. The proposed example would have stated that no portion of the household member's salary is deposited into an account to which the applicant has access, the household member does not regularly use that salary to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that salary. The proposed example would have clarified that an issuer would not be permitted to consider the household member's salary as the applicant's income for purposes of § 1026.51(a).

The Bureau solicited comment on whether the examples set forth in proposed comment 51(a)(1)–6 are appropriate, as well as on whether there are additional examples that should be included. Finally, as noted above, the proposal would have renumbered current comment 51(a)(1)–5—which concerns ''current obligations''—as comment 51(a)(1)–7 without further change.

Comments Received

As noted above, the Bureau received over 300 comments from individual consumers, consumer groups, banks, credit unions, trade groups, card issuers, retailers, and other financial institutions. The majority of industry commenters supported the Bureau's proposal to eliminate the independent ability-to-pay requirement for consumers 21 or older. One industry commenter stated that many of its customers have been frustrated and disappointed by their inability to obtain a credit card because they do not have independent income. Another industry commenter posited that the current standard has reduced access to credit not only for married persons and partners who do not work outside the home, but also for elderly Americans who are increasingly dependent on their adult children for financial assistance. An industry commenter noted the impact of the Bureau's current rules on military spouses, who it maintains are more likely to be under-employed, working part-time, or out of the labor force completely. Most industry commenters, including banks, credit unions, trade groups, card issuers, and retailers, similarly supported language in proposed § 1026.51(a)(1)(ii) to permit card issuers to rely on income or assets to which a consumer has a reasonable expectation of access, but requested certain edits and clarifications, which are discussed in more detail below.

In addition, certain consumer commenters, individually and in connection with advocacy groups representing the interests of women (including mothers who do not work outside the home), strongly supported the Bureau's proposal and urged the Bureau to remove the independent ability-to-pay requirement. These commenters argued that changing the rule is critical to ensuring that stay-at-home spouses and partners are able to build and retain access to credit in the case of abuse, death, or disability of the breadwinner. Some consumer commenters also noted that having a credit card is an essential tool for managing a household and is necessary for making purchases, travel reservations, and bill payments, as well as for qualifying for a business or home loan.

Two consumer group commenters opposed the Bureau's proposal, arguing that the independent ability-to-pay standard could be clarified without removing it altogether. These commenters stated that the Bureau should retain the independent ability-to-pay requirement, but clarify that a person can have income or assets that do not come from that person's individual wages (*e.g.,* where a non-applicant's income is deposited in a joint account, or another account to which the applicant has access). These commenters argued that an issuer's consideration of a consumer's ability to pay should be based solely on the income or assets controlled by the consumer liable on the account and that it is better for consumers to have a cosigner on the card account than to take on debt based on potentially unreliable income.

[28] For simplicity and ease of reference, the proposed examples in comment 51(a)(1)–6 would have addressed scenarios involving two individuals who reside in the same household (*i.e.,* the applicant and another individual). The examples referred to the second member of the applicant's household as a ''household member.'' However, the Bureau noted that the proposed rule and commentary also would apply to households in which more than two individuals reside.

Several industry commenters stated their general opposition to any additional rules that would interfere with a financial institution's ability to make its own underwriting decisions. Other industry commenters expressed concern that card issuers relying on reasonably expected income as an underwriting criterion would have difficulty evaluating whether the applicant truly has the means to repay a debt and, as a result, would inevitably make poor decisions. Several industry commenters urged the Bureau to make it clear that card issuers are not required to consider income to which the consumer has a reasonable expectation of access for applicants 21 or older, but instead may consider, for example, the consumer's independent ability to pay.

Finally, several industry commenters requested that the Bureau clarify in the rule, commentary, or supplementary information that compliance with the ability-to-pay options provided in the proposal does not give rise to discrimination claims based on age, sex, or marital status under the Equal Credit Opportunity Act (ECOA) [29] and Regulation B.[30] Specifically, a number of industry commenters requested that the Bureau clarify that application of different ability-to-pay standards to consumers based on age does not violate ECOA or Regulation B because the Credit Card Act, and not the card issuer, requires the different treatment. One industry commenter requested assurances that the continued consideration of the independent ability to pay for consumers 21 or older does not violate Regulation B's prohibition against sex discrimination. Another industry commenter expressed concern that application of the reasonable expectation of access criterion to consumers 21 or older may result in a potential discriminatory practice based on marital status.

The Final Rule

The final rule adopts the amendments to § 1026.51(a)(1) substantially as proposed, with several edits and clarifications to address issues raised by commenters. In addition, the final rule adds comment 51(a)(1)-9, which clarifies that issuers may use a single, common application for all consumers, regardless of age.

Ability-to-pay standard. As noted above, § 1026.51(a)(1)(i) currently provides that a card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any limit applicable to such account, unless the card issuer considers the consumer's independent ability to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and current obligations. The Bureau acknowledged in the proposal that § 1026.51(a)(1)(i) in its current form may unduly limit the ability of certain individuals age 21 or older to obtain credit. Accordingly, the Bureau proposed to eliminate the independence standard for these consumers and delete all references to the term ''independent'' from § 1026.51(a)(1) and associated commentary.

Based on comments received as discussed above and its own analysis, the Bureau is adopting its proposal to remove references to the independence standard in § 1026.51(a)(1) and associated commentary. The Bureau believes that the removal of the independence standard from the ability-to-pay requirement will likely result in greater access to credit for stay-at-home spouses and partners and is consistent with the explicit requirements of TILA section 150. As stated above and in the proposal, the Bureau has become aware of several issuers having denied card applications from individuals with high credit scores based on the applicant's stated income. In addition, comments submitted by industry members and consumers corroborate the Bureau's concerns that the current independent ability-to-pay standard has resulted in card issuers denying credit to individuals with high credit scores because they do not have an independent source of income. For example, one industry commenter stated that many of its customers have been frustrated and disappointed by their inability to obtain a credit card because they do not have independent income. One consumer commenter stated that, despite having excellent credit, her application for credit was denied due to lower income resulting from the decision to work only part-time to care for a young child. Another consumer commenter stated that since reentering the workforce after an extended period as a stay-at-home mother, she has twice been denied a credit card because she did not have credit in her own name. A trade group commenter noted the ''unfair impact'' of the current independent ability-to-pay requirement on military spouses and their families, who it argued rely on the working spouse's income to a greater extent than their civilian counterparts.

As stated above, the Bureau also does not believe that TILA section 150 requires consideration of the ''independent'' ability to pay for applicants who are 21 or older. TILA section 150 refers to ''the ability of the consumer to make the required payments under the terms of the account'' and does not expressly include an independence requirement. In contrast, TILA section 127(c)(8)(B)(ii), which sets forth analogous requirements that apply to consumers who are under 21, expressly requires that the consumer demonstrate ''an independent means of repaying any obligation arising from the proposed extension of credit . . ..'' The Bureau believes that the better reading of TILA section 150, in light of TILA section 127(c)(8), is that it does not impose an independence requirement in the ability-to-pay provision for consumers who are 21 or older.

As also stated above, the Bureau agrees with the Board that the application of an overly broad standard under TILA section 150 could undermine the purposes of the statute by permitting issuers to open accounts for consumers based on income or assets of other individuals in cases where reliance on such income or assets would not reasonably reflect the consumer's ability to use such income or assets to make payments on a credit card debt. Therefore, as discussed below, the Bureau is providing additional guidance to clarify when reliance on a third party's income or assets would be considered unreasonable and, accordingly, could not be used to satisfy § 1026.51(a). However, the Bureau also believes that there are other situations in which card issuers could reasonably rely on the income or assets of a third party in assessing an applicant's ability to pay. Nothing in the text of TILA section 150 suggests that it was intended to impose a blanket prohibition on extending credit in the latter circumstances. Rather, the plain language of TILA section 150 suggests that it was intended to impose a more flexible regulatory standard than the independent ability-to-pay requirement of TILA section 127(c)(8)(B)(ii).

Accordingly, given the likely impact of existing § 1026.51(a) on the access to credit for spouses or partners who do not work outside the home, and based on the Bureau's statutory interpretation of TILA sections 127(c)(8) and 150, the final rule removes all references to an ''independent'' ability-to-pay standard from § 1026.51(a)(1) and comments 51(a)–1 and –2. However, as discussed below, the final rule states in § 1026.51(a)(1)(ii) that it would be reasonable for a card issuer to consider a consumer's independent income or assets in its consideration of the

[29] 15 U.S.C. 1691 *et seq.*

[30] 12 CFR part 1002.

consumer's ability to pay. This provision is consistent with the approach clarified in the final rule to permit card issuers the flexibility to rely on a consumer's independent income or assets, or as an alternative, income or assets to which a consumer has a reasonable expectation of access. The final rule also makes a non-substantive, technical change in § 1026.51(a)(1)(i) for consistency and clarity.

Reasonable expectation of access. As discussed above, in conjunction with the proposal to amend § 1026.51(a)(1)(i) by removing the term ''independent'' from the ability-to-pay requirement, the Bureau proposed to amend § 1026.51(a)(1)(ii) to add new language clarifying that the consideration of a consumer's current income or assets may include any income or assets to which the consumer has a reasonable expectation of access. The Bureau also proposed several non-substantive, technical changes to § 1026.51(a)(1)(ii) for clarity.

As noted above, most industry commenters supported the Bureau's proposal in § 1026.51(a)(1)(ii) to permit card issuers to rely on income or assets to which a consumer has a reasonable expectation of access, but suggested certain edits and clarifications as discussed in more detail below. Numerous consumer commenters also supported the Bureau's proposal and posited that changing the ability-to-pay rules is critical to ensuring that non-working spouses and partners have access to credit in the event of abuse, death, or disability of the primary breadwinner.

The consumer group commenters, however, argued that a card issuer should not be permitted to allow a person to take on debt based on income to which the consumer merely has access, which they view as unreliable income. Instead, these commenters argued that the card issuer should require a joint applicant or cosigner on the account if the applicant does not have sufficient current or reasonably expected income or assets to satisfy the independent ability-to-pay requirement. Several industry commenters also expressed concern that issuers relying on a consumer's reasonable expectation of access to income or assets would have difficulty evaluating whether the applicant truly has the means to repay a debt and, as a result, would inevitably make poor decisions. One industry commenter argued that the reasonable expectation of access criterion would present material risks to the underwriting process. Some industry commenters also expressed concern that extending the card issuer's ability to consider reasonably accessible income to that of cosigners and guarantors would add an additional layer of risk to the credit transaction. Several industry commenters urged the Bureau to make clear that card issuers are not required to consider income to which the consumer has a reasonable expectation of access, but instead may consider, for example, the consumer's independent ability to pay.

Based on careful consideration of the comments submitted and its own analysis, the Bureau adopts substantially as proposed amendments to § 1026.51(a)(1)(ii). The final rule retains in § 1026.51(a)(1)(ii) the requirement that card issuers establish and maintain reasonable written policies and procedures to consider the consumer's ability to make the required minimum payments under the terms of the account based on the income or assets and current obligations of card applicants. As amended, this paragraph now provides that such policies and procedures include treating any income and assets to which the consumer has a reasonable expectation of access as the consumer's income or assets, *or* limiting consideration of the consumer's income or assets to the consumer's independent income and assets. In other words, a card issuer *may* consider income and assets to which an applicant has a reasonable expectation of access, but is not *required* to do so. A card issuer has the option of limiting its consideration of an applicant's income and assets to his or her independent income and assets.[31]

The Bureau also adopts its proposal to conform § 1026.51(a)(1)(ii) to amended § 1026.51(a)(1)(i) by revising it to state that it would be unreasonable for a card issuer not to review any information about a consumer's income or assets and current obligations—rather than the consumer's ''independent'' income or assets, as stated in the current rule.

Although some commenters expressed concern that the new reasonable expectation of access criterion may result in riskier underwriting and, thus, greater incidence of default, no supporting data was provided and the Bureau is not convinced that would be the case should a card issuer decide to incorporate a consumer's reasonable expectation of access to income as an underwriting criterion. As discussed in greater detail below, the Bureau is providing in the official commentary examples of when it would be reasonable or unreasonable for an issuer to consider the income or assets of a non-applicant to which the applicant claims to have a reasonable expectation of access. In addition, as one commenter noted, the ability-to-pay requirement is not a substitute for other asset-liability management parameters and underwriting criteria used by card issuers in determining whether a consumer is eligible for an extension of credit and may not be evaluated until other underwriting criteria have been analyzed. The Bureau believes that because credit cards are generally unsecured, card issuers will be motivated to carefully review the risk factors available to them regarding a consumer's creditworthiness.[32]

The Bureau also proposed changes to the commentary to § 1026.51(a)(1) to reflect the proposed changes to § 1026.51(a)(1). Current comment 51(a)(1)–4 sets forth guidance regarding the consideration of income and assets under § 1026.51(a). The proposed rule would have replaced current comment 51(a)(1)–4 with new comments 51(a)(1)–4 through –6; current comments 51(a)(1)–5 and –6 would have been renumbered as comments 51(a)(1)–7 and –8. The final rule adopts the proposed comments substantially as proposed, with additional clarification and guidance as requested by commenters. The final rule also adopts comment 51(a)(1)–9, which clarifies the requirements for issuers using a single, common application for all consumers, regardless of age.

Amended comment 51(a)(1)–4, as proposed, generally would have incorporated portions of existing comment 51(a)(1)–4.ii, which provides guidance on the income or assets that may be considered for purposes of § 1026.51(a), with reorganization for clarity. In addition, for consistency with proposed § 1026.51(a)(1)(ii), proposed comment 51(a)(1)–4 would have been revised to expressly provide that a card issuer may consider any income or assets to which an applicant,

[31] Several commenters described this option as ''continuing'' to use the current ''independent ability-to-pay standard.'' Strictly speaking, however, that regulatory standard no longer exists under the final rule; it has been replaced with the ability-to-pay standard. It is thus more accurate to describe this option as using an independent-income-or-assets underwriting criterion to satisfy the ability-to-pay regulatory standard.

[32] Although not addressed in the proposal, consumer group commenters urged the Bureau to ban deferred interest plans on credit card accounts, where such plans promote ''no interest'' until a certain date, but then retroactively access that interest starting from the purchase date if the consumer does not pay off the entire balance by the specified date. These commenters believed these types of deferred interest plans are unfair and deceptive. Because deferred interest plans are outside the scope of this rulemaking, the comments are not further addressed in this final rule.

accountholder, cosigner, or guarantor who is or will be liable for debts incurred on the account has a reasonable expectation of access. In response to the Bureau's proposal, one industry commenter requested that the Bureau clarify in the commentary that income or assets available to a consumer under state community property laws should be eligible for consideration as income or assets to which a consumer has a reasonable expectation of access. The Bureau received no other specific comments on this aspect of the proposal.

The final rule revises proposed comment 51(a)(1)–4 in a number of ways in response to comments received and to make further clarifications. To begin with, the final rule clarifies in comment 51(a)(1)–4.i that, for purposes of § 1026.51(a), a card issuer may treat any income and assets to which an applicant has a reasonable expectation of access as the consumer's current or reasonably expected income or assets, but is not required to do so. The final rule further clarifies that a card issuer may instead limit its consideration of the consumer's current or reasonably expected income or assets to his or her independent income and assets, and notes that such an issuer may look to the guidance provided in comments 51(b)(1)(i)–1 and 51(b)(2)–2 for the purpose of using independent income and assets as an underwriting criterion. Finally, the final rule corrects an inadvertent omission in the proposal by adding the term ''joint applicant'' to comment 51(a)(1)–4.i.

In comment 51(a)(1)–4.ii, the final rule clarifies that current or reasonably expected income and assets includes income that is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or joint account). For the reasons discussed below, comment 51(a)(1)–4.ii also clarifies that proceeds from student loans may be treated as current or reasonably expected income, provided that the card issuer only considers the loan proceeds remaining after tuition and other expenses have been disbursed to the applicant's educational institution.

Finally, the final rule revises comment 51(a)(1)–4.iii. in several ways. In response to a request for clarification, the final rule includes State community property laws as an example of a Federal or State statute or regulation that grants a consumer an ownership interest in the income and assets of another person. The final rule also clarifies that a card issuer may consider the consumer's current or reasonably expected income to include the income of authorized users, household members, or other persons who are not liable for debts incurred on the account if that income is regularly deposited into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or joint account). The Bureau believes that such income may be considered the consumer's current or reasonably expected income, even though it is not the consumer's individual wages, because the consumer has access to the non-applicant's income that is being deposited regularly into an account on which the consumer is an accountholder. As discussed below, the final rule revises the examples in comment 51(a)(1)–6 to be consistent with the revisions to comment 51(a)(1)–4.iii.

Proposed comment 51(a)(1)–5 generally would have incorporated portions of existing comment 51(a)(1)–4.i and –4.iii, which provide guidance on the sources of information about a consumer's income and assets on which a card issuer may rely. Currently, comment 51(a)(1)–4.iii provides that, if a card issuer requests on its application forms that applicants provide their income without reference to household income (such as by requesting ''income'' or ''salary''), the card issuer may rely on the information provided by applicants in response to such prompts to satisfy the requirements of § 1026.51(a). Proposed comment 51(a)(1)–5.i similarly would have provided that card issuers may rely on information provided by applicants in response to a request for ''salary,'' ''income,'' or ''assets.'' In addition, proposed comment 51(a)(1)–5.i would have clarified that, for purposes of § 1026.51(a), card issuers also may rely on information provided by applicants in response to a request for ''available income,'' ''accessible income,'' or other language requesting that the applicant provide information regarding current or reasonably expected income or assets or any income or assets to which the applicant has a reasonable expectation of access.

Proposed comment 51(a)(1)–5.i also retained existing guidance regarding requests by issuers for ''household income.'' Specifically, proposed comment 51(a)(1)–5.i would have stated that card issuers may not rely solely on information provided in response to a request for ''household income''; rather, the card issuer would need to obtain additional information about the applicant's income (such as by contacting the applicant). The Bureau stated in the proposal that it believes that it would be inappropriate to permit an issuer to rely on the income of one or more third parties when opening a credit card account for a consumer merely because the applicant(s) and the other individual(s) share a residence. For example, a household might consist of two roommates who do not have access to one another's income or assets. The Bureau also stated that it believes that in this case it generally would be inappropriate to permit one roommate to rely on the income or assets of the other; however, given that they share a household, it is possible that one roommate applicant might interpret the request for ''household income'' to include the other roommate's income.

Several industry commenters stated that it was unclear whether card issuers would be required to take additional steps to confirm information provided as part of an application, and urged the Bureau to clarify what, if any, verification of applicant information is required. One industry commenter suggested that the Bureau add the term ''solely'' or ''without further inquiry'' to comment 51(a)(1)–5 to better illustrate that card issuers are not required to verify financial information received in response to prompts for ''salary,'' ''income,'' ''assets,'' ''available income,'' ''accessible income,'' or other language requesting that the applicant provide information regarding current or reasonably expected income or assets or any income or assets to which the applicant has a reasonable expectation of access. The consumer group commenters, however, indicated that card issuers should be required to obtain some verification of whatever income source is relied upon.

Several industry commenters also suggested that the card issuer be permitted to rely on income information provided by the consumer on an application in response to prompts for ''household income'' without additional information. These commenters argued that consumers are more familiar with the term ''household income'' than the allowable terms suggested in the proposal, such as ''accessible income'' and ''available income,'' and that the term elicits the type of income the Bureau's proposal is designed to permit issuers to use in ability-to-pay considerations. One commenter commissioned its own study, which it states indicated that ''household income'' is a meaningful term for consumers, and that a request for ''household income'' elicited the appropriate type of income for an ability-to-pay determination. The commenter also stated that few of the respondents in its study provided the income of a roommate or similar household member when asked for

''household income.'' The commenter suggested that the Bureau allow card issuers to rely on information received from consumers in response to a prompt for income using the term ''household income,'' provided that the request is qualified with a phrase such as ''that the applicant can access.'' Another industry commenter questioned whether the term ''accessible household income'' would be more likely than ''available income'' or ''accessible income'' to elicit a response inclusive of a spouse's or partner's income.

The final rule adopts comment 51(a)(1)–5 substantially as proposed with additional clarification. First, in response to inquiries regarding card issuers' obligations to verify information included in applications received from consumers, the Bureau clarifies in comment 51(a)(1)–5.i that card issuers are not required to verify financial information received in response to prompts for ''salary,'' ''income,'' ''assets,'' ''available income,'' ''accessible income,'' or other language requesting that the applicant provide information regarding current or reasonably expected income or assets and any income or assets to which the applicant has a reasonable expectation of access. Specifically, the final rule revises comment 51(a)(1)–5 to state that card issuers may rely without further inquiry on information provided by applicants in response to prompts for financial information that are consistent with the guidance in comment 51(a)(1)–5.i. The Bureau notes that this clarification does not alter the current rule, which does not require verification of income information provided in response to prompts such as ''salary'' or ''income.''

The final rule also clarifies in comment 51(a)(1)–5.i the circumstances under which a card issuer may not rely solely on information provided in a credit card application. Specifically, comment 51(a)(1)–5.i, as adopted, states that card issuers may not rely on information provided in response to a request for ''household income''; rather, the card issuer must obtain additional information about the applicant's income, including income to which the applicant has a reasonable expectation of access (such as by contacting the applicant). The Bureau does not believe it is appropriate to allow card issuers to rely on information provided in response to ''household income'' to determine the consumer's current or reasonably expected income for purposes of the ability-to-pay standard in § 1026.51(a). The Bureau remains concerned that the term ''household income'' may generate financial data for income to which the applicant has no expectation of access. As stated in the proposal, the Bureau believes that it would be inappropriate to permit a card issuer to rely on the income of one or more third parties when opening a credit card account for a consumer merely because the applicant(s) and the other individuals share a residence. For example, a household might consist of two roommates who do not have access to one another's income or assets. The Bureau believes that in this case it generally would be inappropriate to permit one roommate to rely on the income or assets of the other; however, given that they share a household, it is possible that one roommate applicant might interpret the request for ''household income'' to include the other roommate's income. As noted above, one industry commenter relied on a study of prospective and current cardholders in urging the Bureau to permit card issuers to rely on information provided in response to a request for ''household income.'' However, it is not clear whether prompting respondents for ''income'' or another allowable term would have produced different information than was received in response to a request for ''household income.'' Further, it appears that some respondents indicated that they might include a roommate's income in response to a request for ''household income.'' Thus, the Bureau does not believe that the study warrants revising the treatment of household income. Accordingly, the final rule retains in comment 51(a)(1)–5.i the requirement that card issuers obtain additional information about an applicant's income (such as by contacting the applicant) in response to a request for ''household income.'' Comment 51(a)(1)–5.i as adopted also clarifies that if a card issuer chooses to prompt consumers for financial information using the term ''household income'' on credit card applications, a card issuer may use the guidance in comments 51(a)(1)–4, –5 and –6 when collecting additional information to determine the consumer's current or reasonably expected income under § 1026.51(a).

As discussed above, several consumer groups indicated that card issuers should be required to obtain some verification of whatever income source is stated on the application. As also discussed above, the final rule generally does not require that card issuers verify the income information that an applicant indicates on an application (*i.e.,* except in the circumstances discussed in comment 51(a)(1)–5). The Bureau notes that TILA section 150 does not require verification of a consumer's ability to make required payments. Moreover, credit card applications are usually solicited and received en masse and, as one industry commenter noted, are usually subject to a heavily automated process. To require verification of information from masses of applications received at once would likely increase approval times, resulting in greater consumer inconvenience and costs to card issuers. As a result, the Bureau believes that card issuers should be afforded the flexibility to determine instances when they need to verify information. Furthermore, because these accounts are generally unsecured, the Bureau believes that card issuers have business reasons to seek supplemental information or clarification when either the information supplied by the applicant is inconsistent with the data the card issuers already have or are able to gather on the consumer or when the risk in the amount of the credit line warrants such follow-up. Nonetheless, the Bureau believes it is appropriate to require card issuers to collect additional information regarding the applicant's current or reasonably expected income (such as by contacting the applicant) when the application uses the term ''household income.'' As discussed above, the Bureau believes that this term could lead an applicant to overstate the applicant's current or reasonably expected income that may be considered for purposes of § 1026.51(a)(1).

Proposed comment 51(a)(1)–6 provided further guidance on when it is permissible to consider a household member's income for purposes of § 1026.51(a).[33] Proposed comment 51(a)(1)–6 set forth four illustrative examples regarding the consideration of a household member's income and explained how income and assets would be treated in those scenarios pursuant to the ability-to-pay standard in § 1026.51(a). Proposed comment 51(a)(1)–6.i noted that if a household member's salary is deposited into a joint account shared with the applicant, an issuer is permitted to consider that salary as the applicant's income for purposes of § 1026.51(a). Proposed comment 51(a)(1)–6.ii assumed that the

[33] For simplicity and ease of reference, the proposed examples in comment 51(a)(1)–6 addressed scenarios involving two individuals who reside in the same household (*i.e.,* the applicant and another individual). The examples referred to the second member of the applicant's household as a ''household member.'' However, the Bureau noted that the proposed rule and commentary also would apply to households in which more than two individuals reside.

household member regularly transfers a portion of his or her salary, which in the first instance is directly deposited into an account to which the applicant does not have access, from that account into a second account to which the applicant does have access. The applicant then uses the account to which he or she has access for the payment of household or other expenses. An issuer is permitted to consider the portion of the salary deposited into the account to which the applicant has access as the applicant's income for purposes of § 1026.51(a). The third example in proposed comment 51(a)(1)–6.iii assumed that no portion of the household member's salary is deposited into an account to which the applicant has access. However, the household member regularly uses that salary to pay for the applicant's expenses. The example clarified that an issuer is permitted to consider the household member's salary as the applicant's income for purposes of § 1026.51(a) because the applicant has a reasonable expectation of access to that salary.

The final example in proposed comment 51(a)(1)–6.iv described a situation in which the consumer's expectation of access would not be deemed to be reasonable. The example stated that no portion of the household member's salary is deposited into an account to which the applicant has access, the household member does not regularly use that salary to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that salary. The proposed comment clarified that an issuer would not be permitted to consider the household member's salary as the applicant's income for purposes of § 1026.51(a).

Several industry commenters indicated concern that comment 51(a)(1)–6 only addresses situations involving the salary of a household member. These commenters also raised concerns about whether card issuers could rely on these examples in situations where spouses or partners do not reside in the same physical location (*e.g.,* military spouses, graduate students, elderly parents). Several industry commenters suggested that the comment be revised to indicate that residence in the same physical location or dwelling is not a prerequisite to be considered members of the same household. Another industry commenter suggested that the Bureau replace the term ''household member'' with ''non-applicant'' or, in the alternative, add examples to the commentary that would apply to applicants and non-applicants that do not reside in the same household. This commenter also suggested defining ''household'' in the commentary as ''a social unit that shares resources regardless of whether the unit shares one residence.''

Several industry commenters also suggested that the examples in proposed comment 51(a)(1)–6 should be revised to refer to ''salary or other income'' so that it is clear that the examples also address income that may come from a variety of sources such as Social Security benefits, veteran's benefits, retirement income, and investment income. One industry commenter also suggested that the examples in proposed comment 51(a)(1)–6.ii should be revised to delete the reference to ''payment of household or other expenses'' as unnecessary. One industry commenter was concerned that the language in the prelude to the examples in which the applicant is described as unemployed may lead some to believe that unemployment is a prerequisite to application of the reasonable expectation of access criterion and, thus, should be deleted.

The final rule adopts comment 51(a)(1)–6 as proposed in substance, but makes several amendments in response to commenters' concerns and requests for clarification. First, comment 51(a)(1)–6, as adopted, clarifies that the card issuer may consider a consumer's reasonable expectation of access to the salary or other income of any non-applicant, including, but not limited to, a household member. Accordingly, the final rule removes all references to ''household members'' in the examples and replaces them with the term ''non-applicant.'' In addition, the examples in comment 51(a)(1)–6 also refer to the non-applicant's ''salary or other income'' to make clear that the examples also address income that may come from a variety of sources such as Social Security benefits, veteran's benefits, retirement income, and investment income. Also, as discussed above, the final rule revises comment 51(a)(1)–6 to make the examples more consistent with the interpretations set forth in comment 51(a)(1)–4.iii, as adopted in the final rule.

Specifically, as revised in the final rule, the example in comment 51(a)(1)–6.i assumes that a non-applicant's salary or other income is deposited regularly into a joint account shared with the applicant. This example clarifies that a card issuer is permitted to consider the amount of the non-applicant's income that is being deposited regularly into the account to be the applicant's current or reasonably expected income for purposes of § 1026.51(a). In this case, the applicant would have a current or expected ownership interest in the non-applicant's income that is being deposited regularly into the joint account.

The example in comment 51(a)(1)–6.ii assumes that the non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly transfers a portion of that income into the applicant's individual deposit account. The example in comment 51(a)(1)–6.ii provides that a card issuer is permitted to consider the amount of the non-applicant's income that is being transferred regularly into the applicant's account to be the applicant's current or reasonably expected income for purposes of § 1026.51(a).

The example in comment 51(a)(1)–6.iii assumes that the non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly uses a portion of that income to pay for the applicant's expenses. This example clarifies that a card issuer is permitted to consider the amount of the non-applicant's income that is used regularly to pay for the applicant's expenses to be the applicant's current or reasonably expected income for purposes of § 1026.51(a). The Bureau agrees with certain commenters that this example is important because it makes clear that income in which a consumer has a reasonable expectation of access includes situations where the non-applicant's income is not deposited into a shared account to which the applicant has access. It is possible that a non-working spouse or partner does not have a shared account with the non-applicant but regularly receives income from that person.

Finally, the example in comment 51(a)(1)–6.iv assumes that the non-applicant's salary or other income is deposited into an account to which the applicant does not have access, the non-applicant does not regularly use that income to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that income. This example clarifies that a card issuer is not permitted to consider the non-applicant's income as the applicant's current or expected income for purposes of § 1026.51(a).

As discussed above, one industry commenter was concerned that the language in the prelude to the examples in which the applicant is described as unemployed may lead some to believe that unemployment is a prerequisite to

application of the reasonable access criterion and, thus, should be deleted. The final rule retains in comment 51(a)(1)–6 the language in the prelude to the examples in which the applicant is described as unemployed. The Bureau believes that this language is useful for the examples to clarify that the applicant does not have income earned from his or her own wages. Nonetheless, the Bureau notes that a card issuer may still rely on the examples in comment 51(a)(1)–6, even if the applicant is employed.

Single application. The Bureau recognized in the proposal that, as a practical matter, a card issuer is likely to use a single application form for all consumers, regardless of age, and solicited comment on how, as a practical matter, card issuers are likely to prompt consumers for income and assets in light of the two different income criteria that may be used to satisfy the ability-to-pay income requirements, which would be applied to consumers based on age. One commenter noted that it has not yet determined how it will modify its application, but urged the Bureau to retain flexibility in the rule so that card issuers may rely on income and assets information provided in the application process. Several commenters similarly urged the Bureau to provide card issuers with the flexibility to develop the application and approaches to be used to interact with consumers under the revised standard. Some commenters urged the Bureau to state in the final rule that issuers are permitted to use a single application form for all consumers, regardless of age. Other commenters requested clarification on whether issuers would be required or permitted to include the commentary examples on the credit card application. Another commenter stated that issuers need the flexibility to develop approaches suitable to the context of the application, whether it is direct mail, point of sale, on-line, or mobile.

The Bureau agrees with commenters that additional clarification regarding the type, format, and content of credit card applications would be helpful. Accordingly, the final rule adopts comment 51(a)(1)–9, which clarifies that card issuers may use a single, common application form or process for all consumers, regardless of age. Comment 51(a)(1)–9 also clarifies that a card issuer may prompt applicants, regardless of age, using only the term ''income'' and satisfy the ability-to-pay requirements of both § 1026.51(a) and (b). In such cases, additional verification of information provided in the application would not be required. In situations where a card issuer chooses not to prompt only for ''income'' on a common application, comment 51(a)(1)–9 provides guidance on combinations of terms that may be used to elicit the type of income information required under both ability-to-pay standards. Specifically, comment 51(a)(1)–9 provides as an example a scenario where the application form includes two line items, one prompting applicants for ''personal income,'' and another prompting applicants for ''available income.'' The Bureau believes that this combination of terms would not require additional information because the term ''personal income'' would appropriately prompt applicants under 21 for individual income as required by § 1026.51(b), while the term ''available income'' would prompt an applicant for financial information that may be considered under § 1026.51(a). Consistent with comment 51(a)(1)–5.i, comment 51(a)(1)–9 as adopted in the final rule clarifies that combined prompts containing terms identified in comments 51(a)(1)–5.i and 51(b)(1)(i)–2.i, when used in a manner consistent with the commentary, do not require additional information beyond what is provided by the consumer on the application.

Current obligations. As discussed above, the proposal would have revised § 1026.51(a)(1)(ii) to provide that card issuers must establish and maintain reasonable written policies and procedures to consider a consumer's income or assets and a consumer's current obligations, which may include any income and assets to which the consumer has a reasonable expectation of access. Reasonable policies and procedures to consider a consumer's ability to make the required payments include the consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations. The proposal stated that it would be unreasonable for a card issuer not to review any information about a consumer's income or assets or current obligations, or to issue a credit card to a consumer who does not have any income or assets. As noted above, the Bureau also renumbered current comment 51(a)(1)–5—which concerns ''current obligations''—as comment 51(a)(1)–7 and solicited comment on whether additional guidance on this subject is appropriate or necessary in light of the proposed changes to § 1026.51(a) and the official interpretation to that subsection.

Several consumer groups indicated that if the Bureau is going to permit the payment of expenses by a household member to be considered as ''income'' for an applicant, then it should also establish a parallel requirement that issuers consider those *expenses* when determining an applicant's ability to pay. In other words, if payment of household expenses by another constitutes income, then those household expenses should be included in the analysis required by § 1026.51(a)(1)(ii). These commenters indicated that otherwise, an individual with high expenses, who receives help with those expenses from another person, would be deemed inaccurately to have sufficient income to pay the credit card debt. These commenters also indicated that § 1026.51(a)(1)(ii) also only appears to require consideration of credit obligations, without explicit consideration of other non-debt expenses, such as food and utilities, and urged the Bureau to revise § 1026.51(a)(1)(ii) to provide explicitly that issuers must consider household expenses in the overall analysis of an applicant's ability to pay. These commenters suggested that a simple method of approximating household expenses for an applicant would be to use the Internal Revenue Service's Collection Financial Standards. Another commenter argued that the reasonable expectation of access standard would make it difficult to assess an applicant's creditworthiness because only the applicant's personal debt is required.

Based on careful review of the comments, the Bureau declines to add additional requirements for considering debt obligations. The Bureau believes that the current commentary provides card issuers the flexibility to obtain information regarding debt obligations directly from the consumer or in a consumer report and does not prohibit a card issuer from considering household expenses in evaluating a consumer's current obligations. The Bureau also believes it would be unduly burdensome to require card issuers to consider the debt obligations of a non-applicant because such information may generally not be available to the consumer at the time of applying for credit and to require such information may needlessly result in the denial of credit to otherwise creditworthy individuals or discourage consumers from applying at all. Accordingly, the final rule adopts comment 51(a)(1)–7 as proposed.

51(b) Rules Affecting Young Consumers

The Proposal

Section 1026.51(b) implements TILA section 127(c)(8) and sets forth special ability-to-pay rules for consumers who are under the age of 21. Section 1026.51(b)(1) currently provides that a card issuer may not open a credit card account under an open-end (not home-secured) consumer credit plan for a consumer less than 21 years old unless the consumer has submitted a written application and the card issuer has either: (i) Financial information indicating the consumer has an independent ability to make the required minimum periodic payments on the proposed extension of credit in connection with the account, consistent with § 1026.51(a); or (ii) a signed agreement of a cosigner, guarantor, or joint applicant, who is at least 21 years old, to be either secondarily liable for any debt on the account incurred before the consumer has attained the age of 21 or jointly liable with the consumer for any debt on the account, and financial information indicating that such cosigner, guarantor, or joint applicant has the independent ability to make the required minimum periodic payments on such debts, consistent with § 1026.51(a).

The Bureau proposed several amendments to § 1026.51(b) for conformity with the proposed amendments to § 1026.51(a) discussed above. First, § 1026.51(b)(1)(i) currently provides that a card issuer may open a credit card account for a consumer under the age of 21 if the card issuer has ''[f]inancial information indicating the consumer has an independent ability to make the required minimum periodic payments on the proposed extension of credit in connection with the account, *consistent with paragraph (a) of this section.''* (Emphasis added.) As discussed above, the proposal would have removed the independence standard from the general ability-to-pay standard in § 1026.51(a), but proposed § 1026.51(b) would have continued to require that consumers under the age of 21 without a cosigner or similar party who is 21 years or older have an independent ability to pay, consistent with TILA section 127(c)(8). Accordingly, the Bureau proposed to delete the phrase ''consistent with paragraph (a) of this section'' from § 1026.51(b)(1)(i), to reflect the difference in ability-to-pay standards for consumers who are 21 or older and consumers who are under the age of 21. Similarly, the Bureau proposed to delete from § 1026.51(b)(1)(ii)(B) a reference to the independent ability to pay of a cosigner, guarantor, or joint applicant who is 21 or older, consistent with proposed § 1026.51(a), which would have required that consumers who are 21 or older only have the ability to pay, rather than the independent ability to pay.

The Bureau also proposed several new comments that would have explained specifically how the independent ability-to-pay standard under § 1026.51(b)(1)(i) differs from the more general ability-to-pay standard in proposed § 1026.51(a). Proposed comment 51(b)(1)(i)–1 generally would have addressed sources of income and assets that an issuer may consider and would have made clear that under the independent ability-to-pay standard in § 1026.51(b)(1)(i) a card issuer may not consider income and assets to which the applicant has only a reasonable expectation of access as is permitted under the general ability-to-pay standard in proposed § 1026.51(a). For example, proposed comment 51(b)(1)(i)–1.i would have noted that, because § 1026.51(b)(1)(i) requires that the consumer who has not attained the age of 21 have an independent ability to make the required minimum periodic payments, the card issuer may only consider the current or reasonably expected income and assets of an applicant or accountholder who is less than 21 years old under § 1026.51(b)(1)(i). In addition, proposed comment 51(b)(1)(i)–1.i would have noted that the card issuer may not consider income or assets to which an applicant, accountholder, cosigner, or guarantor, in each case who is under the age of 21 and is or will be liable for debts incurred on the account, has only a reasonable expectation of access under § 1026.51(b)(1)(i).

Proposed comment 51(b)(1)(i)–2 generally would have provided interpretations on the sources of information on which a card issuer may rely for purposes of determining the consumer's current or reasonably expected income and assets under § 1026.51(b)(1)(i). For example, proposed comment 51(b)(1)(i)–2.i would have stated that card issuers may rely on information provided by applicants in response to a request for ''salary,'' ''income,'' ''assets,'' or other language requesting that the applicant provide information regarding current or reasonably expected income and/or assets. The proposed comment also would have provided, however, that card issuers may not rely solely on information provided in response to a request for ''available income,'' ''accessible income,'' or ''household income.'' Instead, the card issuer would have needed to obtain additional information about an applicant's income (such as by contacting the applicant). In addition, proposed comment 51(b)(1)(i)–3 would have set forth four factual scenarios and would have explained how income would be treated in those scenarios pursuant to the independent ability-to-pay standard in § 1026.51(b)(1)(i).

Finally, the Bureau proposed to amend existing comment 51(b)(1)–2 and to redesignate it as comment 51(b)(1)(ii)–1. Existing comment 51(b)(1)–2 states that information regarding income and assets that satisfies the requirements of § 1026.51(a) satisfies the requirements of § 1026.51(b)(1). In the supplementary information to the proposal, the Bureau noted that, as proposed, income and assets that satisfy the requirements of § 1026.51(a) might no longer satisfy the requirements under § 1026.51(b) for an applicant who is under the age of 21; however, income and assets that satisfy the requirements of § 1026.51(a) would satisfy the ability-to-pay requirements of § 1026.51(b)(1)(ii)(B) (*i.e.,* those that apply to a cosigner, guarantor, or joint applicant who is 21 or older). Proposed comment 51(b)(1)(ii)–1 accordingly would have stated that information regarding income and assets that satisfies the requirements of § 1026.51(a) also satisfies the requirements of § 1026.51(b)(1)(ii)(B).

In the supplementary information to the proposal, the Bureau noted that one consequence of the proposed rule would be that a spouse or partner who is 21 or older and does not work outside the home could rely on income to which that consumer has a reasonable expectation of access. In many cases, spouses or partners who are 21 or older who do not work outside the home could, accordingly, rely on the income of a working spouse or partner and could open a new credit card account without needing a cosigner, guarantor, or joint applicant. However, the proposed rule would not have permitted an applicant who is under the age of 21 to rely on income or assets that are merely accessible. In the supplementary information to the proposal, the Bureau explained that it expects that in some cases, depending on the specific circumstances, non-working spouses or partners under the age of 21 may need to apply jointly with their income-earning spouse or partner or to offer that spouse or partner as a guarantor on the account. The Bureau believes that this outcome is consistent with the independent ability-to-pay standard that TILA section 127(c)(8) applies to applicants who have not attained the

age of 21. At the same time, the Bureau understood that the proposed rule may result in it being more difficult for spouses or partners under 21 who do not work outside the home to obtain credit, as compared to spouses or partners who are 21 or older who do not work outside the home.

In the supplementary information to the proposal, the Bureau noted that a prohibition on discrimination based on marital status is a long-standing and fundamental tenet of fair lending law and, given that TILA section 127(c)(8) imposes a more stringent independent ability-to-pay standard on applicants who are under the age of 21 than on those who are 21 or older, the Bureau stated its belief that it would be inappropriate to apply the ''reasonable expectation of access'' income criterion to all applicants who are under 21. However, the Bureau also solicited comment on whether additional guidance was needed to clarify application of the rule to applicants under the age of 21, particularly spouses or partners who do not work outside the home. If such clarification was warranted, the Bureau solicited comment on how such guidance could be provided in a manner consistent with TILA section 127(c)(8), ECOA, and Regulation B.[34]

Comments Received

In response to the proposal, several industry commenters urged the Bureau to revise existing § 1026.51(b)(1) to remove the independent ability-to-pay standard for consumers under 21 years of age, and instead apply the general ability-to-pay standard as proposed in § 1026.51(a) to all consumers. One industry commenter also stated that the decision to extend credit should be based on a card issuer's risk management standards and that the rule should not set forth an independent ability-to-pay standard for consumers under the age of 21. This commenter stated that many consumers under the age of 21 are married with families, jobs, and obligations that necessitate the availability of open-end credit. This commenter urged the Bureau to provide some flexibility for card issuers to apply the criterion for applicants that are 21 or older to applicants under the age of 21 who have a reasonable expectation of access to a household member's income. Another industry commenter urged the Bureau to permit card issuers to consider the use of all household income in the application process, and apply rules consistently across all ages, which the commenter stated would produce a more efficient and fair process that is easily understood and executed. This commenter also stated that such a rule would avoid the negative impact to those applicants under the age of 21 who have a partner or spouse by allowing them to report all household income. Another industry commenter requested that the Bureau amend § 1026.51(b)(1) to permit a card issuer to consider the shared income of a consumer who is younger than 21 and is legally married to a consumer 21 years or older.

In addition, several industry commenters and consumer groups requested that the Bureau consider several clarifying revisions to proposed commentary that would have interpreted § 1026.51(b)(1). Also, several industry commenters urged the Bureau to state specifically that compliance with this final rule does not result in a violation of the Regulation B prohibition against age-based discrimination. These suggestions by commenters are discussed in more detail below.

The Final Rule

The final rule adopts § 1026.51(b)(1)(i) as proposed. As adopted, § 1026.51(b)(1)(i) continues to require that consumers under the age of 21 without a cosigner or similar party who is 21 years or older have an independent ability to pay, consistent with TILA section 127(c)(8).[35] As adopted, comment 51(b)(1)(i)–1.i notes that, because § 1026.51(b)(1)(i) requires that the consumer who has not attained the age of 21 have an independent ability to make the required minimum periodic payments, the card issuer may only consider the current or reasonably expected income or assets of an applicant who is less than 21 years old under § 1026.51(b)(1)(i). Comment 51(b)(1)(i)–1.i also notes that under § 1026.51(b)(1)(i), a consumer's current or reasonably expected income may not include income to which the consumer only has a reasonable expectation of access. Comment 51(b)(1)(i)–1.ii clarifies the sources of income that may be considered as current or reasonably expected income and that current or reasonably expected income includes income regularly deposited into an account on which the consumer is an accountholder. Under comment 51(b)(1)(i)–1.iii, an applicant's current or reasonably expected income includes not only current or reasonably expected income earned by the applicant, but also income earned by a non-applicant where Federal or State statute or regulation grants the applicant an ownership interest in such income and assets (*e.g.,* joint ownership granted under State community property laws), or where the non-applicant's income is being deposited regularly into an account on which the applicant is an accountholder (*e.g.,* an individual deposit account or joint account). However, comment 51(b)(1)(i)–1.i notes that the card issuer may not consider under § 1026.51(b)(1)(i) income or assets to which an applicant, joint applicant, cosigner, or guarantor, in each case who is under the age of 21 and is or will be liable for debts incurred on the account, has only a reasonable expectation of access without a current or expected ownership interest as discussed above.

The final rule also adopts § 1026.51(b)(1)(ii)(B) as proposed, which provides that where there is a cosigner, guarantor, or joint applicant who is 21 or older, such consumers who are 21 or older need only to have an ability to pay, consistent with § 1026.51(a) as adopted in the final rule, rather than an independent ability to pay under § 1026.51(b). In addition, as discussed in more detail below, the final rule revises § 1026.51(b)(2) to provide that, for credit card accounts that were opened by consumers under the age of 21 without a cosigner or similar party who is 21 years or older, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless, at the time of the contemplated increase, the consumer has an independent ability to make the required minimum periodic payments on the increased limit, consistent with § 1026.51(b)(1)(i), or a cosigner, guarantor or joint applicant who is at least 21 years old agrees in writing to assume liability for any debt incurred on the account, consistent with § 1026.51(b)(1)(ii).

As discussed above, the Bureau recognizes that one consequence of the final rule is that a spouse or partner age 21 or older who does not work outside the home could rely on income to which that consumer has a reasonable expectation of access. In many cases, spouses or partners who are 21 or older and do not work outside the home could, accordingly, rely on the income of a working spouse or partner and could open a new credit card account without needing a cosigner, guarantor, or joint applicant. However, the final rule does not permit an applicant who

[34] 15 U.S.C. 1691 *et seq.;* 12 CFR part 1002.

[35] One industry commenter a requested that the Bureau specifically exempt secured credit cards from the independent ability-to-pay standard set forth in § 1026.51(b)(1)(i). The final rule does not exempt secured credit card accounts from the requirements of § 1026.51(b)(1)(i). The Bureau believes that adopting such an exemption is outside the scope of the changes considered as part of this rulemaking.

is under 21 to rely on income or assets that are merely accessible. Instead, the final rule implements the independent ability-to-pay standard that TILA section 127(c)(8) applies to applicants who have not attained the age of 21. Thus, in some cases, depending on the specific circumstances, non-working spouses or partners under 21 may need to apply jointly with their income-earning spouse or partner or to offer that spouse or partner as a guarantor on the account. The Bureau believes this is the outcome compelled by the Credit Card Act.

As discussed in more detail below, the Bureau notes, however, that the final rule in comments 51(b)(1)(i)–1.iii and –3 provides that a card issuer is permitted to consider a non-applicant's income (or portion of that income) to be the applicant's current or reasonably expected income where a Federal or State statute or regulation either grants the applicant an ownership interest in such income (*e.g.,* joint ownership granted under State community property laws) or such income is being deposited regularly into an account on which the applicant is an accountholder *(e.g.,* an individual deposit account or joint account). These interpretations make clear that card issuers may rely on such income of non-working spouses or partners under the age of 21 to open a new credit card account.

As discussed above, one industry commenter requested that the Bureau amend § 1026.51(b)(1) to permit a card issuer to consider the shared income of a consumer under 21 who is legally married to a consumer 21 years or older, in obtaining credit. The Bureau does not believe it is appropriate to revise § 1026.51(b)(1) to permit certain married consumers under the age of 21 to rely on income or assets that are merely accessible, while requiring all consumers under the age of 21 who are not married to meet an independent ability-to-pay requirement. As discussed above, the Bureau believes that a prohibition on discrimination based on marital status is a long-standing and fundamental tenet of fair lending law. And while TILA section 127(c)(8) imposes a more stringent independent ability-to-pay standard on applicants who are under 21 than on those who are 21 or older, it does not make the same distinction based on marital status. For that reason, the Bureau believes that it would be inappropriate to allow card issuers to employ the general ability-to-pay standard, which permits the consideration of income to which the applicant has a reasonable expectation of access, to certain applicants who are under 21 and married, while applying the independent ability-to-pay standard to all applicants who are under 21 and not married.

Independent ability-to-pay standard. As discussed above, the Bureau proposed several new comments that would have explained specifically how the independent ability-to-pay standard under § 1026.51(b)(1)(i) differs from the more general ability-to-pay standard in proposed § 1026.51(a). For example, proposed comment 51(b)(1)(i)–1.i would have provided that a card issuer may consider any current or reasonably expected income and assets of the consumer or consumers who are applying for a new account or will be liable for debts incurred on that account, including a cosigner or guarantor. In addition, proposed comment 51(b)(1)–1.i would have specified that when a card issuer is considering whether to increase the credit limit on an existing account, the card issuer may consider any current or reasonably expected income and assets of the consumer or consumers who are accountholders, cosigners, or guarantors and are liable for debts incurred on that account. Proposed comment 51(b)(1)(i)–1.i also would have noted that, because § 1026.51(b)(1)(i) requires that the consumer who has not attained the age of 21 have an independent ability to make the required minimum periodic payments, the card issuer may only consider the current or reasonably expected income and assets of an applicant or accountholder who is less than 21 years old under § 1026.51(b)(1)(i). In addition, proposed comment 51(b)(1)(i)–1.i would have noted that the card issuer may not consider income or assets to which an applicant, accountholder, cosigner, or guarantor, in each case who is under the age of 21 and is or will be liable for debts incurred on the account, has only a reasonable expectation of access under § 1026.51(b)(1)(i). Proposed comment 51(b)(1)(i)–1.ii would have provided examples of current or reasonably expected income and assets.

The final rule adopts comment 51(b)(1)(i)–1.i and .ii substantively as proposed, except that provisions in comment 51(b)(1)(i)–1.i relating to credit limit increases have been moved to comment 51(b)(2)–2, as discussed in more detail below. Several consumer groups suggested that the Bureau should clarify that student loan proceeds are not an applicant's current or reasonably expected income for purposes of the independent ability-to-pay standard in § 1026.51(b)(1)(i). These commenters referenced news articles that indicated that students are reporting a college loan as income and some card issuers are accepting that claim. These commenters indicated that, at a minimum, the Bureau should exclude any student loan proceeds up to the amount of the consumer's college tuition from being considered the applicant's current or reasonably expected income.

Based on careful consideration of the commenters' concerns, the final rule clarifies in comment 51(b)(1)(i)–1.ii that proceeds from student loans may be treated as current or reasonably expected income, provided that the card issuer only considers the loan proceeds remaining after tuition and other expenses have been disbursed to the applicant's educational institution. The Bureau believes that many students, particularly those in graduate programs, rely on student loan proceeds to finance their living expenses. The Bureau notes that the current rule does not specifically exclude student loan proceeds from being considered an applicant's current or reasonably expected income for purposes of the independent ability-to-pay standard in § 1026.51(b)(1)(i). And while the final rule permits consideration of certain student loan proceeds, § 1026.51(a)(1)(ii) also requires card issuers to establish and maintain reasonable written policies and procedures to consider a consumer's income or assets, and current debt. Thus, if a card issuer prompts a consumer to include, or otherwise has reason to know that a consumer has included, student loan proceeds as income on an application, it would be unreasonable for the card issuer not to exclude the portion of those proceeds that are unavailable to make payments on the account because they will be paid to the applicant's educational institution for tuition and other expenses.

Proposed comment 51(b)(1)(i)–1.iii would have explained that consideration of the income and assets of authorized users, household members, or other persons who are not liable for debts incurred on the account does not satisfy the requirement to consider the consumer's income or assets, unless a Federal or State statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income and assets. Several industry commenters suggested that the Bureau revise proposed comment 51(b)(1)(i)–1.iii to refer specifically to community property laws as an example of a State statute or regulation that grants a consumer who is liable for debts incurred on the account an ownership interest in a non-applicant's income or assets.

The final rule adopts comment 51(b)(1)(i)–1.iii substantially as proposed with two clarifications. First, the final rule revises proposed comment 51(b)(1)(i)–1.iii to refer specifically to community property laws as discussed above. In addition, the final rule revises proposed comment 51(b)(1)(i)–1.iii to provide that a card issuer may consider a consumer's current or reasonably expected income to include any income of a person who is not liable for debts incurred on the account that is being deposited regularly into an account on which the consumer is an accountholder. The Bureau believes that such income may be considered the consumer's current or reasonably expected income, even though it is not the consumer's individual wages, because the income is being deposited regularly into the consumer's own account. The Bureau believes that these interpretations are consistent with the independent ability-to-pay standard set forth in TILA section 127(c)(8) because, in these circumstances, the applicant has a current or reasonably expected ownership interest in the non-applicant's income. As discussed below, the final rule also revises the examples in comment 51(b)(1)(i)–3 to be consistent with the revisions to comment 51(b)(1)(i)–1.iii.

Proposed comment 51(b)(1)(i)–2 generally would have provided interpretations on the sources of information on which a card issuer may rely for purposes of determining the consumer's current or reasonably expected income and assets under § 1026.51(b)(1)(i). For example, proposed comment 51(b)(1)(i)–2.i would have stated that card issuers may rely on information provided by applicants in response to a request for ''salary,'' ''income,'' ''assets,'' or other language requesting that the applicant provide information regarding current or reasonably expected income or assets. The proposed comment also would have provided, however, that card issuers may not rely solely on information provided in response to a request for ''available income,'' ''accessible income,'' or ''household income.'' Instead, the card issuer would have needed to obtain additional information about an applicant's income (such as by contacting the applicant).

As discussed in the section-by-section analysis for § 1026.51(a), several industry commenters urged the Bureau to clarify that credit card issuers may rely on an applicant's stated income without additional inquiry or verification in response to a request for ''salary,'' ''income,'' ''assets,'' or other language requesting that the applicant provide information regarding current or reasonably expected income or assets. One commenter indicated that a consumer study conducted by it regarding the best way to ask consumers about income for purposes of the ability-to-pay determinations did not reveal a single most effective way to request income from applicants under 21 years of age, although a substantial number of consumer respondents found ''personal income'' and ''individual income'' to be clearest, but were confused by the meaning of the term ''independent.''

The final rule adopts comment 51(b)(1)(i)–2 as proposed with several revisions. The final rule revises proposed comment 51(b)(1)(i)–2.i to make clear that credit card issuers may rely on an applicant's stated income without further inquiry in response to a request for ''salary,'' ''income,'' ''personal income,'' ''individual income,'' ''assets,'' or other language requesting that the applicant provide information regarding his or her current or reasonably expected income or assets. As proposed and adopted, comment 51(b)(1)(i)–2.i also provides that card issuers may not rely solely on information provided in response to a request for ''household income.'' Nor may card issuers rely solely on information provided in response to a request for ''available income,'' ''accessible income,'' or other language prompting an applicant to provide income or assets to which the applicant only has a reasonable expectation of access. In those cases, the card issuer would need to obtain additional information about an applicant's current or reasonably expected income (such as by contacting the applicant). The final rule also revises proposed comment 51(b)(1)(i)–2.i to cross reference new comment 51(a)(1)–9, which clarifies that card issuers may use a single, common application form or process for all credit card applicants, regardless of age. See the section-by-section analysis of § 1026.51(a) for a discussion of comment 51(a)(1)–9.

As discussed in more detail in the section-by-section analysis of § 1026.51(a), several consumer groups indicated that card issuers should be required to obtain some verification of whatever income source is relied upon. For the same reasons discussed in more detail in the section-by-section analysis of § 1026.51(a), the final rule does not require that card issuers verify the income information provided by an applicant under 21 on an application form, except under the circumstances discussed in comment 51(b)(1)(i)–2.i.

Proposed comment 51(b)(1)(i)–3 set forth four factual scenarios and explained how income would be treated in those scenarios pursuant to the independent ability-to-pay standard in § 1026.51(b)(1)(i). Specifically, proposed comment 51(b)(1)(i)–3.i provided that if a household member's salary is deposited into a joint account shared with the applicant, a card issuer may consider that salary to be the applicant's income for purposes of § 1026.51(b)(1)(i). Proposed comment 51(b)(1)(i)–3.ii discussed an example where the household member's salary is deposited into an account to which the applicant does not have access. However, the household member regularly transfers a portion of that salary into an account to which the applicant does have access, which the applicant uses for the payment of household or other expenses. Proposed comment 51(b)(1)(i)–3.ii would have clarified that whether a card issuer may consider the portion of the salary that is deposited into the account to be the applicant's income for purposes of § 1026.51(b)(1)(i) depends on whether a Federal or state Statute or regulation grants the applicant an ownership interest in the account to which the applicant has access. Proposed comment 51(b)(1)(i)–3.iii discussed an example where no portion of the household member's salary is deposited into an account to which the applicant has access. However, the household member regularly uses that salary to pay for the applicant's expenses. Proposed comment 51(b)(1)(i)–3 would have provided that under these circumstances a card issuer may not consider the household member's salary as the applicant's income for purposes of § 1026.51(b)(1)(i) because the salary is not current or reasonably expected income of the applicant. Proposed comment 51(b)(1)(i)–3.iv discussed an example where no portion of the household member's salary is deposited into an account to which the applicant has access, the household member does not regularly use that salary to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that salary. Proposed comment 51(b)(1)(i)–3.iv would have provided that the card issuer may not consider the household member's salary to be the applicant's income for purposes of § 1026.51(b)(1)(i). The Bureau solicited comment on whether the examples set forth in proposed comment 51(b)(1)(i)–3 are appropriate, as well as on whether there are additional examples that should be included.

As discussed in more detail in the section-by-section analysis of

§ 1026.51(a), several industry commenters requested that the Bureau make several clarifying revisions to comment 51(b)(1)(i)–3, such as making clear that the examples apply in situations where spouses or partners do not reside in the same physical location (*e.g.,* military spouses, graduate students, elderly parents), and apply to ''salary and other income'' to address income that may come from a variety of sources such as Social Security benefits, veteran's benefits, retirement income, and investment income. One industry commenter also suggested that the proposed comment be revised to make clear that the examples in proposed comment 51(b)(1)(i)–3.i and .ii are examples of a consumer's current or reasonably expected income that may be considered by a card issuer in determining whether a consumer meets the independent ability-to-pay standard in § 1026.51(b)(1)(i).

The final rule adopts comment 51(b)(1)(i)–3 in substance as proposed, with several revisions to clarify the intent of the examples. As discussed above, the final rule revises comment 51(b)(1)(i)–1.iii to provide that consideration of the income and assets of authorized users, household members, or other persons who are not liable for debts incurred on the account does not satisfy the requirement to consider the consumer's current or reasonably expected income or assets, unless a Federal or State statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income and assets (*e.g.,* joint ownership granted under State community property laws), or such income is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or a joint account).

The final rule revises the examples in comment 51(b)(1)(i)–3 to be more consistent with comment 51(b)(1)(i)–1.iii as adopted in the final rule, and to address concerns raised by commenters. As adopted in the final rule, the examples in comment 51(b)(1)(i)–3 demonstrate the general interpretations set forth in comment 51(b)(1)(i)–1.iii that a card issuer is permitted to consider a non-applicant's income to be the applicant's current or reasonably expected income for purposes of the independent ability-to-pay standard in § 1026.51(b)(1)(i) if the applicant has a current or reasonably expected ownership interest in the non-applicant's income, or the income is being deposited regularly into an account on which the applicant is an accountholder. However, a card issuer is not permitted to consider the non-applicant's income to be the applicant's current or reasonably expected income for purposes of the independent ability-to-pay standard in § 1026.51(b)(1)(i) when the applicant has only a reasonable expectation of access to the income.

Specifically, as adopted in the final rule, comment 51(b)(1)(i)–3 provides several examples assuming that an applicant is not employed and the applicant is under the age of 21 so § 1026.51(b) applies. Comment 51(b)(1)(i)–3.i provides that if a non-applicant's salary or other income is deposited regularly into a joint account shared with the applicant, a card issuer is permitted to consider the amount of the non-applicant's income that is being deposited regularly into the account to be the applicant's current or reasonably expected income for purposes of § 1026.51(b)(1)(i). This is because the non-applicant's income is being deposited regularly into an account on which the applicant is an accountholder.

Comment 51(b)(1)(i)–3.ii discusses an example where the non-applicant's salary or other income is deposited into an account to which the applicant does not have access, but the non-applicant regularly transfers a portion of that income into the applicant's individual deposit account. Comment 51(b)(1)(i)–3.ii provides that a card issuer is permitted to consider the amount of the non-applicant's income that is being deposited regularly into the applicant's individual deposit account to be the applicant's current or reasonably expected income for purposes of § 1026.51(b)(1)(i). Again, in this case, because the income is being deposited into an account on which the applicant is an accountholder, the card issuer is permitted to consider this income for purposes of the independent ability-to-pay standard under § 1026.51(b)(1)(i).

Comment 51(b)(i)–3.iii discusses an example where the non-applicant's salary or other income is deposited into an account to which the applicant does not have access; however, the non-applicant regularly uses that income to pay for the applicant's expenses. The comment provides that a card issuer is not permitted to consider the non-applicant's income that is used regularly to pay for the applicant's expenses as the applicant's current or reasonably expected income for purposes of § 1026.51(b)(1)(i), unless a Federal or State statute or regulation grants the applicant an ownership interest in such income. Although the applicant would have a reasonable expectation of access to the non-applicant's income that is being used regularly to pay for the applicant's expenses, the applicant does not have a reasonably expected ownership interest in such income unless a Federal or State statute or regulation grants the applicant an ownership interest in such income (*e.g.,* joint ownership granted under State community property laws).

Comment 51(b)(1)(i)–3.iv discusses an example where the non-applicant's salary or income is deposited into an account to which the applicant does not have access, the non-applicant does not regularly use that income to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that income. The comment provides that the card issuer is not permitted to consider the non-applicant's income to be the applicant's current or reasonably expected income for purposes of § 1026.51(b)(1)(i). In this case, the applicant does not have a reasonably expected ownership interest in the non-applicant's income.

Credit limit increases for consumers who are under 21. Currently, § 1026.51(b)(2) addresses credit limit increases for young consumers. Specifically, § 1026.51(b)(2) prohibits credit line increases for accounts opened pursuant to § 1026.51(b)(1)(ii) unless the cosigner, guarantor, or joint accountholder liable on the account agrees in writing to accept liability for the line increase. Current comments 51(b)–1 and 51(b)(2)–1 provide clarification of this provision.

Section 1026.51(b)(2) does not expressly address credit limit increases for accounts opened under § 1026.51(b)(1)(i) (*i.e.,* those based on the underage consumer's independent ability to pay). However, in proposed comment 51(b)(1)(i)–1.i, the Bureau clarified that ''when a card issuer is considering whether to increase the credit limit on an existing account, the card issuer . . . may not consider income or assets to which an applicant, accountholder, cosigner, or guarantor, in each case who is under the age of 21 and is or will be liable for debts incurred on the account, has only a reasonable expectation of access'' because ''§ 1026.51(b)(1)(i) requires that the consumer who has not attained the age of 21 have an independent ability to make the required minimum periodic payments.'' To remove any doubt that the independent ability-to-pay standard applies to credit line increases for accounts opened pursuant to § 1026.51(b)(1)(i), the final rule amends § 1026.51(b)(2) to provide in § 1026.51(b)(2)(i) that where a credit card account has been opened pursuant

to § 1026.51(b)(1)(i), no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless the consumer has an independent ability to make the required minimum periodic payments on the increased limit, consistent with § 1026.51(b)(1)(i), or a cosigner or similar party who is 21 or older agrees in writing to assume liability for any debt incurred on the account, consistent with § 1026.51(b)(1)(ii). The final rule clarifies that a card issuer may not consider income or assets to which an accountholder, cosigner, or guarantor who is under 21 and assumes liability for debts incurred on the account only has a reasonable expectation of access, but may consider income or assets to which the same category of individuals who have attained the age of 21 have a reasonable expectation of access. The final rule moves commentary on these credit limit increases from proposed comment 51(b)(1)(i)–1.i to comment 51(b)(2)–2. In addition, comment 51(b)(2)–2 provides that information regarding income and assets that satisfies the requirements of § 1026.51(b)(1)(i) also satisfies the requirements of § 1026.51(b)(2)(i)(A) and card issuers may rely on the guidance in the commentary to § 1026.51(b)(1)(i) for purposes of determining whether an accountholder who is less than 21 years old has the independent ability to make the required minimum periodic payments in accordance with § 1026.51(b)(2)(i)(A). Comment 51(b)(2)–2 further provides that information regarding income and assets that satisfies the requirements of § 1026.51(a) also satisfies the requirements of § 1026.51(b)(2)(i)(B) and card issuers may rely on the guidance in the commentary to § 1026.51(a)(1) for purposes of determining whether an accountholder who is 21 or older has the ability to make the required minimum periodic payments in accordance with § 1026.51(b)(2)(i)(B). The final rule also redesignates current § 1026.51(b)(2) as § 1026.51(b)(2)(ii).

Pursuant to its authority under TILA section 105(a) and Section 2 of the Credit Card Act, the Bureau believes that it is necessary to clarify the applicability of the independent ability-to-pay standard to credit limit increases on accounts that were opened by consumers under the age of 21 without a cosigner or similar party who is 21 years or older, and where the consumers are still under the age of 21 at the time the credit limit increase is being considered, to prevent circumvention of the rules in § 1026.51(b)(1)(i). For example, if the ability-to-pay standard in § 1026.51(a)(1), as adopted in the final rule, applied to such credit limit increases, a card issuer could collect information about ''accessible income'' from the consumer who is younger than 21 years of age at application. While the card issuer could not rely on that income in meeting the independent ability-to-pay standard under § 1026.51(b)(1)(i) to open the credit card account for such consumer, the card issuer could consider this ''accessible income'' after account opening pursuant to § 1026.51(a)(1) and increase the credit limit on the account, even if the consumer remained under the age of 21 at the time. To prevent this type of circumvention, the final rule makes clear in § 1026.51(b)(2)(i)(A) that the independent ability-to-pay standard applies to credit limit increases on accounts that were opened by consumers under the age of 21 without a cosigner or similar party who is 21 years or older, and where the consumers are still under the age of 21 at the time the credit limit increase is being considered.

Current obligations. Existing comment 51(a)(1)–5 provides that a card issuer may consider the consumer's current obligations based on information provided by the consumer or in a consumer report. In evaluating a consumer's current obligations, a card issuer need not assume that credit lines for other obligations are fully utilized. The Bureau proposed to renumber current comment 51(a)(1)–5 as comment 51(a)(1)–7. Several industry commenters indicated that the interpretations in proposed comment 51(a)(1)–7 also should apply to the consideration of the consumer's current obligations for purposes of § 1026.51(b)(1). The final rule adds comment 51(b)–5 to provide the same interpretations for considering the consumer's current obligations for purposes of § 1026.51(b)(1) and (2)(i), as adopted in comment 51(a)(1)–7.

Joint applicants or joint accountholders. Existing comment 51(a)(1)–6 provides that with respect to the opening of a joint account for two or more consumers or a credit line increase on such an account, the card issuer may consider the collective ability of all persons who are or will be liable for debts incurred on the account to make the required payments. The Bureau proposed to renumber current comment 51(a)(1)–6 as comment 51(a)(1)–8. Several industry commenters indicated that the same interpretations in proposed comment 51(a)(1)–8 also should apply to the consideration of joint applications or joint accounts under § 1026.51(b)(1). Accordingly, the final rule adds comment 51(b)–6 to clarify that, with respect to the opening of a joint account for two or more consumers under § 1026.51(b)(1) or a credit line increase on such an account under § 1026.51(b)(2)(i), the card issuer may consider the collective ability of all persons who are or will be liable for debts incurred on the account to make the required payments. New comment 51(b)–6 also would cross-reference the commentary to § 1026.51(b)(1)(i) and § 1026.51(b)(2) for information on income and assets that may be considered for joint applicants, joint accountholders, cosigners, or guarantors who are under the age of 21, and the commentary to § 1026.51(b)(1)(ii) for information on income and assets that may be considered for joint applicants, joint accountholders, cosigners, or guarantors who are at least 21 years old.

Cosigner, guarantor, or joint applicant who is 21 or older. Existing comment 51(b)(1)–2 states that information regarding income and assets that satisfies the requirements of § 1026.51(a) satisfies the requirements of § 1026.51(b)(1). The Bureau notes that, under the final rule, income and assets that satisfy the requirements of § 1026.51(a) might no longer satisfy the requirements under § 1026.51(b) for an applicant who is under the age of 21; however, income and assets that satisfy the requirements of § 1026.51(a) would satisfy the ability-to-pay requirements of § 1026.51(b)(1)(ii)(B) (*i.e.,* those that apply to a cosigner, guarantor, or joint applicant who is 21 or older). As proposed, the final rule amends existing comment 51(b)(1)–2 and redesignates it as comment 51(b)(1)(ii)–1. As adopted, comment 51(b)(1)(ii)–1 states that information regarding income and assets that satisfies the requirements of § 1026.51(a) also satisfies the requirements of § 1026.51(b)(1)(ii)(B).

ECOA and Regulation B

As discussed above, a number of commenters requested that the Bureau clarify in the final rule that a card issuer's compliance with the amended ability-to-pay requirements does not violate ECOA and Regulation B. These commenters were concerned that absent an explicit safe harbor, card issuers would be subject to claims of potential violations of ECOA's and Regulation B's prohibition against discrimination based on age, sex, and marital status.

Several industry commenters requested that the Bureau clarify in the regulation or commentary, or at a minimum, the supplementary information to the final rule, that compliance with the stricter ability-to-pay requirement for consumers under the age of 21 does not give rise to age

discrimination by an issuer under ECOA or Regulation B, since TILA section 127(c)(8), as implemented by § 1026.51(b), requires the distinction. To minimize the risk of potential claims of age-based discrimination, a few industry commenters urged the Bureau to apply the reasonable expectation of access criterion to all consumers, regardless of age. In addition, some commenters were concerned that the business decision to apply the independent ability-to-pay criterion to consumers age 21 or older may give rise to claims of potential discrimination based on sex. One commenter was concerned that the reasonable expectation of access criterion creates a potentially discriminatory practice based on marital status.

As stated above, the Bureau believes that TILA section 127(c)(8) requires the distinction in ability-to-pay requirements between consumers under the age of 21 and consumers age 21 or older. The Bureau agrees that a card issuer would not be in violation of ECOA or Regulation B merely by not considering income to which a consumer under the age of 21 only has a reasonable expectation of access (as it is prohibited from doing under TILA section 127(c)(8) as implemented by § 1026.51(b)), even though the card issuer may consider that income to be the consumer's income for consumers who are 21 or older. Accordingly, the final rule revises comment 51(b)(1)–1 to clarify that a card issuer would not violate Regulation B by virtue of complying with § 1026.51(b). The final rule also redesignates current comment 51(b)(1)–1 as comment 51(b)–7 and current comment 51(b)(1)–2 as comment 51(b)(1)–1 for organizational purposes.

As noted above, one trade association expressed concern that issuers who decide to use only the independent ability-to-pay criterion for applicants age 21 or older might risk violating ECOA and Regulation B—on the theory that doing so would disadvantage non-working spouses, who are likely to be predominantly female, while another industry commenter expressed concern that application of the reasonable expectation of access criterion may result in potential ECOA and Regulation B violations based on marital status. As discussed above, the final rule permits card issuers the flexibility to consider a consumer's ability to pay using the reasonable expectation of access criterion adopted in the final rule or instead using the independent ability-to-pay criterion. The Bureau recognizes that, depending on their business models, some card issuers may decide to use the independent ability-to-pay criterion. The Bureau understands that card issuers regularly make decisions about their tolerance for repayment risk and that such decisions are a proper and entirely appropriate consideration in crafting underwriting decisions. The final rule specifically provides flexibility on this point. The Bureau expects that card issuers will give careful consideration to how to use the discretion allowed under the rule's flexible approach, in light of the issuers' loss experiences, risk appetites, and other pertinent factors, including the potential effect of the decision on an ECOA protected class. The Bureau does not expect that issuers will necessarily have conducted a quantitative analysis in support of those decisions, but that they will be able to explain the reasoning that went into their decisions and the effects of those decisions. The Bureau is committed to engaging with stakeholders as they implement the new rule.

V. Effective Date

This rule is effective on the date of publication in the **Federal Register**.[36] Covered parties may begin to comply with the final rule as of the effective date, but no later than six months from the effective date.

The Bureau believes that the flexible effective date adopted in the final rule appropriately balances the needs of industry to determine their preferred method for meeting ability-to-pay requirements for consumers 21 or older with the goal of providing consumers the benefits of greater access to credit as soon as practical. The Bureau believes the flexible effective date provided in the final rule is appropriate for several reasons. First, based on comments received in response to the proposed rule, the Bureau expects that certain card issuers will continue with existing practices and, thus, will not require additional time to change or update their systems, application materials, or policies. Second, it recognizes that many card issuers may wish to apply the less restrictive ability-to-pay standard set forth in § 1026.51(a) as soon as possible. Finally, the Bureau recognizes that the flexibility afforded to issuers by § 1026.51(a) may require some card issuers to review their existing systems, policies, and practices to determine which of the permissible underwriting criteria—reasonable expectation of access or independent income or assets—meets their business needs. The Bureau believes that, in such instances, six months is an adequate amount of time.

VI. Section 1022(b)(2) of the Dodd-Frank Act

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts,[37] and has consulted or offered to consult with the prudential regulators and the Federal Trade Commission, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies. The Bureau also requested comments on the potential benefits, costs, and impacts of the proposal.

The final rule amends § 1026.51(a) to permit the consideration, for applicants 21 or older, of income and assets to which the applicant has a reasonable expectation of access. Currently, § 1026.51(a) requires that issuers consider the consumer's independent ability to make the required minimum periodic payments under the terms of the account, based on the consumer's income or assets.

The final rule allows issuers to extend credit (either open credit card accounts under open-end consumer credit plans, or increase credit limits applicable to such accounts) in circumstances where they are currently prohibited from doing so, notably in opening credit card accounts or increasing credit limits for consumers 21 or older based on income or assets to which the applicant has a reasonable expectation of access. As one industry commenter noted, the ability-to-pay requirement is not the only underwriting standard used by card issuers and may not be evaluated until other underwriting criteria have been analyzed. In considering the costs and benefits of the final rule, the Bureau notes that the final rule does not require that card issuers in opening a credit card account, or increasing the credit line on such an account, for a consumer who is 21 years or older to consider income to which that consumer has only a reasonable expectation of access,

[36] Although the proposal did not expressly solicit comment on an appropriate implementation period, one industry member submitted comment on this issue. This commenter expressed concern that the new requirements would impose an onerous regulatory burden on affected parties, particularly credit unions and urged the Bureau to delay the effective date of any changes to Regulation Z, but did not indicate a specific timeframe for implementation of the final rule.

[37] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on insured depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas. This discussion considers the impacts of the proposed rule relative to existing law.

but permits card issuers to do so. Issuers, therefore, are not required to make any changes in their practices as a result of the final rule.

Extensions of credit based on the consideration of such income or assets would likely benefit both covered persons (the creditors) and consumers (the applicants) since, in most circumstances, creditors would not extend credit nor would adult applicants accept the offer were it not in the mutual interest of both parties. While certain consumer and issuer behaviors could lead to situations where consumers enter into credit contracts that are harmful to their own financial situation, it is unlikely that preventing creditors from extending credit in such situations would prevent many such cases, while it may prevent many mutually beneficial transactions. For the proposal, the Bureau did not have data with which to quantify the relative credit performance of applicants who received credit on the basis of income or assets to which the applicant had only a reasonable expectation of access compared to other types of applicants. In the proposal, the Bureau sought data on the prevalence of such applications and evidence regarding the performance of such loans, but did not receive specific data regarding default rates from commenters.

As noted in the section-by-section analysis, the Bureau received comments from several entities who expressed concern about the potential risks associated with applying the reasonable expectation of access standard to consumers 21 or older. For example, some industry commenters argued that the reasonable expectation of access standard presents material risks to the underwriting process, while others expressed concern that card issuers relying on the standard would have difficulty evaluating whether the applicant truly has the means to repay a debt, and as a result, would inevitably make poor decisions. As noted above, however, the Bureau did not receive supporting data in the record to substantiate claims that the new standard may result in riskier underwriting and, thus, greater incidence of default. In any event, the final rule does not mandate that card issuers base their consideration of an applicant's ability pay on the reasonable expectation of access criterion. As an alternative, card issuers retain the option of evaluating an applicant's independent income or assets in considering the applicant's ability to pay. The Bureau believes that because credit cards are generally unsecured, card issuers will be motivated to carefully review the risk factors associated with the income sources provided by consumers and other information available to them regarding a consumer's creditworthiness. Moreover, the final rule includes in the official commentary examples of when it would be reasonable or unreasonable for an issuer to consider the income or assets of an individual to whose income the applicant claims to have a reasonable expectation of access.

Finally, the final rule would have no unique impact on insured depository institutions or insured credit unions with $10 billion or less in assets as described in section 1026 of the Dodd-Frank Act, nor would the final rule have a unique impact on rural consumers.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[38] The RFA defines a ''small business'' as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[39]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[40] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[41]

The Bureau did not conduct an IRFA for the November 2012 Proposal because the Bureau concluded that the proposed rule, if finalized, would not have a significant economic impact on any small entities. The Bureau reasoned that it did not expect the proposal to impose costs on covered persons because if the Bureau adopted the proposal as written, all methods of compliance under current law would remain available to small entities. The undersigned therefore certified that the proposed rule would not have a significant economic impact on a substantial number of small entities. The Bureau received one comment regarding the impact of the proposed rule on small entities. An industry commenter urged the Bureau to require card issuers that rely on income models to demonstrate over time that the issuer has seen substantially the same results with modeled income and actual income. The commenter also requested that smaller card issuers be given additional time and flexibility to develop income models and be allowed to use models developed by other entities.

The Bureau reiterates its previous conclusion that it does not expect the final rule to impose costs on covered persons because all methods of compliance under current law will remain available to small entities. With respect to income models, the final rule makes no changes to the requirements for the use of income models and continues to permit card issuers to rely on empirically derived, demonstrably and statistically sound models to estimate a consumer's income or assets. Accordingly, the undersigned certifies that this final rule will not have a significant impact on a substantial number of small entities.

VIII. Paperwork Reduction Act

This final rule amends Regulation Z, 12 CFR part 1026. The collections of information related to Regulation Z have been previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (PRA) and assigned OMB Control Number 3170–0015. Under the PRA and notwithstanding any other provisions of law, the Bureau may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB. As discussed in the November 2012 Proposal, the Bureau does not believe that this final rule will impose any new information collection requirements or substantively or materially revise existing collections of information as contained in Regulation Z. The Bureau did not receive any comments regarding this determination.

List of Subjects in 12 CFR Part 1026

Advertising, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

[38] 5 U.S.C. 601 *et seq.* The Bureau is not aware of any governmental units or not-for-profit organizations to which the proposal would apply.

[39] 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment. *Id.*

[40] 5 U.S.C. 603–605.

[41] 5 U.S.C. 609.

Authority and Issuance

For the reasons set forth in the preamble above, the Bureau amends Regulation Z, Part 1026 of Chapter X in Title 12 of the Code of Federal Regulations as follows:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for Part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601; 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

■ 2. Section 1026.51 is amended by revising paragraphs (a)(1) and (b) to read as follows:

§ 1026.51 Ability to pay.

(a) *General rule*—(1)(i) *Consideration of ability to pay.* A card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the consumer's ability to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and the consumer's current obligations.

(ii) *Reasonable policies and procedures.* Card issuers must establish and maintain reasonable written policies and procedures to consider the consumer's ability to make the required minimum payments under the terms of the account based on a consumer's income or assets and a consumer's current obligations. Reasonable policies and procedures include treating any income and assets to which the consumer has a reasonable expectation of access as the consumer's income or assets, or limiting consideration of the consumer's income or assets to the consumer's independent income and assets. Reasonable policies and procedures also include consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations. It would be unreasonable for a card issuer not to review any information about a consumer's income or assets and current obligations, or to issue a credit card to a consumer who does not have any income or assets.

* * * * *

(b) *Rules affecting young consumers*—(1) *Applications from young consumers.* A card issuer may not open a credit card account under an open-end (not home-secured) consumer credit plan for a consumer less than 21 years old, unless the consumer has submitted a written application and the card issuer has:

(i) Financial information indicating the consumer has an independent ability to make the required minimum periodic payments on the proposed extension of credit in connection with the account; or

(ii)(A) A signed agreement of a cosigner, guarantor, or joint applicant who is at least 21 years old to be either secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 or jointly liable with the consumer for any debt on the account; and

(B) Financial information indicating such cosigner, guarantor, or joint applicant has the ability to make the required minimum periodic payments on such debts, consistent with paragraph (a) of this section.

(2) *Credit line increases for young consumers.* (i) If a credit card account has been opened pursuant to paragraph (b)(1)(i) of this section, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless:

(A) At the time of the contemplated increase, the consumer has an independent ability to make the required minimum periodic payments on the increased limit consistent with paragraph (b)(1)(i) of this section; or

(B) A cosigner, guarantor, or joint applicant who is at least 21 years old agrees in writing to assume liability for any debt incurred on the account, consistent with paragraph (b)(1)(ii) of this section.

(ii) If a credit card account has been opened pursuant to paragraph (b)(1)(ii) of this section, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless the cosigner, guarantor, or joint accountholder who assumed liability at account opening agrees in writing to assume liability on the increase.

* * * * *

■ 3. In Supplement I to Part 1026 under *Section 1026.51 Ability to Pay:*

■ A. Under subheading *51(a) General rule* and subheading *51(a)(1)(i) Consideration of ability to pay:*

■ i. Paragraphs 1, 2, and 4 are revised;

■ ii. Paragraphs 5 and 6 are redesignated as paragraphs 7 and 8, respectively; and

■ iii. New paragraphs 5, 6 and 9 are added.

■ B. Under subheading *51(b) Rules affecting young consumers:*

■ i. New paragraphs 5 and 6 are added;

■ ii. Paragraph 1 under subheading *51(b)(1) Applications from young consumers* is redesignated as paragraph 7 under subheading *51(b) Rules affecting young consumers* and revised;

■ iii. Under subheading *51(b)(1) Applications from young consumers,* paragraph 2 is removed;

■ iv. Subheading *Paragraph 51(b)(1)(i)* and paragraphs 1 through 3 are added;

■ v. Subheading *Paragraph 51(b)(1)(ii)* and paragraph 1 are added; and

■ vi. Under subheading 51(b)(2) *Credit line increases for young consumers,* paragraph 2 is added.

Supplement I to Part 1026—Official Interpretations

* * * * *

Section 1026.51—Ability to Pay

51(a) General rule.

51(a)(1)(i) Consideration of ability to pay.

1. *Consideration of additional factors.* Section 1026.51(a) requires a card issuer to consider a consumer's ability to make the required minimum periodic payments under the terms of an account based on the consumer's income or assets and current obligations. The card issuer may also consider consumer reports, credit scores, and other factors, consistent with Regulation B (12 CFR part 1002).

2. *Ability to pay as of application or consideration of increase.* A card issuer complies with § 1026.51(a) if it bases its consideration of a consumer's ability to make the required minimum periodic payments on the facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account.

* * * * *

4. *Consideration of income and assets.* For purposes of § 1026.51(a):

i. A card issuer may consider any current or reasonably expected income or assets of the consumer or consumers who are applying for a new account or will be liable for debts incurred on that account, including a cosigner or guarantor. Similarly, when a card issuer is considering whether to increase the credit limit on an existing account, the card issuer may consider any current or reasonably expected income or assets of the consumer or consumers who are accountholders, cosigners, or guarantors, and are liable for debts incurred on that account. In both of these circumstances, a card issuer may treat any income and assets to which an applicant, accountholder, joint applicant, cosigner, or guarantor who is or will be liable for debts incurred on the account has a reasonable expectation of access as the applicant's current or reasonably expected income—but is not required to do so. A card issuer may instead limit its consideration of a consumer's current or reasonably expected income or assets to the consumer's independent income or assets as discussed in

comments 51(b)(1)(i)–1 and 51(b)(2)–2. Although these comments clarify the independent ability-to-pay requirement that governs applications from consumers under 21, they provide guidance regarding the use of ''independent income and assets'' as an underwriting criterion under § 1026.51(a). For example, comment 51(b)(1)(i)–1 explains that card issuers may not consider income or assets to which applicants under 21 have only a reasonable expectation of access. An issuer who chooses to comply with § 1026.51(a) by limiting its consideration to applicants' independent income and assets likewise would not consider income or assets to which applicants 21 or older have only a reasonable expectation of access.

ii. Current or reasonably expected income includes, for example, current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income include interest or dividends, retirement benefits, public assistance, alimony, child support, and separate maintenance payments. Proceeds from student loans may be considered as current or reasonably expected income only to the extent that those proceeds exceed the amount disbursed or owed to an educational institution for tuition and other expenses. Current or reasonably expected income also includes income that is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or joint account). Assets include, for example, savings accounts and investments.

iii. Consideration of the income or assets of authorized users, household members, or other persons who are not liable for debts incurred on the account does not satisfy the requirement to consider the consumer's current or reasonably expected income or assets, unless a Federal or State statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income and assets (*e.g.,* joint ownership granted under State community property laws), such income is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or a joint account), or the consumer has a reasonable expectation of access to such income or assets even though the consumer does not have a current or expected ownership interest in the income or assets. See comment 51(a)(1)-6 for examples of non-applicant income to which a consumer has a reasonable expectation of access.

5. *Information regarding income and assets.* For purposes of § 1026.51(a), a card issuer may consider the consumer's current or reasonably expected income and assets based on the following information:

i. Information provided by the consumer in connection with the account, including information provided by the consumer through the application process. For example, card issuers may rely without further inquiry on information provided by applicants in response to a request for ''salary,'' ''income,'' ''assets,'' ''available income,'' ''accessible income,'' or other language requesting that the applicant provide information regarding current or reasonably expected income or assets or any income or assets to which the applicant has a reasonable expectation of access. However, card issuers may not rely solely on information provided in response to a request for ''household income.'' In that case, the card issuer would need to obtain additional information about an applicant's current or reasonably expected income, including income and assets to which the applicant has a reasonable expectation of access (such as by contacting the applicant). See comments 51(a)(1)–4, –5, and –6 for additional guidance on determining the consumer's current or reasonably expected income under § 1026.51(a)(1). See comment 51(a)(1)–9 for guidance regarding the use of a single, common application form or process for all credit card applicants, regardless of age.

ii. Information provided by the consumer in connection with any other financial relationship the card issuer or its affiliates have with the consumer (subject to any applicable information-sharing rules).

iii. Information obtained through third parties (subject to any applicable information-sharing rules).

iv. Information obtained through any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income or assets, including any income or assets to which the consumer has a reasonable expectation of access.

6. *Examples of considering income.* Assume that an applicant is not employed and that the applicant is age 21 or older so § 1026.51(b) does not apply.

i. If a non-applicant's salary or other income is deposited regularly into a joint account shared with the applicant, a card issuer is permitted to consider the amount of the non-applicant's income that is being deposited regularly into the account to be the applicant's current or reasonably expected income for purposes of § 1026.51(a).

ii. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly transfers a portion of that income into the applicant's individual deposit account. A card issuer is permitted to consider the amount of the non-applicant's income that is being transferred regularly into the applicant's account to be the applicant's current or reasonably expected income for purposes of § 1026.51(a).

iii. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly uses a portion of that income to pay for the applicant's expenses. A card issuer is permitted to consider the amount of the non-applicant's income that is used regularly to pay for the applicant's expenses to be the applicant's current or reasonably expected income for purposes of § 1026.51(a) because the applicant has a reasonable expectation of access to that income.

iv. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access, the non-applicant does not regularly use that income to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that income. A card issuer is not permitted to consider the non-applicant's income as the applicant's current or reasonably expected income for purposes of § 1026.51(a) because the applicant does not have a reasonable expectation of access to the non-applicant's income.

* * * * *

9. *Single application.* A card issuer may use a single, common application form or process for all credit card applicants, regardless of age. A card issuer may rely without further verification on income and asset information provided by applicants through such an application, so long as the application questions gather sufficient information to allow the card issuer to satisfy the requirements of both § 1026.51(a) and (b), depending on whether a particular applicant has reached the age of 21. For example, a card issuer might provide two separate line items on its application form, one prompting applicants to provide their ''personal income,'' and the other prompting applicants for ''available income.'' A card issuer might also prompt applicants, regardless of age, using only the term ''income'' and satisfy the requirements of both § 1026.51(a) and (b).

* * * * *

51(b) Rules affecting young consumers.

* * * * *

5. *Current obligations.* A card issuer may consider the consumer's current obligations under § 1026.51(b)(1) and (b)(2)(i) based on information provided by the consumer or in a consumer report. In evaluating a consumer's current obligations, a card issuer need not assume that credit lines for other obligations are fully utilized.

6. *Joint applicants or joint accountholders.* With respect to the opening of a joint account for two or more consumers under § 1026.51(b)(1) or a credit line increase on such an account under § 1026.51(b)(2)(i), the card issuer may consider the collective ability of all persons who are or will be liable for debts incurred on the account to make the required payments. See commentary to § 1026.51(b)(1)(i) and (b)(2) for information on income and assets that may be considered for joint applicants, joint accountholders, cosigners, or guarantors who are under the age of 21, and commentary to § 1026.51(b)(1)(ii) for information on income and assets that may be considered for joint applicants, joint accountholders, cosigners, or guarantors who are at least 21 years old.

7. *Relation to Regulation B.* In considering an application or credit line increase on the credit card account of a consumer who is less than 21 years old, card issuers must comply with the applicable rules in Regulation B (12 CFR part 1026). A card issuer does not violate Regulation B by complying with the requirements in § 1026.51(b).

51(b)(1) Applications from young consumers.

Paragraph 51(b)(1)(i).

1. *Consideration of income and assets for young consumers.* For purposes of § 1026.51(b)(1)(i):

i. A card issuer may consider any current or reasonably expected income or assets of

the consumer or consumers who are applying for a new account or will be liable for debts incurred on that account, including a cosigner or guarantor. However, because § 1026.51(b)(1)(i) requires that the consumer who has not attained the age of 21 have an independent ability to make the required minimum periodic payments, the card issuer may only consider the applicant's current or reasonably expected income or assets under § 1026.51(b)(1)(i). The card issuer may not consider income or assets to which an applicant, joint applicant, cosigner, or guarantor, in each case who is under the age of 21 and is or will be liable for debts incurred on the account, has only a reasonable expectation of access.

ii. Current or reasonably expected income includes, for example, current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income include interest or dividends, retirement benefits, public assistance, alimony, child support, and separate maintenance payments. Proceeds from student loans may be considered as current or reasonably expected income only to the extent that those proceeds exceed the amount disbursed or owed to an educational institution for tuition and other expenses. Current or reasonably expected income includes income that is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or a joint account). Assets include, for example, savings accounts and investments. Current or reasonably expected income and assets does not include income and assets to which the consumer only has a reasonable expectation of access.

iii. Consideration of the income and assets of authorized users, household members, or other persons who are not liable for debts incurred on the account does not satisfy the requirement to consider the consumer's current or reasonably expected income or assets, unless a Federal or State statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income or assets (*e.g.,* joint ownership granted under State community property laws), or the income is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or a joint account). See comment 51(b)(1)(i)–3 for examples of income that may be relied upon as a consumer's current or reasonably expected income.

2. *Information regarding income and assets for young consumers.* For purposes of § 1026.51(b)(1)(i), a card issuer may consider the consumer's current or reasonably expected income and assets based on the following information:

i. Information provided by the consumer in connection with the account, including information provided by the consumer through the application process. For example, card issuers may rely without further inquiry on information provided by applicants in response to a request for ''salary,'' ''income,'' ''personal income,'' ''individual income,'' ''assets,'' or other language requesting that the applicant provide information regarding his or her current or reasonably expected income or assets. However, card issuers may not rely solely on information provided in response to a request for ''household income.'' Nor may they rely solely on information provided in response to a request for ''available income,'' ''accessible income,'' or other language requesting that the applicant provide any income or assets to which the applicant has a reasonable expectation of access. In such cases, the card issuer would need to obtain additional information about an applicant's current or reasonably expected income (such as by contacting the applicant). See comments 51(b)(1)(i)–1, –2, and –3 for additional guidance on determining the consumer's current or reasonably expected income under § 1026.51(b)(1)(i). See comment 51(a)(1)–9 for guidance regarding the use of a single, common application for all credit card applicants, regardless of age.

ii. Information provided by the consumer in connection with any other financial relationship the card issuer or its affiliates have with the consumer (subject to any applicable information-sharing rules).

iii. Information obtained through third parties (subject to any applicable information-sharing rules).

iv. Information obtained through any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income or assets.

3. *Examples of considering income for young consumers.* Assume that an applicant is not employed and the applicant is under the age of 21 so § 1026.51(b) applies.

i. If a non-applicant's salary or other income is deposited regularly into a joint account shared with the applicant, a card issuer is permitted to consider the amount of the non-applicant's income that is being deposited regularly into the account to be the applicant's current or reasonably expected income for purposes of § 1026.51(b)(1)(i).

ii. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly transfers a portion of that income into the applicant's individual deposit account. A card issuer is permitted to consider the amount of the non-applicant's income that is being transferred regularly into the applicant's account to be the applicant's current or reasonably expected income for purposes of § 1026.51(b)(1)(i).

iii. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly uses that income to pay for the applicant's expenses. A card issuer is not permitted to consider the non-applicant's income that is used regularly to pay for the applicant's expenses as the applicant's current or reasonably expected income for purposes of § 1026.51(b)(1)(i), unless a Federal or State statute or regulation grants the applicant an ownership interest in such income.

iv. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access, the non-applicant does not regularly use that income to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that income. The card issuer is not permitted to consider the non-applicant's income to be the applicant's current or reasonably expected income for purposes of § 1026.51(b)(1)(i).

Paragraph 51(b)(1)(ii).

1. *Financial information.* Information regarding income and assets that satisfies the requirements of § 1026.51(a) also satisfies the requirements of § 1026.51(b)(1)(ii)(B) and card issuers may rely on the guidance in comments 51(a)(1)–4, –5, and –6 for purposes of determining whether a cosigner, guarantor, or joint applicant who is at least 21 years old has the ability to make the required minimum periodic payments in accordance with § 1026.51(b)(1)(ii)(B).

51(b)(2) Credit line increases for young consumers.

* * * * *

2. *Independent ability-to-pay standard.* Under § 1026.51(b)(2), if a credit card account has been opened pursuant to § 1026.51(b)(1)(i), no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless, at the time of the contemplated increase, the consumer has an independent ability to make the required minimum periodic payments on the increased limit, consistent with § 1026.51(b)(1)(i), or a cosigner, guarantor, or joint applicant who is at least 21 years old assumes liability for any debt incurred on the account, consistent with § 1026.51(b)(1)(ii). Thus, when a card issuer is considering whether to increase the credit limit on an existing account, § 1026.51(b)(2)(i)(A) requires that consumers who have not attained the age of 21 and do not have a cosigner, guarantor, or joint applicant who is 21 years or older must have an independent ability to make the required minimum periodic payments as of the time of the contemplated increase. Thus, the card issuer may not consider income or assets to which an accountholder, cosigner, or guarantor, in each case who is under the age of 21 and is or will be liable for debts incurred on the account, has only a reasonable expectation of access under § 1026.51(b)(2)(i)(A). The card issuer, however, may consider income or assets to which an accountholder, cosigner, or guarantor, in each case who is age 21 or older and is or will be liable for debts incurred on the account, has a reasonable expectation of access under § 1026.51(b)(2)(i)(B). Information regarding income and assets that satisfies the requirements of § 1026.51(b)(1)(i) also satisfies the requirements of § 1026.51(b)(2)(i)(A) and card issuers may rely on the guidance in the commentary to § 1026.51(b)(1)(i) for purposes of determining whether an accountholder who is less than 21 years old has the independent ability to make the required minimum periodic payments in accordance with § 1026.51(b)(2)(i)(A). Information regarding income and assets that satisfies the requirements of § 1026.51(a) also satisfies the requirements of § 1026.51(b)(2)(i)(B) and card issuers may rely on the guidance in comments 51(a)(1)–4, –5, and –6 for purposes of determining whether a cosigner, guarantor,

or joint applicant who is at least 21 years old has the ability to make the required minimum periodic payments in accordance with § 1026.51(b)(2)(i)(B).

* * * * *

Dated: April 29, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2013–10429 Filed 5–2–13; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No.: FAA–2010–1175; Amdt. No. 25–138]

RIN 2120–AJ83

Installed Systems and Equipment for Use by the Flightcrew

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends design requirements in the airworthiness standards for transport category airplanes to minimize the occurrence of design-related flightcrew errors. The new design requirements will enable a flightcrew member to detect and manage his or her errors when the errors occur. Adopting this rule will eliminate regulatory differences between the airworthiness standards of the United States (U.S.) and those of the European Aviation Safety Agency (EASA) without affecting current industry design practices.

DATES: Effective July 2, 2013.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see ''How To Obtain Additional Information'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this final rule, contact Loran Haworth, Airplane and Flightcrew Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98057–3356; telephone (425) 227–1133; facsimile (425) 227–1320; email *Loran.Haworth@faa.gov*.

For legal questions about this final rule, contact Doug Anderson, Office of the Regional Counsel (ANM–7), 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2166; facsimile 425–227–1007; email *Douglas.Anderson@faa.gov*.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, the FAA is charged with prescribing regulations and minimum standards for the design and performance of aircraft that the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority. It prescribes new safety standards for the design, production, and operation of transport category airplanes.

List of Abbreviations and Acronyms Frequently Used in This Document

AFM Airplane Flight Manual
ALPA Air Line Pilots Association, International
ARAC Aviation Rulemaking Advisory Committee
ATC Air Traffic Control
DER Designated Engineering Representative
EASA European Aviation Safety Agency
EFB Electronic Flight Bag
FAA Federal Aviation Administration
FMS Flight Management System
HF Human Factors
ICAO International Civil Aviation Organization
NPRM Notice of Proposed Rulemaking
OEM Original Equipment Manufacturer
RFA Regulatory Flexibility Act
SBREFA Small Business Regulatory Enforcement Fairness Act
STC Supplemental Type Certificate
TC Type Certificate
UM Unit Member

I. Overview of Final Rule

This final rule adds § 25.1302 which addresses—

- Design requirements to minimize errors made by the flightcrew and enable them to detect and manage their errors when the errors occur;
- Flightcrew limitations and control requirements not covered by current regulations;
- Flightcrew interactions with the equipment that can be reasonably expected in service;
- Uniform standards that address design for flightcrew error in transport category airplanes; and
- Harmonization of the United States (U.S.) and EASA airworthiness standards.

II. Background

Accidents often result from a sequence or combination of flightcrew errors and safety related events. Flightcrews contribute positively to the safety of the air transportation system by using their ability to assess complex situations and make reasoned decisions. However, even trained, qualified, checked, alert flightcrew members can make errors.

Flightcrew errors that could impact safety are often detected and mitigated in the normal course of events. However, accident analyses have identified flightcrew performance and error as significant factors in a majority of accidents involving transport category airplanes. Some errors may be influenced by the design of the systems the flightcrew uses to operate the airplane and by the flightcrew interfaces of those systems, even those that are carefully designed.

The design of the flight deck and other systems may influence flightcrew task performance and may also affect the rate of occurrence and effects of flightcrew errors.

Human error is generally characterized as a deviation from what is considered correct in some context. In the hindsight of analysis of accidents, incidents, or other events of interest, these deviations might include an inappropriate action, a difference from what is expected in a procedure, a mistaken decision, a slip of the fingers in typing, an omission of some kind, and many other examples.

A. Statement of the Problem

The FAA tasked the Aviation Rulemaking Advisory Committee (ARAC) through its Human Factors Harmonization Working Group to review existing regulations and recommend measures to address the contribution of design and certification of transport category airplane flight decks to flightcrew error. The ARAC submitted its recommendations to the FAA in a report, Human Factors—Harmonization Working Group (HFHWG) Final Report, dated June 15, 2004. This final rule implements these recommendations.

The HFHWG acknowledged that existing regulations are designed to address differing aspects of flightcrew performance. Flightcrew capabilities are carefully considered through—

1. Airworthiness standards for the issuance of type certificates for airplanes (14 CFR part 25);
2. Airplane operating requirements (14 CFR part 121);
3. Certification and operating requirements (14 CFR part 119); and

4. Requirements for issuing pilot certificates and ratings (14 CFR part 61).

Taken together, these requirements provide a high degree of operational safety in the air transportation system. They take into consideration equipment design, training, qualifications for pilot certificates, airplane operations and procedures, and the interaction of systems, equipment and personnel and how each contribute to operating safely through risk management.

However, the HFHWG noted that design characteristics can contribute to flightcrew error. They recommended that more explicit requirements for design attributes related to managing and avoiding flightcrew error be included to augment the existing regulations. These requirements are codified in new § 25.1302.

EASA incorporated these same regulations in 2006 based on the ARAC recommendations. The requirements in the new § 25.1302 are harmonized with those in the current EASA CS 25.1302 (Amendment 25/3). Thus, this rulemaking eliminates regulatory differences between the applicable sections of the U.S. and Europe.

B. Current Requirements

Several existing regulations apply to aspects of flightcrew performance. These regulations are listed and discussed in the ARAC report, Human Factors—Harmonization Working Group Final Report, June 15, 2004, which is posted on the FAA Web site *http://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/TAEhfhT1-072299.pdf.*

C. Summary of the NPRM

The FAA published a notice of proposed rulemaking (NPRM) on February 3, 2011 (76 FR 6088) and posted the draft of AC 25.1302 for comment at the same time. The proposed rule augments existing generally applicable rules with more explicit requirements for design attributes related to avoiding and managing flightcrew error. The comment period closed on April 4, 2011 for both documents.

This rule is one aspect of a balanced approach involving both design approval requirements in the minimum airworthiness standards of part 25 and requirements for training/licensing/qualification, operations, and procedures such as those found in parts 61, 91, 121, and 135.

D. General Overview of Comments

The FAA received comments from Airbus, the Boeing Company, the Cessna Aircraft Company, the Garmin Company, the Mitsubishi Company and the Air Line Pilots Association, International (ALPA). The commenters discussed the following:

- Airbus had no comments on § 25.1302 and four comments on Advisory Circular (AC) 25.1302.
- Boeing welcomed § 25.1302 and had ''no specific comments on the proposed rule.''
- ALPA supports the new § 25.1302 as well as AC 25.1302.
- Cessna stated the ''content of this regulation is indeed good and valuable; however demonstrating and documenting compliance to the stated requirements will very likely impose a large burden on the part of the applicant.''
- Garmin also commented on cost and burden.
- Both Cessna and Garmin are concerned with future delegation of findings.
- Cessna and Mitsubishi both commented on the example of an intentional error described in the preamble.

None of the commenters opposed the proposed rule.

III. Discussion of Public Comments and Final Rule

Cost of Rule

The economic analysis for the proposed rule stated there would be no additional costs to transport airplane manufacturers as they are already in compliance or intend to fully comply with the EASA standard. Cessna and Garmin commented that the cost impact of this rule is not small and unimportant.

Cessna believes substantial nonrecurring cost will result from demonstrating compliance with this rule. In addition to securing the services of human factors specialists, substantial time and cost will be associated with the ''more methodological approach'' specified in Figure 1 of Advisory Circular 25.1302.

The FAA notes all new transport airplane type certificate (TC) applicants, including Cessna, are expected to seek EASA validation. In response to our request for clarification, Cessna explicitly did not dispute our statement in the NPRM that ''The requirements of these proposed standards are similar to those in the current EASA CS 25.1302. Means of compliance are intended to be identical.'' The costs to which Cessna refers are unavoidable if Cessna is to comply with the current CS 25.1302, as well as our rule. There are no incremental costs as a result of the harmonization of standards itself. Accordingly, no change was made to this rule as a result of this comment.

Garmin commented that ''very few applicants have truly complied with the EASA rule and many manufacturers have noted increased cost and certification burden in showing compliance to the rule. Additionally, very few 'clean sheet' aircraft certifications have been performed since 2006, while a majority of certification projects typically involve type design changes to already certified aircraft (examples include updating avionics systems, engines, drag reduction, interior enhancements, etc). In this process applicants often are not required to comply with the latest certification regulations. The FAA's draft AC 25.1302 makes clear the proposed rule's applicability is not limited to new TC designs but is also intended for STC design changes.'' Garmin believes the FAA may not have considered the cost impact of these efforts.

For design changes, increased costs result only if both of the following are true:

1. The project would not be expected to seek EASA validation, and
2. The certification basis for the design change is updated to include this rule.

The requirements of § 21.101, Designation of Applicable Regulations, will determine which future design changes need to have the certification basis updated to include the requirements of this final rule. Minor changes to the flight deck are not considered significant product-level changes and would not warrant changing the certification basis under § 21.101. Significant changes to the flight deck do require an updated certification basis; however, costs associated with the updated certification basis required by § 21.101 were accounted for in the economic evaluation for that rule.

As noted in the Benefits discussion of Type Certification Procedures for Changed Products (65 FR 36244, June 7, 2000), compliance is required with all later regulations where such compliance will contribute materially to the level of safety.

The requirements of § 21.101 do not require compliance with later regulations under the following circumstances:

(1) If the change in the aeronautical product is not significant,

(2) for those areas or components of the product not affected by the change,

(3) if such compliance would not contribute materially to the level of safety of the changed product,

(4) or in the final analysis, if such compliance would be impractical; i.e., would result in costs that would not commensurate with the safety benefit that would be derived.

Therefore, the incremental costs for changed products have already been justified by the benefits and are not attributable to this rulemaking. Accordingly, no change was made to this rule as a result of this comment.

Applicability and Scope

Manufacturers are concerned about the broad applicability of the rule.

Cessna expressed concern about documentation needed when the applicant seeks a design approval before a training program is accepted. Cessna stated that in nearly every case, the aircraft manufacturer is going to seek aircraft certification prior to training program acceptance. So, in nearly every situation, the original equipment manufacturer (OEM) would have to guess the impacts on training time because the training provider is rarely involved, or even selected in some cases, at that early phase due to company confidentiality with new products.

The FAA is aware that applicants may have different processes for developing a training program while simultaneously seeking design approval. Given these different processes, the applicant only needs to document novel, complex, or highly integrated design features and any new and different design assumptions that have the potential to affect training time or flightcrew procedures. It is not necessary to document the impact on training time to receive a design approval. However, the close relationship between design requirements and requirements for training, licensing, operations and procedures is recognized and is also clarified in AC 25.1302.

Cessna recommended more specific information to address the possibility that failure conditions may present conflicting information on flightdeck displays. Cessna states that conflicting indications can be addressed by accomplishment of appropriate flightcrew procedures (i.e., selection of reversion display modes).

Airworthiness design guidance regarding information conflicts is provided in AC 25–11A and AC 25.1302. For example, AC 25–11A provides guidance on reversion display modes. In addition, AC 25.1302 paragraph 5–8 C 1 (d) states: ''The applicant should describe what conclusion the flightcrew is expected to draw and what action should be taken when information on the display conflicts with other information on the flightdeck either with or without a failure.'' Other examples can be found by searching for the word ''failure'' in AC 25.1302. These issues are also covered as part of the systems safety assessment required by § 25.1309. We do agree with Cessna that when the flightcrew is fully aware of and understands the information conflict, crew procedures may be used to help flightcrew members make display reversion selections or to ignore the erroneous information.

Cessna stated there was no discussion regarding the interface with other equipment, such as the electronic flight bag (EFB). AC 120–76A provides guidance for Class 3 EFB's; however, Class 1 and 2 EFB's are considered portable electronic devices that are not part of the airplane type design, and thus conflicts between information on these devices and installed systems are not covered under § 25.1302.

Cessna remarked that § 25.1302(a) requires that information on all possible functions and features for all flight deck equipment be included in the Airplane Flight Manual (AFM). Cessna acknowledged the intent of § 25.1302 is to require ''necessary information'' for the flightcrew to properly accomplish tasks associated with use of equipment, which should not require an exhaustive discussion of all possible functions or uses. Cessna stated that identifying and addressing every possible function or use of all installed equipment, especially for a flight management system (FMS) with extensive capabilities and features, would result in voluminous written material which is of little benefit to the flightcrew.

Cessna suggests limiting the provision of information in the AFM to only what is necessary for the airplane in its operational environment. More extensive discussions of ''all features and capabilities'' could be in the information provided by the equipment manufacturer (e.g., a Pilot's Guide).

Cessna is correct that the intent is that flightcrews be provided with all ''necessary information.'' However, we do not agree that § 25.1302(a) requires all information to be in the AFM. A major function of § 25.1302 is to require that installed systems, rather than the AFM, provide information needed by the crew. Section 25.1302 does not require an exhaustive discussion of all possible functions or uses, but does require a discussion of the tasks associated with the intended function as further clarified in AC 25.1302. Guidance for the level of information of the equipment's intended function and types of documents needed to show compliance with § 25.1302(a) is contained in section 5–3 of AC 25.1302.

ALPA stated that the provisions contained in the NPRM and AC should apply to both normal and non-normal operations. These provisions call for equipment to be designed so the flightcrew can safely perform the tasks associated with the equipment's intended function in both normal and non-normal operations. ALPA noted the AC includes this provision, but the NPRM does not, and proposes that the following text be added to the introductory paragraph of § 25.1302: ''The applicant must show that these systems and installed equipment, individually and in combination with other such systems and equipment, are designed so that qualified flightcrew members trained in their use can safely perform all of the tasks associated with the systems' and equipment's intended function 'during normal and non-normal conditions'.''

The FAA notes this issue is addressed under the heading, ''Applicability and Scope'' of the NPRM preamble. The FAA envisions that equipment will be designed so the flightcrew can safely perform tasks associated with the equipment's intended function. This requirement would apply to operations in both normal and non-normal conditions, since the requirements of § 25.1302 are generally applicable and not limited to specific conditions. Therefore, we did not change the rule in this regard.

Ambiguity in the Rule

Cessna suggested that ''the FAA and foreign regulatory agencies have little experience in establishing compliance with highly subjective criteria such as stated in the proposed rule, and this will likely lead to ambiguity and differences of opinion among the agencies and individual offices within the agencies.''

The FAA notes that the rule, its guidance material, and harmonization with EASA's regulations will provide more structure, reduce ambiguity, and help resolve differences of opinion. It is the lack of any criteria that leads to differences. The methods of compliance established in AC 25.1302 provide acceptable ways for applicants to address the performance-based aspects of the rule. As is often the case, we expect that as the FAA and industry gain experience with § 25.1302, those methods of compliance will be further refined. The FAA did not change the rule language based on the above comments.

Delegation and Oversight

Both Cessna and Garmin expressed concerns about delegation and oversight of proposed § 25.1302. Cessna saw no clear path for delegation of compliance findings for the requirements of § 25.1302 to authorized individuals or organizations. No Unit Member (UM) or Designated Engineering Representative (DER) chart exists for Human Factors (HF), so Cessna assumed either there would be no delegation in this area or the delegation would be accomplished through creative use of the ''special'' delegation on other systems charts. Cessna stated, ''the FAA has not been willing to approve this delegation for HF specialists in the past,'' and suggested ''the FAA needs a well thought out approach to HF issues prior to simply adopting this regulation for harmonization with EASA.''

Cessna further stated in a follow-up discussion that the proposed FAA requirements and guidance for § 25.1302 are similar to those of EASA, but not identical. Cessna stated EASA has a process for delegating findings to the FAA or a designee, but the FAA currently lacks a delegation process and this will result in additional costs for this rule ''should the applicant have to wait for availability of limited FAA human factors specialists in finding compliance.''

Garmin stated that there is a question of designee oversight and authority. It is not clear who is delegated to make findings of compliance in this proposed rule or corresponding AC.

The FAA recognizes the need to plan an approach for delegation and oversight. The FAA will strive to work with industry and designees to develop the experience necessary to delegate in this area. This may initially result in limitations requiring the FAA's review of designee recommendations before we fully delegate the findings. Until the FAA and designees have gained experience in applying the standards and recommending findings of compliance, we will not fully delegate the findings. This is typical of all new airworthiness standards.

We are currently defining the roles and responsibilities for all HF specialists in the FAA Aircraft Certification Service. These actions will also aid in determining the technical roles and responsibilities of potential HF designees. When the work is completed, we intend to develop a plan for formalizing HF delegation. Until that time, we expect that formal findings of compliance to § 25.1302 will be handled by limiting designees approval authority until they have established their knowledge, skills, and abilities to make HF findings. We have not changed the rule language based on this comment.

We also note that whatever the costs incurred owing to initially limited delegation, these costs are unavoidable if the applicant is to comply with the current CS 25.1302, as well as our rule. There are no incremental costs as a result of the harmonization of standards itself. The existence of a delegation program is desirable for many reasons, including reduced certification burden to both the FAA and manufacturers. However, a delegation program does not create any incremental costs or reduce savings that may result from harmonization of the FAA standards with EASA standards.

Redundancy of Rule

Cessna stated the proposed rule is redundant for certain controls already installed in the cockpit. The proposed rule should clarify that controls addressed in §§ 25.777 and 25.779 are excluded from the requirements of § 25.1302.

Section 25.1302 is generally applicable and not intended to replace more specific rules. We consider §§ 25.777, 25.779, and 25.1302 to be consistent and mutually supportive. We do not believe that showing compliance with §§ 25.777 or 25.779 would in any way conflict with the requirements of § 25.1302. However, showing compliance with those specific rules is not sufficient, by itself, to show that flightcrew errors associated with controls have been properly addressed as required by § 25.1302. Therefore, compliance with § 25.1302 for flight deck controls still must be shown.

Equipment Behavior and Pilot Background

Cessna commented the proposal appears to ignore pilot background. Many pilots express different perceptions of the same equipment based on their prior background. Cessna believes this is a significant contributor to their perception of equipment function and operation. If the intent of the ''qualified flightcrew'' in § 25.1301(c)(1) is to eliminate prior bias from earlier training and/or operation of other systems, it is not clear. Cessna also made a related statement on error management and prior training and recommended a clear statement of the level of training presumed.

While we understand the concern, this rule is not intended to directly address prior bias from earlier training or operation of other systems. This rule assumes at least the minimum flightcrew requirements for the intended operation, as discussed at the beginning of subchapter 5–2 of AC 25.1302. We do not intend that the design must compensate for deficiencies in flightcrew training or experience. Given the qualification assumption, the behavior of the installed equipment must be predictable and unambiguous to the flightcrew. AC 25.1322–1, chapter 5–6 also provides additional information regarding system behavior.

Intentional Errors

Cessna took issue with the preamble statement, ''An example of an intentional error that might occur would be a situation where an alert occurs, but the flightcrew does not perform the associated procedure because they believe it to be a nuisance alert.'' In this situation, § 25.1302(d) requires the applicant to show that this error can be detected. Cessna interpreted this statement to mean it is an ''error'' to ignore something intentionally, and thus the applicant has to make sure the pilot detects and manages the fact that he or she is ignoring something intentionally. Cessna suggested that the statement should focus on reducing the number of nuisance alerts. Mitsubishi Aircraft Corporation also commented on the same example and suggested deleting the sentence and referring to § 25.1322.

We agree with Cessna that not responding to a valid alert is an error. In this example, the flightcrew ignores the alert since they believe it is not valid. Cessna is also correct in stating that the design must provide a means to allow the flightcrew to manage the error as stated in § 25.1302(d). In response to Cessna's comment that the rule should promote the reduction of nuisance alerts, we note that this requirement is already included in §§ 25.1322(d) and 25.1322(d)(1).

We do not agree with Mitsubishi that the sentence should be deleted since this is a good illustration of an intentional error. Mitsubishi requested to ''instead, cover the proposed rule with the existing regulation and statement from § 25.1322(d).'' The error discussed in the preamble is the intentional act of disregarding a valid alert. This sentence is still warranted to illustrate the distinction for the appropriate application of this regulation. The example in this sentence demonstrates the flightcrew's misinterpretation of a valid alert as being a nuisance alert (i.e., it is invalid) which may be caused by design deficiencies that lead to frequent nuisance alerts. This is one underlying design deficiency that § 25.1302 is intended to address. While this

particular example relates to nuisance alerts, there may be other design characteristics that lead flightcrew members to make other kinds of intentional errors.

No changes to the rule text were made based on these comments.

Type of Flightcrew Participation

ALPA suggested the rule promote design for active flightcrew participation, as opposed to design for passive flightcrew involvement, i.e., systems that only monitor operation. ALPA suggested keeping the flightcrew actively involved in the process of controlling all the aircraft systems, equipment, and the aircraft itself, so that they understand the situation better. Active designs would enable the flightcrew to detect failures better and intervene quicker in airplane operation.

While it may be desirable for the flightcrew to be ''actively involved'' with some systems, the FAA believes it is not appropriate to require ''active involvement'' for all systems and equipment. Such a mandated involvement may impose a significant workload on the flightcrew. However, the FAA agrees the design should enable the flightcrew to understand the situation, detect failures, and determine the need for intervention in a timely manner. Unrelated to the ALPA comment, the FAA clarified the intent of this rule for controls and information with the following change (shown in italic) to the rule language in this same section: ''Flight deck controls must be installed to allow accomplishment of all the tasks required to safely perform the equipment's intended function *and information must be provided* to the flightcrew that is necessary to accomplish the defined tasks.'' This wording change provides clarity while remaining in harmony with the intent of the EASA CS 25.1302(a) language.

Visibility of System and Equipment Displays

ALPA commented that AC 25.1302 discusses the need for the system and equipment displays to be visible in all lighting conditions. ALPA supports this and recommends revising § 25.1302(b)(1) as follows: ''Be provided in a clear and unambiguous manner at a resolution and precision appropriate to the task *in all lighting conditions and in all phases of flight* (additions in italicized text).''

The FAA generally agrees with the ALPA recommendation; however, the rule already requires a ''clear and unambiguous manner at a resolution and precision appropriate to the task'' in all phases of flight, which would indicate the flightcrew would need sufficient lighting for controls and information to be clear and unambiguous. This issue is covered in AC 25.1302. No change to the rule language was made as a result of this comment.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impact of the final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the costs and benefits is not prepared. Such a determination has been made for this final rule.

The reasoning for this determination follows similar logic used in the NPRM. The final rule, § 25.1302, addresses human factors as they apply to installed equipment on the flight deck because crew limitations and design-related errors are not currently covered by the regulations in so specific a manner. The final rule will harmonize with EASA's CS 25.1302, which is already in effect and for which there is no counterpart in the current CFR. This final rule will require compliance from manufacturers and modifiers of transport category aircraft. A review of current manufacturers has revealed they already meet or intend to meet the EASA standard as it exists in CS 25.1302. The compliance of manufacturers with the EASA requirements increase safety by (1) reducing the likelihood of flight crew errors and (2) enabling detection and recovery from errors that do occur, or mitigating their effects. Since the manufacturers intend to comply with the EASA requirements, there will be no additional safety benefits from compliance with this rule. And since the requirements in the final rule are identical to those in CS 25.1302, the manufacturers will incur no additional costs. We received no comments on the NPRM regarding a similar determination. Although there are no additional costs or benefits accruing to manufacturers as a result of this final rule, the rule does promote the social benefit of international cooperation between the FAA and EASA. The FAA therefore has determined that this final rule has benefits that justify the costs and does not warrant a full regulatory evaluation.

The FAA has also determined that this final rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a

significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The FAA believes that this final rule will not have a significant impact on a substantial number of small entities for the following reason: As noted above, this final rule will not entail additional costs to manufacturers as they are already in compliance or intend to fully comply with the EASA standard. We received no comments from small entities on the same determination made in the NPRM. Therefore as the FAA Administrator, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined that it will promote international trade by harmonizing with corresponding European Aviation Safety Agency (EASA) regulations.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million.

This final rule does not contain such a mandate. The requirements of Title II do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with this final rule. To the extent you may have comments on the information collection burdens associated with the aircraft certification application process, please direct those comments to the information collection associated with OMB Control Number 2120–0018.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform its regulations to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and found no ICAO standards comparable to § 25.1302.

F. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in FAA Order 1050.1E, Chapter 3, Paragraph *312d* and involves no extraordinary circumstances.

G. Regulations Affecting Intrastate Aviation in Alaska

Section 1205 of the FAA Reauthorization Act of 1996 (110 Stat. 3213) requires the FAA, when modifying its regulations in a manner affecting intrastate aviation in Alaska, to consider the extent to which Alaska is not served by transportation modes other than aviation and to establish appropriate regulatory distinctions. In the NPRM, the FAA requested comments on whether the final rule should apply differently to intrastate operations in Alaska. The agency did not receive any comments and has determined, based on the administrative record of this rulemaking, that there is no need to make any regulatory distinctions applicable to intrastate aviation in Alaska.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a ''significant energy action'' under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13563, Improving Regulation and Regulatory Review

The FAA analyzed this final rule under the principles and criteria of Executive Order 13563, Improving Regulation and Regulatory Review. The agency determined that this rule is adopted under public participation with an open exchange of all stakeholders. The rule is tailored to impose the least burden on society while obtaining regulatory objectives. It is a carefully written rule which harmonizes with the existing EASA rule and minimizes the cumulative effects of new and existing rules in human factors.

D. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order (EO) 13609, Promoting International Regulatory Cooperation, (77 FR 26413, May 4, 2012) promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policy and agency responsibilities of Executive Order 13609, Promoting International Regulatory Cooperation. The agency has determined that this action would eliminate differences between U.S. aviation standards and those of other civil aviation authorities by harmonizing EASA CS 25.1302 with

this new rule. Transport Canada will also harmonize with this new rule after it is issued.

VI. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document my be obtained by using the Internet—

1. Search the Federal eRulemaking Portal (*http://www.regulations.gov*);
2. Visit the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/* or
3. Access the Government Printing Office's Web page at *http://www.gpo.gov/fdsys/*.

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to *http://www.regulations.gov* and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/*.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Human factors, Reporting and recordkeeping requirements, Safety, Transportation.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 25 of Title 14, Code of Federal Regulations, as follows:

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

■ 1. The authority citation for part 25 continues to read as follows:

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

■ 2. Add § 25.1302 to subpart F to read as follows:

§ 25.1302 Installed systems and equipment for use by the flightcrew.

This section applies to installed systems and equipment intended for flightcrew members' use in operating the airplane from their normally seated positions on the flight deck. The applicant must show that these systems and installed equipment, individually and in combination with other such systems and equipment, are designed so that qualified flightcrew members trained in their use can safely perform all of the tasks associated with the systems' and equipment's intended functions. Such installed equipment and systems must meet the following requirements:

(a) Flight deck controls must be installed to allow accomplishment of all the tasks required to safely perform the equipment's intended function, and information must be provided to the flightcrew that is necessary to accomplish the defined tasks.

(b) Flight deck controls and information intended for the flightcrew's use must:

(1) Be provided in a clear and unambiguous manner at a resolution and precision appropriate to the task;

(2) Be accessible and usable by the flightcrew in a manner consistent with the urgency, frequency, and duration of their tasks; and

(3) Enable flightcrew awareness, if awareness is required for safe operation, of the effects on the airplane or systems resulting from flightcrew actions.

(c) Operationally-relevant behavior of the installed equipment must be:

(1) Predictable and unambiguous; and

(2) Designed to enable the flightcrew to intervene in a manner appropriate to the task.

(d) To the extent practicable, installed equipment must incorporate means to enable the flightcrew to manage errors resulting from the kinds of flightcrew interactions with the equipment that can be reasonably expected in service. This paragraph does not apply to any of the following:

(1) Skill-related errors associated with manual control of the airplane;

(2) Errors that result from decisions, actions, or omissions committed with malicious intent;

(3) Errors arising from a crewmember's reckless decisions, actions, or omissions reflecting a substantial disregard for safety; and

(4) Errors resulting from acts or threats of violence, including actions taken under duress.

Issued in Washington, DC, on April 22, 2013.

Michael P. Huerta,

Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2013–0374; Special Conditions No. 25–488–SC]

Special Conditions: Airbus, Model A340–600 Series Airplanes; Lower Deck Crew Rest Compartments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special condition; request for comments.

SUMMARY: These special conditions are issued for the Airbus Model A340 series airplanes. These airplanes, as modified by Flight Structures, Inc., will have a novel or unusual design feature associated with the installation of lower deck crew rest (LDCR) compartments. The LDCR compartment is novel in terms of part 25 in that it will be located under the passenger cabin floor in the aft cargo compartment of Airbus Model A340–200 series airplanes. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is April 29, 2013. We must receive your comments by June 17, 2013.

ADDRESSES: Send comments identified by docket number FAA–2013–0374 using any of the following methods:

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

Mail: Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey

Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.

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

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

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

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Alan Sinclair, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–2194; facsimile 425–227–1149.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On July 21, 2011, Flight Structures, Inc., applied for a supplemental type certificate to install a lower deck crew rest (LDCR) compartment in Airbus Model A340–600 series airplanes. The LDCR is located under the passenger cabin floor of Airbus Model A340–600 series airplanes and installed in the aft portion of the airplane. Occupancy for the LDCR compartment is limited to a maximum of seven (7) occupants. There are seven approved berths able to withstand the maximum flight loads when the LDCR compartment is at maximum capacity. The LDCR will only be occupied in flight, i.e., not during taxi, takeoff or landing. A smoke detection system, manual fire-fighting system, oxygen system and occupant amenities are provided. Additionally, a sink and vanity are located just inside the main access door.

Main access to the LDCR compartment is gained via the fixed staircase just outside of the LDCR access door. Secondary emergency egress uses an existing emergency escape hatch which is located above the aft left-hand bunk to provide access to the main deck. See Figure 1.

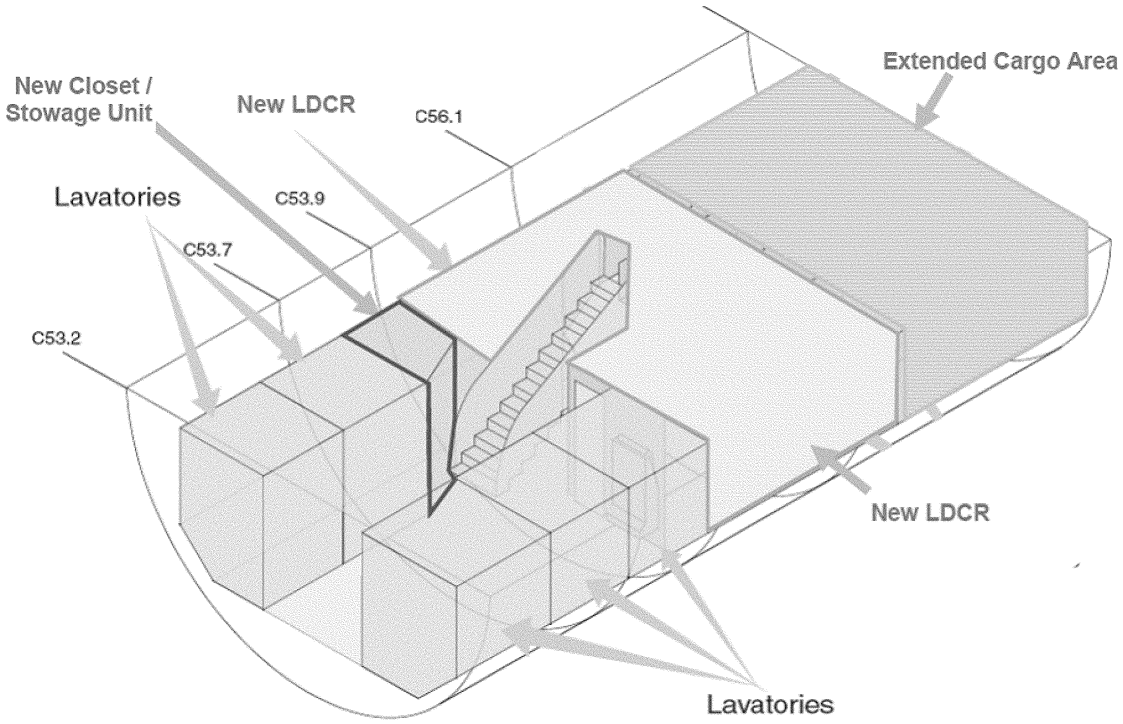

Figure 1: Diagram of Lower Deck Crew Rest Compartment

Type Certification Basis

Under the provisions of § 21.101, Flight Structures, Inc., must show that the Airbus Model A340–600 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A43NM or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in A43NM are as follows: 14 CFR part 25, as amended by Amendments 25–1 through 25–63; certain regulations at later Amendments 25–65, 25–66, and 25–77; and Amendment 25–64 with exceptions. Refer to Type Certificate Data Sheet A43NM, as applicable, for a complete description of the certification basis for these models, including certain special conditions that are not relevant to these proposed special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A340–600 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A340–600 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

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

Novel or Unusual Design Features

The Airbus Model A340–600 series airplanes will incorporate the following novel or unusual design features: LDCR compartments.

While the installation of LDCR compartments is not a new concept for large transport category airplanes, each compartment design has unique features by virtue of its design, location, and use on the airplane. Crew rest compartments have been previously installed and certificated on several Airbus airplane models (as well as those of other manufacturers) in locations as varied as in the main passenger seating area, in the overhead space above the main passenger cabin seating area, and below the passenger cabin seating area within the cargo compartment. The modification is evaluated with respect to the interior and assessed in accordance with the certification basis of the airplane. However, part 25 does not provide all of the requirements necessary for safety in crew rest compartments. The LDCR compartment is novel in terms of part 25 in that it will be located under the passenger cabin floor in the aft cargo compartment of Airbus Model A340–200 series airplanes. Further, these special conditions do not negate the need to address other applicable part 25 regulations.

Due to the novel or unusual features associated with the installation of this LDCR compartment, special conditions are considered necessary to provide a level of safety equal to that established by the airworthiness regulations incorporated by reference in the type certificate.

Operational Evaluations and Approval

These special conditions outline requirements for LDCR compartment design approvals (e.g., type design change or supplemental type certificate) administered by the FAA's Aircraft Certification Service. Prior to operational use of an LDCR compartment on U.S.-registered aircraft, the FAA's Flight Standards Service must evaluate and approve the ''basic suitability'' of the LDCR compartment for crew occupation. Additionally, if an operator wishes to use an LDCR compartment as sleeping quarters, the crew rest compartment must undergo an additional evaluation and approval (Reference §§ 121.485(a), 121.523(b), and 135.269(b)(5)). Compliance with these special conditions does not ensure that the applicant has demonstrated compliance with the requirements of part 121 or part 135.

To obtain an operational evaluation, the type design holder must contact the Aircraft Evaluation Group (AEG) in the Flight Standards Service and request a basic suitability evaluation or a sleeping quarters evaluation of their crew rest compartments. The results of these evaluations should be documented in the Flight Standardization Board Report Appendix. Individual operators may reference these standardized evaluations in discussions with their FAA Principal Operating Inspector as the basis for an operational approval, in lieu of an on-site operational evaluation.

Any changes to the approved LDCR compartment configuration that affect crew member emergency egress or any other procedures affecting the safety of the occupying crew members and/or related training shall require a re-evaluation and approval. The applicant for a crew rest design change that affects egress, safety procedures, or training is responsible for notifying the FAA's AEG that a new crew rest evaluation is required.

Procedures must be developed to assure that a crew member entering the LDCR compartment through the vestibule to fight a fire will examine the vestibule and the lavatory areas for the source of the fire prior to entering the remaining areas of the crew rest compartment. These procedures are intended to ensure that the source of the fire is not between the crew member and the primary exit. In the event a fire source is not immediately self-evident to the firefighter, the firefighter should check for potential fire sources at areas closest to the primary exit first, then proceed to check areas in such a manner that the fire source, when found, would not be between the firefighter and the primary exit. Procedures describing methods to search the LDCRs for fire source(s) must be transmitted to the operator for incorporation into their training programs and appropriate operational manuals.

Discussion

The FAA formulated the special conditions for the LDCR compartment from previous requirements established for various airplanes. These special conditions along with the original type certification basis provide the regulatory requirements necessary for certification of this modification. Other special conditions may be developed, as needed, based on further FAA review and discussions with the applicant, manufacturer, and civil aviation authorities.

Compliance with these proposed special conditions does not relieve the applicant from the existing airplane certification basis requirements. One particular area of concern is the smaller compartment volume created in the lower deck area of the airplane as a result of the crew rest installation. The applicant must comply with the requirements of § 25.365(e), (f), and (g) for each of these compartments, including the crew rest compartment, as well as any other airplane compartments whose decompression characteristics are affected by the installation of the crew rest

compartment. Please note that compliance with § 25.831 must also be demonstrated for all phases of flight where occupants will be present.

The applicant should note that the FAA considers crew rest compartment smoke or fire detection and fire suppression systems (including airflow management features which prevent hazardous quantities of smoke or fire extinguishing agent from entering any other compartment occupied by crew members or passengers) complex in terms of paragraph 6d of Advisory Circular (AC) 25.1309–1A, *System Design and Analysis,* dated June 21, 1988. In addition, the FAA considers failure of the crew rest compartment fire protection system (i.e., smoke or fire detection and fire suppression systems) in conjunction with a crew rest fire to be a catastrophic event. Based on the ''Depth of Analysis Flowchart'' shown in Figure 2 of AC 25.1309–1A, the depth of analysis should include both qualitative and quantitative assessments (reference paragraphs 8d, 9, and 10 of AC 25.1309–1A). In addition, it should be noted that flammable fluids, explosives, or other dangerous cargo are prohibited from being carried in the crew rest areas.

The requirements to enable crew member(s) quick entry to the crew rest compartment and to locate a fire source inherently places limits on the amount of baggage that may be carried and the size of the crew rest area. The FAA considers that the crew rest area must be limited to the stowage of crew personal luggage and must not be used for the stowage of cargo or passenger baggage. The design of such a system to include cargo or passenger baggage would require additional requirements to ensure safe operation.

The addition of galley equipment or a kitchenette incorporating a heat source (e.g., cook tops, microwaves, coffee pots, etc.) other than a conventional lavatory or kitchenette hot water heater within the LDCR compartment may require further special conditions to be considered. A hot water heater is acceptable without further special conditions consideration.

For the reasons discussed above, these special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Airbus Model A340–600 series airplanes. Should Flight Structures, Inc., apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No. A43NM to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

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

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Airbus Model A340–600 series airplanes modified by Flight Structures, Inc.

1. Occupancy of the lower deck crew rest (LDCR) compartment is limited to the total number of installed bunks and seats in that compartment. There must be an approved seat or berth able to withstand the maximum flight loads when occupied for each occupant permitted in the LDCR compartment. The maximum occupancy is seven in the LDCR compartment.

(a) Appropriate placards must be located inside and outside each entrance to the LDCR compartment to indicate:

(1) The maximum number of occupants allowed,

(2) That occupancy is restricted to crew members who are trained in the evacuation procedures for the LDCR compartment,

(3) That occupancy is prohibited during taxi, take-off, and landing,

(4) That smoking is prohibited in the LDCR compartment, and

(5) That stowage in the crew rest compartment area is limited to crew personal luggage. The stowage of cargo or passenger baggage is not allowed.

(b) At least one ashtray must be on the inside and outside of any entrance to the LDCR compartment.

(c) There must be a means to prevent passengers from entering the LDCR compartment in the event of an emergency or when no flight attendant is present.

(d) There must be a means for any door installed between the LDCR compartment and passenger cabin to be capable of being quickly opened from inside the compartment, even when crowding occurs at each side of the door.

(e) For all doors installed, there must be a means to preclude anyone from being trapped inside the LDCR compartment. If a locking mechanism is installed, it must be capable of being unlocked from the outside without the aid of special tools. The lock must not prevent opening from the inside of the compartment at any time.

(f) The means of opening doors and hatches to the LDCR compartment must be simple and obvious. In addition, doors or hatches that separate the LDCR compartment from the main deck must not adversely affect evacuation of occupants on the main deck (e.g., slowing evacuation by encroaching into aisles) or cause injury to those occupants during opening or while opened.

2. There must be at least two emergency evacuation routes, which could be used by each occupant of the LDCR compartment to rapidly evacuate to the main cabin. These evacuation routes must be able to be closed from the main passenger cabin after evacuation. In addition—

(a) The routes must be located with sufficient separation within the LDCR compartment to minimize the possibility of an event either inside or outside of the crew rest compartment rendering both routes inoperative.

(b) Compliance to the requirements of Special Condition No. 2(a) may be shown by inspection or by analysis. Regardless which method is used, the maximum acceptable exit separation is 60 feet measured between exit openings.

3. Compliance by Inspection. A LDCR compartment in which the evacuation

routes are located such that each occupant of the seats and berths has an unobstructed route to at least one of the evacuation routes regardless of the location of a fire would be acceptable by inspection. A fire within a berth that only blocks the occupant of that berth from exiting the berth need not be considered. Therefore, exits which are located at absolute opposite ends (i.e., adjacent to opposite end walls) of the crew rest would require no further review or analysis with regard to exit separation.

4. Compliance by Analysis.

(a) Analysis must show the LDCR compartment configuration and interior features provide for all occupants of the LDCR compartment to escape the compartment in the event of a hazard inside or outside of the compartment. Elements to consider in this evaluation are as follows:

(1) Fire inside or outside the LDCR compartment considered separately and the design elements used to reduce the available fuel for the fire,

(2) Design elements to reduce the fire ignition sources in the LDCR compartment,

(3) Distribution and quantity of emergency equipment within the LDCR compartment,

(4) Structural failure or deformation of components that could block access to the available evacuation routes (e.g., seats, folding berths, contents of stowage compartments, etc.),

(5) An incapacitated person blocking the evacuation routes, and

(6) Any other foreseeable hazard not identified above that could cause the evacuation routes to be compromised.

(b) Analysis must consider design features affecting access to the evacuation routes. The design features that should be considered include but are not limited to seat-back break-over, the elimination of rigid structure that reduces access from one part of the compartment to another, the elimination of items that are known to be the cause of potential hazards, the availability of emergency equipment to address fire hazards, the availability of communications equipment, supplemental restraint devices to retain items of mass that could hinder evacuation if broken loose and load path isolation between components that contain the evacuation routes.

(c) Analysis of the fire threats should be used in determining the placement of required fire extinguishers and protective breathing equipment (PBE) and should take into consideration the possibility of fire in any location in the LDCR compartment. The location and quantity of PBE and fire extinguishers should allow occupants located in any approved seats or berths access to the equipment necessary to fight a fire in the LDCR compartment.

(d) The intent of this special condition is to provide sufficient exit separation, therefore the exit separation analysis described above should not be used to approve exits which have less physical separation (measured between the centroid of each exit opening) than the minimums prescribed below, unless compensating features are identified and submitted to the FAA for evaluation and approval.

(e) For LDCR compartments with one exit located near the forward or aft end of an LDCR compartment (as measured by having the centroid of the exit opening within 20 percent of the forward or aft end of the total LDCR compartment length) the exit separation should not be less than 50 percent of the total LDCR compartment length.

(f) For LDCR compartments with neither required exit located near the forward or aft end of the LDCR compartment (as measured by not having the centroid of either exit opening within 20 percent of the forward or aft end of the total LDCR compartment length) the exit separation should not be less than 30 percent of the total LDCR compartment length.

(1) The routes must be designed to minimize the possibility of blockage, which might result from fire, mechanical or structural failure, or persons standing below or against the escape route. One of the two evacuation routes should not be located where, during times in which occupancy is allowed, normal movement by passengers occurs (i.e., main aisle, cross aisle or galley complex) that would impede egress from the LDCR compartment. If an evacuation route utilizes an area where normal movement of passengers occurs, it must be demonstrated that passengers would not impede egress to the main deck. If there is low headroom at or near the evacuation route, provisions must be made to prevent or to protect occupants (of the LDCR compartment) from head injury. The use of evacuation routes must not be dependent on any powered device. If a hatch is installed in an evacuation route, the point at which the evacuation route terminates in the passenger cabin should not be located where normal movement by passengers or crew occurs (main aisle, cross aisle, passageway or galley complex). If such a location cannot be avoided, special consideration must be taken to ensure that the hatch or door can be opened when a person, the weight of a ninety-fifth percentile male, is standing on the hatch or door.

(2) Emergency evacuation procedures, including the emergency evacuation of an incapacitated occupant from the LDCR compartment, must be established. The applicant must transmit all of these procedures to the operator for incorporation into its training programs and appropriate operational manuals.

(3) There must be a limitation in the Airplane Flight Manual or other suitable means requiring that crew members be trained in the use of evacuation routes.

5. There must be a means for the evacuation of an incapacitated person (representative of a ninety-fifth percentile male) from the LDCR compartment to the passenger cabin floor.

(a) The evacuation must be demonstrated for all evacuation routes. A crew member (a total of one assistant within the LDCR compartment) may provide assistance in the evacuation. Additional assistance may be provided by up to three persons in the main passenger compartment. These additional assistants must be standing on the floor while providing assistance.

(b) For evacuation routes having stairways, the additional assistants may ascend up to one half the elevation change from the main deck to the LDCR compartment, or to the first landing, whichever is lower.

6. The following signs and placards must be provided in the LDCR compartment:

(a) At least one exit sign meeting the requirements of § 25.812(b)(1)(i) must be located near each exit. One allowable exception is utilization of a sign with reduced background area of no less than 5.3 square inches (excluding the letters), provided that it is installed such that the material surrounding the exit sign is light in color (e.g., white, cream, light beige). If the material surrounding the exit sign is not light in color, a sign with a minimum of a one-inch wide background border around the letters would also be acceptable. Another allowable exception is a sign with a symbol that the FAA has determined to be equivalent for use as an exit sign in an LDCR compartment.

(b) An appropriate placard located near each exit defining the location and the operating instructions for each evacuation route.

(c) Placards must be readable from a distance of 30 inches under emergency lighting conditions.

(d) The exit handles and evacuation path operating instruction placards must be illuminated to at least 160

microlamberts under emergency lighting conditions.

7. There must be a means in the event of failure of the aircraft's main power system, or of the normal LDCR compartment lighting system, for emergency illumination to be automatically provided for the LDCR compartment.

(a) This emergency illumination must be independent of the main lighting system.

(b) The sources of general cabin illumination may be common to both the emergency and the main lighting systems if the power supply to the emergency lighting system is independent of the power supply to the main lighting system.

(c) The illumination level must be sufficient for the occupants of the LDCR compartment to locate and move to the main passenger cabin floor by means of each evacuation route.

(d) The illumination level must be sufficient, with the privacy curtains in the closed position, for each occupant of the crew rest compartment to locate a deployed oxygen mask.

8. There must be means for two-way voice communications between crew members on the flight deck and occupants of the LDCR compartment. There must also be two-way communications between the occupants of the LDCR compartment and each flight attendant station in the passenger cabin required to have a public address system microphone per § 25.1423(g). In addition, the public address system must include provisions to provide only the relevant information to the flight crew members in the LDCR compartment (e.g., fire in flight, aircraft depressurization, preparation of the compartment occupants for landing, etc.).

9. There must be a means for manual activation of an aural emergency alarm system, audible during normal and emergency conditions, to enable crew members on the flight deck and at each pair of required floor level emergency exits to alert occupants of the LDCR compartment of an emergency situation. Use of a public address or crew interphone system will be acceptable, provided an adequate means of differentiating between normal and emergency communications is incorporated. The system must be powered in flight, after the shutdown or failure of all engines and auxiliary power units, for a period of at least ten minutes.

10. There must be a means, readily detectable by seated or standing occupants of the LDCR compartment to indicate when seat belts should be fastened. In the event there are no seats, at least one means must be provided to cover anticipated turbulence (e.g., sufficient handholds). Seat-belt-type restraints must be provided for berths and must be compatible for the sleeping attitude during cruise conditions. There must be a placard on each berth requiring that seat belts must be fastened when occupied. If compliance with any of the other requirements of these special conditions is predicated on specific head location, there must be a placard identifying the head position.

11. In lieu of the requirements specified in § 25.1439(a) that pertain to isolated compartments and to provide a level of safety equivalent to that which is provided occupants of an isolated galley, all of the following equipment must be provided in the LDCR compartment:

(a) At least one approved hand-held fire extinguisher appropriate for the kinds of fires likely to occur.

(b) Two PBE devices suitable for firefighting or one PBE for each hand-held fire extinguisher, whichever is greater. All PBE devices must approved to Technical Standard Order (TSO)-C116 or equivalent.

(c) One flashlight.

NOTE: Additional PBE and fire extinguishers in specific locations, beyond the minimum numbers prescribed in Special Condition No. 11 may be required as a result of the egress analysis accomplished to satisfy Special Condition No. 2(a).

12. A smoke or fire detection system (or systems) must be provided that monitors each occupiable area within the LDCR compartment, including those areas partitioned by curtains. Flight tests must be conducted to show compliance with this requirement. Each system (or systems) must provide:

(a) A visual indication to the flightdeck within one minute after the start of a fire;

(b) An aural warning in the LDCR compartment; and

(c) A warning in the main passenger cabin. This warning must be readily detectable by a flight attendant, taking into consideration the positioning of flight attendants throughout the main passenger compartment during various phases of flight.

13. The LDCR compartment must be designed such that fires within the compartment can be controlled without a crew member having to enter the compartment, or the design of the access provisions must allow crew members equipped for firefighting to have unrestricted access to the compartment. The time for a crew member on the main deck to react to the fire alarm, to don the firefighting equipment, and to gain access must not exceed the time for the compartment to become smoke-filled, making it difficult to locate the fire source. Procedures describing methods to search the LDCR compartments for fire sources(s) must be established. The applicant must transmit these procedures to the operator for incorporation into their training programs and appropriate operational manuals.

14. Fire and Smoke Extinguishing Equipment:

(a) A means must be provided to prevent hazardous quantities of smoke or extinguishing agent originating in the LDCR compartment from entering any other compartment occupied by crew members or passengers. This means must include the time periods during the evacuation of the LDCR compartment and, if applicable, when accessing the LDCR compartment to manually fight a fire. Smoke entering any other compartment occupied by crew members or passengers when the access to the LDCR compartment is opened, during an emergency evacuation, must dissipate within five minutes after the access to the LDCR compartment is closed. Hazardous quantities of smoke may not enter any other compartment occupied by crew members or passengers during subsequent access to manually fight a fire in the LDCR compartment (the amount of smoke entrained by a firefighter exiting the LDCR compartment through the access is not considered hazardous). During the one-minute smoke detection time, penetration of a small quantity of smoke from the LDCR compartment into an occupied area is acceptable. Flight tests must be conducted to show compliance with this requirement.

(b) There must be a provision in the firefighting procedures to ensure that all door(s) and hatch(es) at the crew rest compartment outlets are closed after evacuation of the crew rest compartment and during firefighting to minimize smoke and extinguishing agent from entering other occupiable compartments.

(c) If a built-in fire extinguishing system is used in lieu of manual firefighting, then the fire extinguishing system must be designed so that no hazardous quantities of extinguishing agent will enter other compartments occupied by passengers or crew. The system must have adequate capacity to suppress any fire occurring in the LDCR compartment, considering the fire threat, volume of the compartment and the ventilation rate.

15. There must be a supplemental oxygen system within the crew rest

compartment that provides the following:

(a) At least one mask for each seat and berth in the crew rest compartment.

(b) If a destination area (such as a changing area) is provided in the LDCR compartment, an oxygen mask must be readily available for each occupant that can reasonably be expected to be in the destination area (with the maximum number of required masks within the destination area being limited to the placarded maximum occupancy of the crew rest).

(c) An oxygen mask must be readily accessible to each occupant who can reasonably be expected to be moving from the main cabin into the crew rest compartment, moving around within the crew rest compartment, or moving from the crew rest compartment to the main cabin.

(d) The system must provide an aural and visual alert to warn the occupants of the LDCR compartment to don oxygen masks in the event of decompression. The aural and visual alerts must activate concurrently with the deployment of the oxygen masks in the passenger cabin. To compensate for sleeping occupants, the aural alert must be heard in each section of the LDCR compartment and must sound continuously for a minimum of five minutes or until a reset switch within the LDCR compartment is activated. A visual alert that informs occupants that they must don an oxygen mask must be visible in each section.

(e) There must also be a means by which the oxygen masks can be manually deployed from the flight deck.

(f) Procedures for crew rest occupants in the event of decompression must be established. These procedures must be transmitted to the operator for incorporation into its training programs and appropriate operational manuals.

(g) The supplemental oxygen system for the crew rest shall meet the same 14 CFR part 25 regulations as the supplemental oxygen system for the passenger cabin occupants except for the 10 percent additional masks requirement of 14 CFR 25.1447(c)(1).

(h) The illumination level of the normal LDCR compartment lighting system must automatically be sufficient for each occupant of the compartment to locate a deployed oxygen mask.

16. The following requirements apply to LDCR compartments that are divided into several sections by the installation of curtains or partitions:

(a) A placard is required adjacent to each curtain that visually divides or separates, for privacy purposes, the LDCR compartment into small sections. The placard must require that the curtain(s) remains open when the private section it creates is unoccupied. The vestibule section adjacent to the stairway is not considered a private area and, therefore, does not require a placard.

(b) For each section of the LDCR compartment created by the installation of a curtain, the following requirements of these special conditions must be met with the curtain open or closed:

(1) No smoking placard (Special Condition No. 1),

(2) Emergency illumination (Special Condition No. 7),

(3) Emergency alarm system (Special Condition No. 9),

(4) Seat belt fasten signal or return to seat signal as applicable (Special Condition No. 10),

(5) The smoke or fire detection system (Special Condition No. 12), and

(6) The oxygen system (Special Condition No. 15).

(c) Lower deck crew rest compartments visually divided to the extent that evacuation could be affected must have exit signs that direct occupants to the primary stairway exit. The exit signs must be provided in each separate section of the LDCR compartment, except for curtained bunks, and must meet the requirements of § 25.812(b)(1)(i). An exit sign with reduced background area or a symbolic exit sign as described in Special Condition No. 6(a) may be used to meet this requirement.

(d) For sections within a LDCR compartment that are created by the installation of a rigid partition with a door physically separating the sections, the following requirements of these special conditions must be met with the door open or closed:

(1) There must be a secondary evacuation route from each section to the main deck, or alternatively, the applicant must show that any door between the sections has been designed to preclude anyone from being trapped inside the compartment. Removal of an incapacitated occupant within this area must be considered. A secondary evacuation route from a small room designed for only one occupant for short time duration, such as a changing area or lavatory, is not required. However, removal of an incapacitated occupant within a small room, such as a changing area or lavatory, must be considered.

(2) Any door between the sections must be shown to be openable when crowded against, even when crowding occurs at each side of the door.

(3) There may be no more than one door between any seat or berth and the primary stairway exit.

(4) There must be exit signs in each section meeting the requirements of § 25.812(b)(1)(i), or shown to have an Equivalent Level of Safety, that direct occupants to the primary stairway exit. An exit sign with reduced background area or a symbolic exit sign as described in Special Condition No. 6(a) may be used to meet this requirement.

(e) For each smaller section within the main LDCR compartment created by the installation of a partition with a door, the following requirements of these special conditions must be met with the door open or closed:

(1) No smoking placards (Special Condition No. 1);

(2) Emergency illumination (Special Condition No. 7);

(3) Two-way voice communication (Special Condition No. 8);

(4) Emergency alarm system (Special Condition No. 9);

(5) Seat belt fasten signal or return to seat signal as applicable (Special Condition No. 10);

(6) Emergency firefighting and protective equipment (Special Condition No. 11);

(7) Smoke or fire detection system (Special Condition No. 12), and

(8) The oxygen system (Special Condition No. 15).

17. The requirements of two-way voice communication with the flight deck and provisions for emergency firefighting and protective equipment are not applicable to lavatories or other small areas that are not intended to be occupied for extended periods of time.

18. Where a waste disposal receptacle is fitted, it must be equipped with an automatic fire extinguisher that meets the performance requirements of § 25.854(b).

19. Materials (including finishes or decorative surfaces applied to the materials) must comply with the flammability requirements of § 25.853(a) as amended by Amendment 25–116. Mattresses must comply with the flammability requirements of § 25.853(c), as amended by Amendment 25–116.

20. The addition of a lavatory within the LDCR compartment would require the lavatory to meet the same requirements as those for a lavatory installed on the main deck except with regard to Special Condition No. 12 for smoke detection.

21. Each stowage compartment in the crew rest compartment must be completely enclosed. All enclosed stowage compartments within the LDCR compartment that are not limited to stowage of emergency equipment or airplane supplied equipment (i.e., bedding) must meet the design criteria

given in the table below. Enclosed stowage compartments greater than 200 ft³ in interior volume are not addressed by this special condition. The in flight accessibility of very large enclosed stowage compartments and the subsequent impact on the crew members' ability to effectively reach any part of the compartment with the contents of a hand fire extinguisher will require additional fire protection considerations similar to those required for inaccessible compartments such as Class C cargo compartments.

Fire protection features	Stowage compartment interior volumes		
	Less than 25 cubic feet	25 cubic feet to less than 57 cubic feet	57 cubic feet to 200 cubic feet
Materials of construction [1]	Yes	Yes	Yes.
Detectors [2]	No	Yes	Yes.
Liner [3]	No	Yes	Yes.
Locating device [4]	No	Yes	Yes.

[1] *Material:* The material used to construct each enclosed stowage compartment must at least be fire resistant and must meet the flammability standards established for interior components (i.e., 14 CFR part 25 Appendix F, parts I, IV, and V) per the requirements of § 25.853. For compartments less than 25 ft³ in interior volume, the design must ensure the ability to contain a fire likely to occur within the compartment under normal use.

[2] *Detectors:* Enclosed stowage compartments equal to or exceeding 25 ft³ in interior volume must be provided with a smoke or fire detection system to ensure that a fire can be detected within a one-minute detection time. Flight tests must be conducted to show compliance with this requirement. Each system (or systems) must provide:

(a) A visual indication in the flight deck within one minute after the start of a fire,

(b) An aural warning in the LDCR compartment, and

(c) A warning in the main passenger cabin. This warning must be readily detectable by a flight attendant, taking into consideration the positioning of flight attendants throughout the main passenger compartment during various phases of flight.

[3] *Liner:* If the material used to construct the stowage compartment can be shown to meet the flammability requirements of a liner for a Class B cargo compartment (i.e., § 25.855 at Amendment 25–116, and Appendix F, part I, paragraph (a)(2)(ii)), then no liner would be required for enclosed stowage compartments equal to or greater than 25 ft³ in interior volume but less than 57 ft³ in interior volume. For all enclosed stowage compartments equal to or greater than 57 ft³ in interior volume but less than or equal to 200 ft³, a liner must be provided that meets the requirements of § 25.855 for a Class B cargo compartment.

[4] *Location Detector:* Lower deck crew rest compartments which contain enclosed stowage compartments exceeding 25 ft³ interior volume and which are located away from one central location such as the entry to the LDCR compartment or a common area within the LDCR compartment would require additional fire protection features and/or devices to assist the firefighter in determining the location of a fire.

Issued in Renton, Washington, on April 29, 2013.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 323

RIN 0790–AI86

[Docket ID: DOD–2012–OS–0018]

Defense Logistics Agency Privacy Program

AGENCY: Defense Logistics Agency, DoD.

ACTION: Final rule.

SUMMARY: The Defense Logistics Agency (DLA) is revising its Privacy Act procedural and exemption rules. The DLA Privacy Offices have been repositioned under the DLA General Counsel; therefore, responsibilities have been updated to reflect the repositioning. In addition, DLA has adopted revisions to the DoD Privacy Program.

DATES: This rule is effective June 3, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler at (703) 767–5045.

SUPPLEMENTARY INFORMATION: The proposed rule was published on August 6, 2012 (77 FR 46653). No comments were received.

Executive Summary

I. Purpose of This Regulatory Action

a. This rule provides policies and procedures for the Defense Logistics Agency's implementation of the Privacy Act of 1974, as amended. In addition, DLA has adopted specific sections of the DoD Privacy Program as published in 32 CFR part 310.

b. *Authority:* Privacy Act of 1974, Pub. L. 93–579, Stat. 1896 (5 U.S.C. 552a).

II. Summary of the Major Provisions of This Regulatory Action

The DLA Privacy Offices have been repositioned under the DLA General Counsel; therefore, responsibilities have been updated to reflect the repositioning.

III. Costs and Benefits of This Regulatory Action

This regulatory action imposes no monetary costs to the Agency or public. The benefit to the public is the accurate reflection of the Agency's Privacy Program to ensure that policies and procedures are known to the public.

Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive orders.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act

systems of records within the Department of Defense.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that Privacy Act rules for the Department of Defense impose no additional information collection requirements on the public under the Paperwork Reduction Act of 1995.

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been determined that Privacy Act rulemaking for the Department of Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, ''Federalism''

It has been determined that Privacy Act rules for the Department of Defense do not have federalism implications. The rules do not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 323

Privacy.

Accordingly, 32 CFR part 323 is revised to read as follows:

PART 323—DEFENSE LOGISTICS AGENCY PRIVACY PROGRAM

Sec.
323.1 Purpose.
323.2 Applicability.
323.3 Policy.
323.4 Responsibilities.
323.5 Access to systems of records information.
323.6 Exemption rules.

Authority: Privacy Act of 1974, Pub. L. 93–579, Stat. 1896 (5 U.S.C. 552a).

§ 323.1 Purpose.

This part sets out Defense Logistics Agency policy, assigns responsibilities, and prescribes procedures for the effective administration of the DLA Privacy Program.

§ 323.2 Applicability.

This part:

(a) Applies to Defense Logistics Agency Headquarters (DLA HQ) and all other organizational entities within the Defense Logistics Agency (hereafter referred to as ''DLA Components'').

(b) Shall be made applicable by contract or other legally binding action to U.S. Government contractors whenever a DLA contract requires the performance of any activities associated with maintaining a system of records, including the collection, use, and dissemination of records on behalf of DLA.

§ 323.3 Policy.

DLA adopts and supplements the DoD Privacy Program policy and procedures codified at 32 CFR 310.4 through 310.53, and appendices A through H of 32 CFR part 310.

§ 323.4 Responsibilities.

(a) *General Counsel.* The General Counsel, DLA, under the authority of the Director, Defense Logistics Agency:

(1) Implements the DLA Privacy Program and is hereby designated as the Component Senior Official for Privacy.

(2) Serves as the DLA Final Denial Appellate Authority.

(3) Provides advice and assistance on all legal matters arising out of, or incident to, the implementation and administration of the DLA Privacy Program.

(4) Serves as the DLA focal point on Privacy Act litigation with the Department of Justice; and will advise the Defense Privacy and Civil Liberties Office on the status of DLA privacy litigation. This responsibility may be delegated.

(5) Serves as a member of the Defense Privacy Board Legal Committee. This responsibility may be delegated.

(6) Supervises and administers the DLA FOIA and Privacy Act Office (DGA) and assigned staff. This responsibility may be delegated.

(7) May exempt DLA systems of records.

(b) *Initial Denial Authority (IDA) at Headquarters DLA.* By this part, the DLA Director designates the Head of each Headquarters DLA Component as an IDA. Each Head may further delegate this responsibility to their Deputy. For the DLA General Counsel's Office, the Deputy General Counsel shall serve as the Initial Denial Authority (IDA).

(c) *DLA Privacy Act Office.* The DLA Privacy Act Office (DGA) staff:

(1) Formulates policies, procedures, and standards necessary for a uniform DLA Privacy Program.

(2) Serves as the DLA representative on the Defense Privacy Board and the Defense Data Integrity Board.

(3) Provides advice and assistance on privacy matters.

(4) Develops or compiles the rules, notices, and reports required under 32 CFR part 310.

(5) Assesses the impact of technology on the privacy of personal information.

(6) Conducts Privacy training for personnel assigned, employed, and detailed, including contractor personnel and individuals having primary responsibility for implementing the DLA Privacy Program.

(7) Develops forms used within the DLA Privacy Program. This part serves as the prescribing document for forms developed for the DLA Privacy Program.

(d) *DLA Components Heads.* The DLA Components Heads:

(1) Designate an individual as the point of contact for Privacy matters for their DLA Component and advise DGA of the name of official so designated. This individual also will serve as the Privacy Officer for the co-located tenant DLA organizations.

(2) Designate an official to serve as the initial denial authority for initial requests for access to an individual's records or amendments to records, and will advise DGA of the names of the officials so designated.

(e) *DLA Acquisition Management Directorate (J–7).* The DLA Acquisition Management Directorate (J–7) shall be responsible for:

(1) Developing the specific DLA policies and procedures to be followed when soliciting bids, awarding contracts or administering contracts that are subject to 32 CFR 310.12.

(2) Establishing an appropriate contract surveillance program to ensure contractors comply with the procedures established in accordance with 32 CFR 310.12.

§ 323.5 Access to systems of records information.

(a) Individuals who wish to gain access to records contained in a system of records about themselves will submit their request in writing 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. Any written request must:

(1) Identify the particular ''system(s) of records'' to be searched;

(2) Contain the information listed under the ''Notification procedure'' or ''Record access procedures'' elements of the applicable system of records notice;

(3) Verify identity when the information sought is of a sensitive nature by submitting an unsworn declaration in accordance with 28. U.S.C. 1746 or notarized signature;

(4) Adequately explain a request for expedited processing, if applicable;

(5) State whether they agree to pay fees associated with the processing of your request; and

(6) Contain a written release authority if records are to be released to a third

party. Third parties could be, but are not limited to, a law firm, a Congressman's office, a union official, or a private entity.

(b) Amendment and/or Access denials will be processed in accordance with 32 CFR 310.18 and 310.19.

(c) If an individual disagrees with the initial agency determination regarding notification, access, or amendment, he may appeal by writing to the General Counsel, Defense Logistics Agency, ATTN: DGA, Suite 1644, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6221 or by emailing the appeal to *hq-foia@dla.mil* or by faxing the appeal to (703) 767–6091.

§ 323.6 Exemption rules.

(a) The Director, DLA or designee may claim an exemption from any provision of the Privacy Act from which an exemption is allowed.

(b) An individual is not entitled to access information that is compiled in reasonable anticipation of a civil action or proceeding. The term ''civil action or proceeding'' is intended to include court proceedings, preliminary judicial steps, and quasi-judicial administrative hearings or proceedings (i.e., adversarial proceedings that are subject to rules of evidence). Any information prepared in anticipation of such actions or proceedings, to include information prepared to advise DLA officials of the possible legal or other consequences of a given course of action, is protected. The exemption is similar to the attorney work-product privilege except that it applies even when the information is prepared by non-attorneys. The exemption does not apply to information compiled in anticipation of criminal actions or proceedings.

(c) Exempt Records Systems. All systems of records maintained by the Defense Logistics Agency will be exempt from the access provisions of 5 U.S.C. 552a(d) and the notification of access procedures of 5 U.S.C. 522a(e)(4)(H) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive Order 13526 and which is required by the Executive Order to be kept secret in the interest of national defense or foreign policy. This exemption, which may be applicable to parts of all DLA systems of records, is necessary because certain record systems not otherwise specifically designated for exemptions herein may contain isolated items of information which have been properly classified.

(d) System Identifier: S170.04 (Specific exemption).

(1) System name: Debarment and Suspension Files.

(2) Exemption: (i) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). If an individual, however, is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. NOTE: When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) The specific sections of 5 U.S.C. 552a from which the system is exempt are 5 U.S.C. 552a(c)(3), (d)(1) through (d)(4), (e)(1), (e)(4)(G), (H), and (I), and (f).

(3) Authorities: 5 U.S.C. 552a(k)(2) and (k)(5).

(4) Reasons: (i) From 5 U.S.C. 552a(c)(3), as granting access to the accounting for each disclosure, as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of an investigation or prosecutive interest by DLA or other agencies. This seriously could compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or making witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(ii) From 5 U.S.C. 552a(d)(1) through (4) and (f), as providing access to records of a civil investigation, and the right to contest the contents of those records and force changes to be made to the information contained therein, would seriously interfere with and thwart the orderly and unbiased conduct of an investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would: Allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach to satisfy any Government claim arising from the investigation or proceeding.

(iii) From 5 U.S.C. 552a(e)(1), as it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(iv) From 5 U.S.C. 552a(e)(4)(G) and (H), as there is no necessity for such publication since the system of records would be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments and corrections to the information in the system.

(v) From 5 U.S.C. 552a(e)(4)(I), as to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. DLA, nevertheless, will continue to publish such a notice in broad generic terms as is its current practice.

(e) System Identifier: S500.10 (Specific exemption).

(1) System name: Personnel Security Files.

(2) Exemption: (i) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(ii) Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), and (e)(1).

(3) Authority: 5 U.S.C. 552a(k)(5).

(4) Reasons: (i) From 5 U.S.C. 552a(c)(3) and (d), when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential source to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source but it would impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified

information. Unless sources may be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(ii) From 5 U.S.C. 552a(e)(1), as in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. Such information permits more informed decision-making by the Department when making required suitability, eligibility, and qualification determinations.

(f) System Identifier: S500.20 (Specific exemption).

(1) System name: Defense Logistics Agency (DLA) Criminal Incident Reporting System (DCIRS).

(2) Exemption: (i) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). If an individual, however, is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. NOTE: When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(ii) The specific sections of 5 U.S.C. 552a from which the system is to be exempted are 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), (I), and (f).

(3) Authority: 5 U.S.C. 552a(k)(2).

(4) Reasons: (i) From subsection (c)(3), as to grant access to an accounting of disclosures as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutive interest by DLA or other agencies. This could seriously compromise case preparation by: Prematurely revealing its existence and nature; compromising or interfering with witnesses or making witnesses reluctant to cooperate; and leading to suppression, alteration, or destruction of evidence.

(ii) From 5 U.S.C. 552a(d) and (f), as providing access to this information could result in the concealment, destruction or fabrication of evidence and jeopardize the safety and wellbeing of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information also could reveal and render ineffectual investigative techniques, sources, and methods used by this component and could result in the invasion of privacy of individuals only incidentally related to an investigation. Investigatory material is exempt to the extent that the disclosure of such material would reveal the identity of a source who furnished the information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. This exemption will protect the identities of certain sources that would be otherwise unwilling to provide information to the Government. The exemption of the individual's right of access to his/her records and the reasons therefore necessitate the exemptions of this system of records from the requirements of the other cited provisions.

(iii) From 5 U.S.C. 552a(e)(1), as it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(iv) From 5 U.S.C. 552a(e)(4)(G), (H), and (I), as it will provide protection against notification of investigatory material which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place in jeopardy confidential informants who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(g) System Identifier: S500.30 (Specific exemption).

(1) System name: Incident Investigation/Police Inquiry Files.

(2) Exemption: (i) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). If an individual, however, is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information, except to the extent that disclosure would reveal the identity of a confidential source. NOTE: When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) The specific sections of 5 U.S.C. 552a from which the system is exempt are 5 U.S.C. 552a(c)(3), (d)(1) through (d)(4), (e)(1), (e)(4)(G), (H), and (I), and (f).

(3) Authority: 5 U.S.C. 552a(k)(2) and (k)(5).

(4) Reasons: (i) From 5 U.S.C. 552a(c)(3), because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutive interest by DLA or other agencies. This could seriously compromise case preparation by: Prematurely revealing its existence and nature; compromising or interfering with witnesses or making witnesses reluctant to cooperate; and leading to suppression, alteration, or destruction of evidence.

(ii) From 5 U.S.C. 552a(d)(1) through (d)(4), and (f), as providing access to records of a civil or administrative investigation, and the right to contest the contents of those records and force changes to be made to the information contained therein, would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would: Provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach to satisfy any Government claim arising from the investigation or proceeding.

(iii) From 5 U.S.C. 552a(e)(1), as it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(iv) From 5 U.S.C. 552a(e)(4)(G) and (H), as this system of records is compiled for law enforcement purposes and is exempt from the access provisions of 5 U.S.C. 552a(d) and (f).

(v) From 5 U.S.C. 552a(e)(4)(I), because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. DLA, nevertheless, will continue to publish such a notice in broad generic terms as is its current practice.

(h) System Identifier: S500.60 (Specific exemption).

(1) System name: Defense Logistics Agency Enterprise Hotline Program Records.

(2) Exemption: (i) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). If an individual, however, is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information, except to the extent that disclosure would reveal the identity of a confidential source. NOTE: When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(ii) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(iii) The specific sections of 5 U.S.C. 552a from which the system is exempt are 5 U.S.C. 552a(c)(3), (d)(1) through (4), (e)(1), (e)(4)(G), (H), (I), and (f).

(3) Authority: 5 U.S.C. 552a(k)(2) and (k)(5).

(4) Reasons: (i) From subsection (c)(3), as to grant access to an accounting of disclosures as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutive interest by DLA or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or making witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(ii) From 5 U.S.C. 552a(d)(1) through (4) and (f), as providing access to records of a civil or administrative investigation, and the right to contest the contents of those records and force changes to be made to the information contained therein, would interfere seriously with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow: Interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach to satisfy any Government claim arising from the investigation or proceeding.

(iii) From 5 U.S.C. 552a(e)(1), as it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(iv) From 5 U.S.C. 552a(e)(4)(G) and (H), as this system of records is compiled for law enforcement purposes and is exempt from the access provisions of 5 U.S.C. 552a(d) and (f).

(v) From 5 U.S.C. 552a(e)(4)(I), as to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. DLA will, nevertheless, continue to publish such a notice in broad generic terms as is its current practice.

(i) System Identifier: S510.30 (Specific/General Exemption).

(1) System name: Freedom of Information Act/Privacy Act Requests and Administrative Appeal Records.

(2) Exemption: During the processing of a Freedom of Information Act/Privacy Act request (which may include access requests, amendment requests, and requests for review for initial denials of such requests), exempt materials from other systems of records may, in turn, become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the Defense Logistics Agency claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(3) Authority: 5 U.S.C. 552a(j)(2), (k)(1) through (7).

(4) Reasons: Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy; to avoid interference during the conduct of criminal, civil, or administrative actions or investigations; to ensure protective services provided the President and others are not compromised; to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations; to preserve the confidentiality and integrity of Federal testing materials; and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

Dated: April 24, 2013.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–10523 Filed 5–2–13; 8:45 am]

BILLING CODE 5001–06–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0954; FRL–9796–3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Motor Vehicle Emissions Budgets for the Pennsylvania Counties in the Philadelphia-Wilmington, PA–NJ–DE 1997 Fine Particulate Matter Nonattainment Area

Correction

In rule document 2013–7539 beginning on page 19991 in the issue of Wednesday, April 3, 2013, make the following correction:

§ 52.2020 [Corrected]

On page 19993, in § 52.2020(e)(1), in the table, under the ''Additional explanation'' heading, ''April 13, 2013'' should read ''April 3, 2013''.

[FR Doc. C1–2013–07539 Filed 5–2–13; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 60 and 61

RIN 0906–AA87

National Practitioner Data Bank

AGENCY: Health Resources and Services Administration (HRSA), HHS.

ACTION: Final rule; correction.

SUMMARY: This document corrects non-substantive technical errors in the final rule entitled ''National Practitioner Data Bank'' which appeared in the April 5, 2013, issue of the **Federal Register**. The corrections improve the precision of the text, which is intended to enhance the accuracy with which users comply with these regulatory requirements.

DATES: This correction is effective on May 6, 2013.

FOR FURTHER INFORMATION CONTACT: Director, Division of Practitioner Data Banks, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, 5600 Fishers Lane, Room 8–103, Rockville, MD 20857; telephone number: (301) 443–2300.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. No. 2013–07521 of April 5, 2013 (78 FR 20473), the final rule entitled ''National Practitioner Data Bank'', there were a number of non-substantive technical errors as a result of using a version of text without final edits. The errors are identified in the Summary of Errors section and corrected in the Correction of Errors section. The provisions in this correction document are effective as if they had been included in the document published April 5, 2013.

II. Summary of Errors

A. Summary of Errors in the Preamble

On pages 20473, 20474, 20475, 20476, 20477, and 20478, we made several grammatical errors. Also, we made inadvertent reference to ''government health care program'' instead of the more accurate reference to ''Federal health care program,'' ''state health care program,'' or ''Federal or state health care program.''

On page 20479, we inadvertently referred to ''Social Security Number'' as a word instead of as a phrase. We also made inadvertent reference to ''government health care program'' instead of ''Federal or state'' health care program.

On page 20480, we made inadvertent reference to ''government health care program'' instead of ''Federal or state'' health care program.

On pages 20481, 20482, and 20483, we made inadvertent reference to ''government health care program'' instead of ''state health care program.'' Also, we made two minor punctuation errors.

B. Summary of Errors in the Regulations Text

On page 20484, in the list of sections, we made inadvertent reference in the title of § 60.15 to government health care programs instead of Federal or state health care programs. Also, in § 60.1, we made a minor punctuation error.

On page 20485, in § 60.2, we made two grammatical errors. Also, in § 60.3, under the definition of exclusion, we made inadvertent reference to government health-related program instead of Federal or state health-related program.

On page 20486, in the definition of health plan and in the definition of negative action or finding, we made a minor punctuation error.

On page 20487, in the definition of state law or fraud enforcement agency, we made an inadvertent reference to government health care program instead of state health care program. Also, in the definition of voluntary surrender of license or certification and in § 60.5 (g), we made an inadvertent reference to government health care programs instead of Federal or state health care program.

On page 20488, in § 60.6, we made two minor punctuation errors. In § 60.7, we made one minor grammatical error.

On page 20492, in § 60.13 (c)(2)(ii) and (c)(3)(vi), we used the term ''to include'' instead of ''including.'' We made the correction to clarify that the list following the term is not inclusive. Also, in the title of § 60.15 and in the first paragraph under the title, we made an inadvertent reference to government health care programs instead of Federal or state health care programs.

On page 20493, in § 60.15 (c)(2)(ii) and (c)(3)(vi), we used the term ''to include'' instead of ''including.'' We made the correction to clarify that the list following the term is not inclusive. Also, in § 60.17 (a)(1), we made two minor punctuation errors. Further, in § 60.17 (a)(2), in the phrase ''every 2 years concerning any health care practitioner'' we changed the word ''concerning'' to ''for'' to improve clarity of the requirement.

On page 20494, in § 60.18 (a)(2)(i), we made an inadvertent reference to government health care programs instead of Federal health care programs. In § 60.18 (a)(2)(iii), we made an inadvertent reference to government health care programs instead of state health care programs. Further, in § 60.18 (a)(2)(vi) and (a)(2)(vii), when listing the sections of the rule that contain information that can be disclosed to certain entities, we erroneously omitted reference to § 60.10. Also, in § 60.18 (b) we made a minor grammatical error.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

HHS ordinarily publishes a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect, in accordance with Section 553(b) of the Administrative Procedure Act (APA)(5 U.S.C. 553(b)). However, this notice and comment procedure can be waived if it is found, for good cause, that the notice and comment process is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons therefore in the notice.

Section 553(d) of the APA ordinarily requires a 30-day delay in effective date of final rules after the date of their publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds there is good cause to do so, and the agency incorporates a statement of the findings and its reasons in the rule issued. In our view, this correcting document does not constitute a rule that would be subject to the APA notice and comment or delayed effective date

requirements. It corrects non-substantive technical errors in the preamble and regulations text of the April 5, 2013, final rule and does not make substantive changes to the policies that were adopted. Further, the corrections improve the precision of the text, which is intended to enhance the accuracy with which users comply with these regulatory requirements. As a result, this correcting document is intended to ensure that the final rule accurately reflects the policies adopted in, and legislative requirements set forth in that rule.

In addition, even if this were a rule to which the notice and comment and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the final rule or delaying the effective date would be contrary to the public interest. Furthermore, such procedures would be unnecessary, as we are not altering the policies that were already subject to comment and finalized in our final rule. Therefore, we believe we have good cause to waive the notice and comment and effective date requirements.

IV. Correction of Errors

In FR Doc. No. 2013–07521 published April 5, 2013 (78 FR 20473), make the following corrections:

A. Corrections of Errors in the Preamble

1. On page 20473:

a. Column 1, Summary, line 6: ''National Practitioner Data Bank'' is corrected to read: ''National Practitioner Data Bank (NPDB)''.

b. Column 1, Summary, lines 13 and 14: ''Healthcare Integrity and Protection Data Bank'' is corrected to read: ''Healthcare Integrity and Protection Data Bank (HIPDB)''.

c. Column 1, Summary, lines 19 and 20: ''Healthcare Integrity and Protection Data Bank (HIPDB)'' is corrected to read: ''HIPDB''.

d. Column 1, Summary, lines 22 and 23: ''National Practitioner Data Bank (NPDB)'' is corrected to read: ''NPDB''.

e. Column 1, Summary, lines 26 and 27 and Column 2, lines 1, 2, and 3: ''Healthcare Integrity and Protection Data Bank to the National Practitioner Data Bank, and, once completed, to cease operations of the Healthcare Integrity and Protection Data Bank.'' is corrected to read: ''HIPDB to the NPDB, and, once completed, to cease operations of the HIPDB.''

f. Column 2, Background, (1) The Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.), lines 23, 24 and 25: ''services, state medical or dental boards and other health care practitioner state boards.'' is corrected to read: ''services, state medical or dental boards, and other health care practitioner state boards.''

g. Column 3, Background, (2) Section 1921 of the Social Security Act (42 U.S.C. 1396r–2)(Prior to the passage of the Affordable Care Act), paragraph 2, lines 8 and 9: ''health care practitioner state boards), other state licensing authorities,'' is corrected to read: ''health care practitioner state boards); other state licensing authorities;''

h. Column 3, Background, (2) Section 1921 of the Social Security Act (42 U.S.C. 1396r–2)(Prior to the passage of the Affordable Care Act), paragraph 2, lines 10 and 11: ''agencies administering government health care programs'' is corrected to read: ''agencies administering Federal health care programs''.

i. Column 3, Background, (2) Section 1921 of the Social Security Act (42 U.S.C. 1396r–2)(Prior to the passage of the Affordable Care Act), paragraph 2, lines 13 through 18: ''under contract), state agencies administering or supervising the administration of government health care programs, state Medicaid fraud control units, certain law enforcement agencies,'' is corrected to read: ''under contract); state agencies administering or supervising the administration of state health care programs; state Medicaid fraud control units; certain law enforcement agencies;''

2. On page 20474, Column 1, line 13: ''government health care programs'' is corrected to read: ''Federal or state health care programs''.

3. On page 20475:

a. Column 2, lines 19 and 20: ''participation in a government health care program'' is corrected to read: ''participation in a state health care program''.

b. Column 2, lines 27 and 28: ''administering government health care programs'' is corrected to read: ''administering Federal health care programs''.

c. Column 2, lines 36 and 37: ''administration of government health care programs'' is corrected to read: ''administration of state health care programs''.

d. Column 3, first paragraph under C. Section 1128E, as Amended by Section 6403, lines 18 and 19: ''exclusions from government health care programs'' is corrected to read: ''exclusions from Federal health care programs''.

e. Column 3, third paragraph, line 3: ''data bank requirements'' is corrected to read: ''Data Bank requirements''.

4. On page 20476:

a. Table 1, column 1, under heading What Information is Reported?, Section 1128E (HIPDB), 3rd bullet: ''Exclusions from government health care programs'' is corrected to read: ''Exclusions from Federal or state health care programs''.

b. Table 1, column 2, under heading Reporting/Querying Requirements after Passage of Section 6403, 3rd bullet: ''State authorities that license or certify practitioners, entities, providers, suppliers'' is corrected to read: ''State authorities that license or certify practitioners, entities, providers, and suppliers''.

c. Table 1, column 2, under heading What Information is Reported?, Section 1921 (NPDB), 4th bullet: ''Exclusions from government health care programs'' is corrected to read: ''Exclusions from state health care programs''.

d. Table 1, column 2, under heading What Information is Reported?, Section 1128E (NPDB), 4th bullet: ''Exclusions from government health care programs'' is corrected to read: ''Exclusions from Federal health care programs''.

5. On page 20477:

a. Table 1, column 1, under heading Statutory Requirements before Passage of Section 6403, Section 1921 (NPDB), 5th bullet: ''Agencies administering government health care programs'' is corrected to read: ''Agencies administering Federal health care programs''.

b. Table 1, column 1, under heading Statutory Requirements before Passage of Section 6403, Section 1921 (NPDB), 6th bullet: ''State agencies administering government health care programs'' is corrected to read: ''State agencies administering state health care programs''.

c. Table 1, column 2, under heading Reporting/Querying Requirements after Passage of Section 6403, Section 1921 and Section 1128E (NPDB), 5th bullet: ''Agencies administering (including those providing payment for services) government health care programs and their contractors'' is corrected to read: ''Agencies administering (including those providing payment for services) Federal health care programs and their contractors''.

d. Table 1, column 2, under heading Reporting/Querying Requirements after Passage of Section 6403, Section 1921 and Section 1128E (NPDB), 6th bullet: ''State agencies administering government health care programs'' is corrected to read: ''State agencies administering state health care programs''.

6. On page 20478:

a. Column 1, F. Sanction Authority, line 21 and 22: ''exclusions from

government health care programs'' is corrected to read: ''exclusions from state health care programs''.

b. Column 3, lines 2 through 10: '''board of medical examiners, or board,'' ''health care entity,'' ''health care practitioner, licensed health care practitioner, licensed practitioner, or practitioner,'' ''hospital,'' ''negative action or finding,'' ''peer review organization,'' ''physician,'' ''private accreditation entity,'''' is corrected to read: '''board of medical examiners, or board;'' ''health care entity;'' ''health care practitioner, licensed health care practitioner, licensed practitioner, or practitioner;'' ''hospital;'' ''negative action or finding;'' ''peer review organization;'' ''physician;'' ''private accreditation entity;''''

7. On page 20479:

a. Column 2, line 4: ''word Social Security Number.'' is corrected to read: ''phrase ''Social Security Number.'''''

b. Column 2, heading § 60.9 Reporting Licensure and Certification Actions Taken by States, lines 27 and 28: ''participate in a government health care program.'' is corrected to read: ''participate in a Federal or state health care program.''

c. Column 3, line 15: ''word Social Security Number.'' Is corrected to read: ''phrase ''Social Security Number.'''''

8. On page 20480:

a. Column 2, heading § 60.15 ''Reporting Exclusions From Participation in Government Health Care Programs'' is corrected to read: ''Reporting Exclusions from Participation in Federal or State Health Care Programs''.

b. Column 2, heading § 60.15 Reporting Exclusions From Participation in Government Health Care Programs, lines 9 and 10: ''participating in government health care programs'' is corrected to read: ''participating in Federal or state health care programs''.

9. On page 20481:

a. Column 2, heading Definitions (§ 60.3), 1. Health Care Entity, Health Care Provider, and Health Care Supplier, 2nd paragraph, line 11: ''supplier and entity are well defined.'' is corrected to read: ''supplier, and entity are well defined.''

b. Column 3, under Response heading, line 14: ''probation, reprimand or censure'' is corrected to read: ''probation, reprimand, or censure''.

10. On page 20482:

a. Column 2, heading 6. State Law or Fraud Enforcement Agency, first paragraph, lines 5 and 6: ''agencies administering a government health care program.'' is corrected to read: ''agencies administering a state health care program.''

b. Column 2, heading 6. State Law or Fraud Enforcement Agency, second paragraph, lines 5 and 6: ''agencies administering a government health care program'' is corrected to read: ''agencies administering a state health care program''.

11. On page 20483

a. Column 1, heading Confidentiality of National Practitioner Data Bank Information (§ 60.20), first paragraph, line 18: '' ''superfluous''.'' is corrected to read: '' ''superfluous.'' ''

B. Corrections of Errors in the Regulations Text

■ 1. On page 20484, Column 2, in the table of contents, the heading for § 60.6 is corrected to read: ''Reporting errors, omissions, revisions, or whether an action is on appeal.''

■ 2. On page 20484, Column 3, in the table of contents, the heading for § 60.15 is corrected to read: ''Reporting exclusions from participation in Federal or state health care programs.''

§ 60.1 [Corrected]

■ 3. On page 20484, Column 3, in § 60.1, at lines 11 and 12, the phrase ''dentists and other health care practitioners.'' is corrected to read: ''dentists, and other health care practitioners.''

§ 60.2 [Corrected]

■ 4. On page 20485, Column 1, in § 60.2, at lines 3, 4, and 5, the phrase ''hospitals, health care entities, Boards of Medical Examiners, professional societies'' is corrected to read: ''hospitals, health care entities, Boards of Medical Examiners, and professional societies''.

■ 5. On page 20485, Column 1, in § 60.2, at lines 16, 17, and 18, the phrase ''medical malpractice actions or claims; Federal Government agencies'' is corrected to read: ''medical malpractice actions or claims; and Federal government agencies''.

§ 60.3 [Corrected]

■ 6. On page 20485, Column 2, in § 60.3, at lines 25 through 32, the definition ''*Exclusion* means a temporary or permanent debarment of an individual or entity from participation in any government health-related program, in accordance with which items or services furnished by such person or entity will not be reimbursed under any government health-related program.'' is corrected to read: ''*Exclusion* means a temporary or permanent debarment of an individual or entity from participation in any Federal or state health-related program, in accordance with which items or services furnished by such person or entity will not be reimbursed under any Federal or state health-related program.''

■ 7. On page 20486, Column 1, in § 60.3, in paragraph (5) of the definition of *Health plan,* at lines 1 and 2, the phrase ''An insurance company, insurance service or insurance organization'' is corrected to read: ''An insurance company, insurance service, or insurance organization''.

■ 8. On page 20486, Column 2, under the definition of *Negative action or finding,* paragraph (3)(i), the phrase ''Connected to the delivery of health care services, or'' is corrected to read: ''Connected to the delivery of health care services; or''.

■ 9. On page 20487, Column 2, under the definition of *State law or fraud enforcement agency,* paragraph (3), at lines 4 and 5, the phrase ''administration of a government health care program'' is corrected to read: ''administration of a state health care program''.

■ 10. On page 20487, Column 3, at lines 5 and 6, the phrase ''participation in government health care programs'' is corrected to read: ''participation in Federal or state health care programs''.

§ 60.5 [Corrected]

■ 11. On page 20487, Column 3, in § 60.5(g), the phrase ''Exclusions from government health care programs'' is corrected to read: ''Exclusions from Federal or state health care programs''.

§ 60.6 [Corrected]

■ 12. On page 20488, Column 1, in § 60.6(a) at line 8, the phrase ''NPDB and in the case of reports made'' is corrected to read: ''NPDB and, in the case of reports made''.

■ 13. On page 20488, Column 1, in § 60.6(d)(2), at line 14, the phrase ''the factual nature of the statement.) or'' is corrected to read: ''the factual nature of the statement.); or''.

§ 60.7 [Corrected]

■ 14. On page 20488, Column 2, in § 60.7(b)(1)(viii), the phrase ''Drug Enforcement Administration registration number, if known,'' is corrected to read: ''Drug Enforcement Administration registration number, if known, and''.

§ 60.13 [Corrected]

■ 15. On page 20492, Column 1, in § 60.13(c)(2)(ii), at line 2, the phrase ''Federal or state agencies, to include'' is corrected to read: ''Federal or state agencies, including''.

■ 16. On page 20492, Column 2, in § 60.13(c)(3)(vi), at line 2, the phrase ''Federal or state agencies, to include'' is

corrected to read: ''Federal or state agencies, including''.

§ 60.15 [Corrected]

■ 17. On page 20492, Column 3, in § 60.15, the heading ''Reporting exclusions from participation in government health care programs'' is corrected to read: ''Reporting exclusions from participation in Federal or state health care programs''.

■ 18. On page 20492, Column 3, in § 60.15(a), at line 6, the phrase ''government health care programs'' is corrected to read: ''Federal or state health care programs''.

■ 19. On page 20493, Column 1, in § 60.15(c)(2)(ii), at line 2, the phrase ''Federal or state agencies, to include'' is corrected to read: ''Federal or state agencies, including''.

■ 20. On page 20493, Column 2, in § 60.15(c)(3)(vi), at line 2, the phrase: ''Federal or state agencies, to include'' is corrected to read: ''Federal or state agencies, including''.

§ 60.17 [Corrected]

■ 21. On page 20493, Column 3, in § 60.17(a)(1), the phrase ''At the time a health care practitioner, applies for a position on its medical staff (courtesy or otherwise), or for clinical privileges at the hospital;'' is corrected to read: ''At the time a health care practitioner applies for a position on its medical staff (courtesy or otherwise) or for clinical privileges at the hospital;''

■ 22. On page 20493, Column 3, in § 60.17(a)(2), at lines 1 and 2, the phrase ''Every 2 years concerning any health care practitioner,'' is corrected to read: ''Every 2 years for any health care practitioner''.

§ 60.18 [Corrected]

■ 23. On page 20494, Column 2, in § 60.18(a)(2)(i), at line 3, the phrase ''government health care programs'' is corrected to read: ''Federal health care programs''.

■ 24. On page 20494, Column 2, in § 60.18(a)(2)(iii), at line 3, the phrase ''government health care programs'' is corrected to read: ''state health care programs''.

■ 25. On page 20494, Column 2, in § 60.18(a)(2)(vi), at line 9, the phrase ''pursuant to §§ 60.9 and 60.11'' is corrected to read: ''pursuant to §§ 60.9, 60.10, and 60.11''.

■ 26. On page 20494, Column 2, in § 60.18(a)(2)(vii), at line 13, the phrase ''§§ 60.9 and 60.11'' is corrected to read: ''§§ 60.9, 60.10, and 60.11''.

■ 27. On page 20494, Column 3, in § 60.18(b), the phrase ''National Practitioner Data Bank'' in the paragraph (b) heading is corrected to read: ''NPDB''.

Dated: April 29, 2013.

Jennifer M. Cannistra,

Executive Secretary to the Department.

[FR Doc. 2013–10566 Filed 5–2–13; 8:45 am]

BILLING CODE 4150–28–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 13–326; MB Docket No. 12–374; RM–11687]

Radio Broadcasting Services; Peach Springs, Arizona

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of The Hualapai Tribe, allots FM Channel †265A as a first Tribal Allotment and a potential second local transmission service at Peach Springs, Arizona. (The symbol ''†'' will be used to denote a channel reserved as a Tribal Allotment.) Channel †265A can be allotted at Peach Springs, consistent with the minimum distance separation requirements of the Commission's rules, at coordinates 35–33–17 NL and 113–23–41 WL. *See* Supplementary Information *infra.*

DATES: Effective June 3, 2013.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 12–374, adopted March 1, 2013, and released March 1, 2013. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *www.bcpiweb.com.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission

Nazifa Sawez,

Assistant Chief, Audio Division, Media Bureau.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, 336 and 339.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by adding Channel †265A at Peach Springs.

[FR Doc. 2013–10301 Filed 5–2–13; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120403249–2492–02]

RIN 0648–XC626

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; 2013 Commercial Accountability Measure and Closure for South Atlantic Golden Tilefish

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures for the commercial sector for golden tilefish in the exclusive economic zone (EEZ) of the South Atlantic. Commercial landings for golden tilefish, as estimated by the Science and Research Director (SRD), are projected to reach the commercial annual catch limit (ACL) for golden tilefish on May 5, 2013. Therefore, NMFS closes the commercial sector for golden tilefish in the South Atlantic EEZ on May 5, 2013, and it will

remain closed until the start of the next fishing season, January 1, 2014. This closure is necessary to protect the golden tilefish resource.

DATES: This rule is effective 12:01 a.m., local time, May 5, 2013, until 12:01 a.m., local time, January 1, 2014.

FOR FURTHER INFORMATION CONTACT: Catherine Hayslip, telephone: 727–824–5305, email: *Catherine.Hayslip@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes golden tilefish and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act by regulations at 50 CFR part 622.

The commercial ACL (commercial quota) for golden tilefish in the South Atlantic is 541,295 lb (245,527 kg), gutted weight, for the current fishing year, January 1 through December 31, 2013, as specified in 50 CFR 622.190(a)(2).

Under 50 CFR 622.193(a)(1), NMFS is required to close the commercial sector for golden tilefish when the commercial ACL has been reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. NMFS has determined that the commercial ACL for South Atlantic golden tilefish will have been reached by May 5, 2013. Accordingly, the commercial sector for South Atlantic golden tilefish is closed effective 12:01 a.m., local time, May 5, 2013, until 12:01 a.m., local time, January 1, 2014.

The operator of a vessel with a valid commercial vessel permit for South Atlantic snapper-grouper having golden tilefish onboard must have landed and bartered, traded, or sold such golden tilefish prior to 12:01 a.m., local time, May 5, 2013. During the closure, the bag limit specified in 50 CFR 622.187(b)(2), applies to all harvest or possession of golden tilefish in or from the South Atlantic EEZ, including the bag limit that may be retained by the captain or crew of a vessel operating as a charter vessel or headboat. The bag limit for such captain and crew is zero. During the closure, the possession limits specified in 50 CFR 622.187(c), apply to all harvest or possession of golden tilefish in or from the South Atlantic EEZ. During the closure, the sale or purchase of golden tilefish taken from the EEZ is prohibited. The prohibition on sale or purchase does not apply to the sale or purchase of golden tilefish that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, May 5, 2013, and were held in cold storage by a dealer or processor. For a person on board a vessel for which a Federal commercial or charter vessel/headboat permit for the South Atlantic snapper-grouper fishery has been issued, the sale and purchase provisions of the commercial closure for golden tilefish would apply regardless of whether the fish are harvested in state or Federal waters, as specified in 50 CFR 622.190(c)(1)(ii).

Classification

The Regional Administrator, Southeast Region, NMFS, has determined this temporary rule is necessary for the conservation and management of the South Atlantic snapper-grouper fishery and is consistent with the Magnuson-Stevens Act, the FMP, and other applicable laws.

This action is taken under 50 CFR 622.193(a)(1) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best available scientific information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds that the need to immediately implement this action to close the commercial sector for golden tilefish constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures would be unnecessary and contrary to the public interest. Such procedures would be unnecessary because the rule itself has been subject to notice and comment, and all that remains is to notify the public of the closure.

Allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action to protect golden tilefish since the capacity of the fishing fleet allows for rapid harvest of the ACL (quota). Prior notice and opportunity for public comment would require time and would potentially result in a harvest well in excess of the established commercial ACL (commercial quota).

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: April 29, 2013.

James P. Burgess,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–10437 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 130103002–3396–02]

RIN 0648–BC85

Fisheries of the Northeastern United States; Final 2013–2015 Spiny Dogfish Fishery Specifications

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

ACTION: Final rule.

SUMMARY: This rule implements specifications and management measures for the spiny dogfish fishery for the 2013–2015 fishing years consistent with the recommendations of the Mid-Atlantic and New England Fishery Management Councils. The approved commercial quotas represent increases over status quo levels, and the possession limit is also increased. The action is expected to result in positive economic impacts for the spiny dogfish fishery while maintaining the conservation objectives of the Spiny Dogfish Fishery Management Plan.

DATES: This rule is effective May 1, 2013. The specifications under ''Final 2013–2015 Specifications'' in the preamble are effective May 1, 2013, through April 30, 2016.

ADDRESSES: Copies of the specifications document, including the Environmental Assessment and Initial Regulatory Flexibility Analysis (EA/IRFA) and other supporting documents for the specifications, are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N. State Street, Dover, DE 19901. The specifications document is also accessible via the Internet at: *http://www.nero.noaa.gov.*

NMFS prepared a Final Regulatory Flexibility Analysis (FRFA), which is contained in the Classification section of this rule. Copies of the FRFA and the Small Entity Compliance Guide are available from the Regional Administrator, Northeast Regional Office, NMFS, 55 Great Republic Drive,

Gloucester, MA 01930–2276, and are also available via the Internet at *http://www.nero.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Tobey Curtis, Fishery Policy Analyst, (978) 281–9273; fax: (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

Spiny dogfish (*Squalus acanthias*) were declared overfished by NMFS in 1998. Consequently, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) required NMFS to implement measures to end overfishing and rebuild the spiny dogfish stock. The Mid-Atlantic Fishery Management Council (MAFMC) and the New England Fishery Management Council (NEFMC) developed a joint fishery management plan (FMP) that was implemented in 2000. As a result of the conservation measures in the FMP, the spiny dogfish stock was declared to be successfully rebuilt in 2010.

The regulations implementing the FMP at 50 CFR part 648, subpart L, outline the process for specifying an annual catch limit (ACL), commercial quota, possession limit, and other management measures for a period of 1–5 years. The MAFMC's Scientific and Statistical Committee (SSC) reviews the best available information on the status of the spiny dogfish population and recommends acceptable biological catch (ABC) levels. This recommendation is then used as the basis for catch limits and other management measures developed by the MAFMC's Spiny Dogfish Monitoring Committee and Joint Spiny Dogfish Committee (which includes members of the NEFMC). The MAFMC and NEFMC then review the recommendations of the committees and make their specification recommendations to NMFS. NMFS reviews those recommendations, and may modify them if necessary, to ensure that they are consistent with the FMP and other applicable law. NMFS then publishes proposed measures for public comment. NMFS proposed the specifications set here in the **Federal Register** on March 12, 2013 (78 FR 15674), with a 15-day public comment period. NMFS received one comment, which is addressed below.

A detailed description of how the 2013–2015 spiny dogfish ABC and associated specification measures were derived, and the range of alternatives analyzed, is provided in the proposed rule and in its supplementary materials (see **ADDRESSES**), and is not repeated here. The final approved specifications for the 2013–2015 spiny dogfish fishery are described below.

Final 2013–2015 Specifications

The final ACLs and commercial quotas for fishing years 2013–2015 are shown in Table 1. The commercial quotas represent 14–17-percent increases from the status quo commercial quota (35.694 million lb (16,191 mt)).

The spiny dogfish possession limit is increased from 3,000 lb (1,361 kg) to 4,000 lb (1,814 kg) per trip in each year (Table 1). The possession limit increase is projected to help increase trip level revenues, and reduce the potential for under-harvesting the available quota. The Commission has adopted identical management measures in state waters for 2013.

TABLE 1—SUMMARY OF FINAL SPINY DOGFISH ACLS, COMMERCIAL QUOTAS, AND POSSESSION LIMITS FOR THE 2013–2015 FISHING YEARS

Year	ACL		Commercial quota		Possession limit	
	M lb	mt	M lb	mt	lb	kg
2013	54.295	24,628	40.842	18,526	4,000	1,814
2014	55.277	25,073	41.784	18,953	4,000	1,814
2015	55.063	24,976	41.578	18,859	4,000	1,814

As currently specified in the FMP, quota period 1 (May 1 through October 31) will be allocated 57.9 percent of the commercial quota, and quota period 2 (November 1 through April 30) will be allocated 42.1 percent of the commercial quota. However, the Councils have approved Amendment 3 to the FMP, which would eliminate the seasonal allocation of the commercial quota. Upon implementation of Amendment 3 (which has not yet been submitted to NMFS, but is expected early in the 2013 fishing year), if approved, the commercial quota would only be monitored on an annual, coastwide basis, thereby reducing potential conflicts with the Commission's management of spiny dogfish.

Comments and Responses

NMFS received one comment on the proposed specifications, summarized below.

Comment 1: One public commenter argued that the proposed specifications are based upon inaccurate science, and suggested that the quotas should be reduced by 50 percent. No justification was provided for this reduction.

Response: NMFS disagrees that such a reduction in spiny dogfish harvest levels is necessary at this time. Spiny dogfish spawning stock biomass has been increasing in recent years, and is currently above target levels. The increase in quota is supported by the best available scientific information and follows the ABC and specification process defined in the FMP.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this rule is consistent with the Spiny Dogfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

This action has been determined to be not significant for purposes of Executive Order (E.O.) 12866.

The Assistant Administrator for Fisheries, NOAA, has determined that there is good cause to waive the 30-day delayed effectiveness provision of the Administrative Procedure Act, pursuant to 5 U.S.C. 553(d)(3). This rule imposes no new requirements or burdens on the public, therefore, the public need not take any steps to comply with this rule. In addition, the delay would be contrary to the public interest because the rule provides economic benefits to fishery participants by increasing the spiny dogfish possession limit, without resulting in overfishing. Failure to make this final rule effective at the start of the fishing year will undermine the intent of the rule, which is to promote the optimal utilization and conservation of the spiny dogfish resource. For these reasons, the 30-day delay is waived and this rule will become effective on May 1, 2013.

Pursuant to section 604 of the Regulatory Flexibility Act (RFA), NMFS has prepared a Final Regulatory

Flexibility Analysis (FRFA) in support of this action. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS' responses to those comments, relevant analyses contained in the action and its EA, and a summary of the analyses completed to support the action in this rule. A copy of the analyses done in the action and EA are available from the Council (see **ADDRESSES**). A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, the objectives of, and the legal basis for this rule is contained in the preamble to the proposed rule and this final rule and is not repeated here.

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

One comment was received on the proposed rule. For a summary of the comment, and NMFS's response to it, see the Comments and Responses section above. The comment did not raise any issues or concerns related to the IRFA, and no changes were made to the rule as a result of the comment.

Description and Estimate of Number of Small Entities to Which the Rule Would Apply

The increases in the spiny dogfish commercial quotas would impact vessels that hold Federal open access commercial spiny dogfish permits, and participate in the spiny dogfish fishery. According to MAFMC's analysis, 2,743 vessels were issued spiny dogfish permits in 2011. However, only 326 vessels landed any amount of spiny dogfish. While the fishery extends from Maine to North Carolina, most active vessels were from Massachusetts (31.6 percent), New Jersey (14.7 percent), New Hampshire (11.4 percent), Rhode Island (9.8 percent), New York (8.0 percent), North Carolina (6.7 percent), and Virginia (5.8 percent).

All of the fishing vessels affected by this action are considered small entities under the SBA size standards for small fishing businesses. Although multiple vessels may be owned by a single owner, ownership tracking is not readily available to reliably ascertain affiliated entities. Therefore, for the purposes of this analysis, each permitted vessel is treated as a single small entity and is determined to be a small entity under the RFA.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action does not introduce any new reporting, recordkeeping, or other compliance requirements. This rule does not duplicate, overlap, or conflict with other Federal rules.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

The purpose of this action is to increase spiny dogfish catch limits and landings, consistent with the best available science, thereby extending the duration of the fishing season and increasing revenue relative to the status quo. The action is expected to maximize the profitability for the spiny dogfish fishery during the 2013–2015 fishing years, without jeopardizing the long-term sustainability of the stock. Therefore, the economic impacts resulting from the action are expected to be positive, and there were no other alternatives considered that could have further increased the economic yield from the fishery while remaining consistent with the Magnuson-Stevens Act and the goals of the FMP.

Four management alternatives were analyzed for each year, 2013–2015. Alternative 1 represents the preferred alternative implemented by this rule (Table 1). Alternative 2 included the same commercial quotas as Alternative 1, but would have maintained the status quo possession limit of 3,000 lb (1,361 kg), rather than increasing it to 4,000 lb (1,814 kg). This alternative was rejected because there was no biological basis for rejecting the increased possession limit, which is expected to have positive economic and social benefits. Alternative 3 would have increased the possession limit to 4,000 lb (1,814 kg), and included the highest possible commercial quotas by not making a deduction from the ACL accounting for management uncertainty (estimated to be 3.99 percent of the ACL). Under Alternative 3, the commercial quotas would have been 42.539 million lb (19,295 mt) in 2013, 43.520 million lb (19,740 mt) in 2014, and 43.307 million lb (19,644 mt) in 2015; however, not accounting for management uncertainty would have increased the risk of exceeding the ACL, and would be inconsistent with the FMP; therefore, this alternative was also rejected. Alternative 4 represents the status quo alternative, which would have maintained fishing year 2012 specifications through 2015 (35.694 million-lb (16,191-mt) commercial quota; 3,000-lb (1,361-kg) possession limit). Alternative 4 was rejected because maintaining the lower, status quo quota would not allow the fishery to achieve optimum yield during 2013, 2014, and 2015.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Northeast Regional Office, and the guide, i.e., permit holder letter, will be sent to all holders of permits for the spiny dogfish fishery. The guide and this final rule will be available upon request, and posted on the Northeast Regional Office's Web site at *www.nero.noaa.gov.*

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 29, 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 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. In § 648.235, revise introductory text to paragraphs (a) and (b), and revise paragraphs (a)(1), and (b)(1) to read as follows:

§ 648.235 Spiny dogfish possession and landing restrictions.

(a) *Quota period 1.* From May 1 through October 31, vessels issued a valid Federal spiny dogfish permit specified under § 648.4(a)(11) may:

(1) Possess up to 4,000 lb (1.814 mt) of spiny dogfish per trip; and

* * * * *

(b) *Quota period 2.* From November 1 through April 30, vessels issued a valid Federal spiny dogfish permit specified under § 648.4(a)(11) may:

(1) Possess up to 4,000 lb (1.814 mt) of spiny dogfish per trip; and

* * * * *

[FR Doc. 2013–10461 Filed 4–30–13; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 130108020–3409–01]

RIN 0648–XC438

Fisheries Off West Coast States; West Coast Salmon Fisheries; 2013 Management Measures

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

ACTION: Final rule; notice of availability of an environmental assessment.

SUMMARY: Through this final rule NMFS establishes fishery management measures for the 2013 ocean salmon fisheries off Washington, Oregon, and California and the 2014 salmon seasons opening earlier than May 1, 2014. Specific fishery management measures vary by fishery and by area. The measures establish fishing areas, seasons, quotas, legal gear, recreational fishing days and catch limits, possession and landing restrictions, and minimum lengths for salmon taken in the U.S. exclusive economic zone (EEZ) (3–200 NM) off Washington, Oregon, and California. The management measures are intended to prevent overfishing and to apportion the ocean harvest equitably among treaty Indian, non-treaty commercial, and recreational fisheries. The measures are also intended to allow a portion of the salmon runs to escape the ocean fisheries in order to provide for spawning escapement and inside fisheries (fisheries occurring in state internal waters). This document also announces the availability of an environmental assessment (EA) that analyzes the environmental impacts of implementing the 2013 ocean salmon management measures.

DATES: This final rule is effective from 0001 hours Pacific Daylight Time, May 1, 2013, until the effective date of the 2014 management measures, as published in the **Federal Register**. Comments regarding the reporting burden estimate or any other aspect of the collection-of-information requirements in these management measures may be submitted at any time.

ADDRESSES: Copies of the documents cited in this document are available from Dr. Donald O. McIsaac, Executive Director, Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384, and are posted on its Web site (*www.pcouncil.org*).

Send comments regarding the reporting burden estimate or any other aspect of the collection-of-information requirements in these management measures, including suggestions for reducing the burden, to William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070 or Rod McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213 and to Office of Management and Budget (OMB), by email at *OIRA.Submission@omb.eop.gov* or by fax at (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Peggy Mundy at 206–526–4323, or Heidi Taylor at 562–980–4039.

SUPPLEMENTARY INFORMATION:

Background

The ocean salmon fisheries in the EEZ off Washington, Oregon, and California are managed under a ''framework'' fishery management plan entitled the Pacific Coast Salmon Fishery Management Plan (Salmon FMP). Regulations at 50 CFR part 660, subpart H, provide the mechanism for making preseason and inseason adjustments to the management measures, within limits set by the Salmon FMP, by notification in the **Federal Register**.

The management measures for the 2013 and pre-May 2014 ocean salmon fisheries that are implemented in this final rule were recommended by the Pacific Fishery Management Council (Council) at its April 6 to 11, 2013, meeting.

Schedule Used To Establish 2013 Management Measures

The Council announced its annual preseason management process for the 2013 ocean salmon fisheries in the **Federal Register** on December 12, 2012 (77 FR 73987), and on the Council's Web site at (*www.pcouncil.org*). NMFS published an additional notice of opportunities to submit public comments on the 2013 ocean salmon fisheries in the **Federal Register** on February 25, 2013 (78 FR 12713). These notices announced the availability of Council documents, the dates and locations of Council meetings and public hearings comprising the Council's complete schedule of events for determining the annual proposed and final modifications to ocean salmon fishery management measures, and instructions on how to comment on 2013 ocean salmon fisheries. The agendas for the March and April Council meetings were published in the **Federal Register** and posted on the Council's Web site prior to the actual meetings.

In accordance with the Salmon FMP, the Council's Salmon Technical Team (STT) and staff economist prepared four reports for the Council, its advisors, and the public. All four reports were posted on the Council's Web site and otherwise made available to the Council, its advisors, and the public upon their completion. The first of the reports, ''Review of 2012 Ocean Salmon Fisheries,'' was prepared in February when the scientific information necessary for crafting management measures for the 2013 and pre-May 2014 ocean salmon fisheries first became available. The first report summarizes biological and socio-economic data for the 2012 ocean salmon fisheries and assesses how well the Council's 2012 management objectives were met. The second report, ''Preseason Report I Stock Abundance Analysis and Environmental Assessment Part 1 for 2013 Ocean Salmon Fishery Regulations'' (PRE I), provides the 2013 salmon stock abundance projections and analyzes the impacts on the stocks and Council management goals if the 2012 regulations and regulatory procedures were applied to the projected 2013 stock abundances. The completion of PRE I is the initial step in evaluating the full suite of preseason alternatives.

Following completion of the first two reports, the Council met in Tacoma, WA from March 6 to 11, 2013, to develop 2013 management alternatives for proposal to the public. The Council proposed three alternatives for commercial and recreational fisheries management for analysis and public comment. These alternatives consisted of various combinations of management measures designed to protect weak stocks of coho and Chinook salmon, and to provide for ocean harvests of more abundant stocks. After the March Council meeting, the Council's STT and staff economist prepared a third report, ''Preseason Report II Proposed Alternatives and Environmental Assessment Part 2 for 2013 Ocean Salmon Fishery Regulations'' (PRE II),

which analyzes the effects of the proposed 2013 management alternatives.

Public hearings, sponsored by the Council, to receive testimony on the proposed alternatives were held on March 25, 2013, in Westport, WA and Coos Bay, OR; and March 26, 2013, in Eureka, CA. The States of Washington, Oregon, and California sponsored meetings in various forums that also collected public testimony, which was then presented to the Council by each state's Council representative. The Council also received public testimony at both the March and April meetings and received written comments at the Council office.

The Council met from April 6 to 11, 2013, in Portland, OR to adopt its final 2013 recommendations. Following the April Council meeting, the Council's STT and staff economist prepared a fourth report, ''Preseason Report III Analysis of Council-Adopted Management Measures for 2013 Ocean Salmon Fisheries'' (PRE III), which analyzes the environmental and socio-economic effects of the Council's final recommendations. After the Council took final action on the annual ocean salmon specifications in April, it published the recommended management measures in its newsletter and also posted them on the Council Web site (*www.pcouncil.org*).

Public Comments

The Council invited written comments on developing 2013 salmon management measures in their notice announcing public meetings and hearings (77 FR 73987, December 12, 2012). Additionally, comments were taken at three public hearings held in March, staffed by representatives of the Council and NMFS. The Council received 10 written comments directly. The three public hearings were attended by a total of 89 people; 30 people provided oral comments and three additional written comments were submitted. Comments came from individual fishers, fishing associations, fish buyers, and processors. Comments addressed the 2013 management alternatives described in PRE II, and generally expressed preferences for a specific alternative or for particular season structures. All comments were included in the Council's briefing book for their April 2013 meeting and were considered by the Council, which includes a representative from NMFS, in developing the recommended management measures transmitted to NMFS on April 19, 2013.

Comments on alternatives for fisheries north of Cape Falcon. For fisheries north of Cape Falcon, Alternative I was favored by 6 commercial and 2 recreational commenters. Alternative II was favored by one commercial commenter. Alternative III had no support. There were 2 commenters favoring a late season non-mark selective coho fishery.

Comments on alternatives for fisheries south of Cape Falcon. For fisheries south of Cape Falcon, commercial fishers were divided in support between Alternative I (7 commenters) and Alternative II (10 commenters). For recreational fisheries south of Cape Falcon, 9 commenters favored Alternative I. Alternative III had no support.

Comments on incidental halibut retention in the commercial salmon fisheries. Support was divided among the three alternatives.

Other comments. Hooking mortality was mentioned by three commenters, with respect to mark-selective fisheries and size restrictions. Two commenters requested the Council revisit the perennial commercial fishery closure between Humboldt South Jetty and Horse Mountain, California. One commenter requested the Council add a seat on the Salmon Advisory Subpanel to represent the Klamath Basin in-river recreational fishery.

The Council, including the NMFS representative, took these comments into consideration. The Council's final recommendation generally includes aspects of Alternatives I and II, while taking into account the best available scientific information and ensuring that fisheries are consistent with ESA consultation standards, ACLs, PST obligations, and tribal fishing rights. The best available information regarding hooking mortality is factored into the analysis of the impacts of mark-selective fisheries and size restrictions. These management tools assist the Council in meeting impact limits on weak stocks. The Council retained the commercial fishery closure between Humboldt South Jetty and Horse Mountain to protect California Coastal Chinook in the Eel Canyon area. Finally, the request to add a new seat on the Salmon Advisory Subpanel, while an issue for the Council's consideration, is not relevant to the content of these management measures.

NMFS also invited comments to be submitted directly to the Council or to NMFS, via the Federal Rulemaking Portal (*www.regulations.gov*) in a proposed rule (78 FR 12713, February 25, 2013). Two comments were submitted via *www.regulations.gov,* both comments opposed genetically modified salmon; while NMFS appreciates receiving public comment, the issue of genetically modified salmon is not relevant to setting the 2013 salmon management measures.

National Environmental Policy Act

The Council's documents described above (PRE I, PRE II, and PRE III) collectively comprise the Environmental Assessment (EA) for this action, providing analysis of environmental and socioeconomic effects under the National Environmental Policy Act (NEPA). The EA and its related Finding of No Significant Impact (FONSI) are posted on the NMFS Northwest Region Web site (*www.nwr.noaa.gov*).

Annual Catch Limits and Status Determination Criteria

The Council adopted Amendment 16 to the Salmon FMP in 2011 (76 FR 81852, December 29, 2011). This amendment brought the Salmon FMP into compliance with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) as amended in 2007, and the corresponding revised National Standard 1 Guidelines' (NS1Gs) mandate to end and prevent overfishing. As modified by Amendment 16, the FMP identifies stocks that are in the fishery, describes stock complexes and indicator stocks for those complexes, establishes status determination criteria (SDC), and establishes formulas for specifying overfishing limits (OFLs), acceptable biological catch (ABC), and annual catch limits (ACLs). Amendment 16 also added to the FMP ''de minimis'' fishing provisions that allow for low levels of fishing impacts on specified stocks that are at low levels of abundance.

Annual catch limits (ACLs) are set for two stocks: Sacramento River Fall Chinook (SRFC) and Klamath River Fall Chinook (KRFC). These stocks are indicator stocks for the Central Valley Fall Chinook complex and the Southern Oregon/Northern California Chinook complex, respectively. The Far North Migrating Coastal Chinook complex includes a group of Chinook salmon stocks that are caught primarily in fisheries north of Cape Falcon, Oregon and other fisheries that occur north of the U.S./Canada Border. No ACL is set for these stocks because they are managed according to the Pacific Salmon Treaty with Canada (PST). Other Chinook salmon stocks caught in fisheries north of Cape Falcon are ESA-listed or hatchery produced, and are managed consistent with ESA consultation standards or hatchery goals. Coho stocks are either ESA-listed, hatchery produced, or managed under the PST.

ACLs for SRFC and KRFC are escapement-based, which means they establish a number of adults that must escape the fisheries to return to the spawning grounds. They are set based on the annual abundance projection and a fishing rate reduced to account for scientific uncertainty. The abundance forecasts for 2013 are described in more detail below in the ''Resource Status'' section of this final rule. For SRFC in 2013, the overfishing limit (OFL) is S_{OFL} = 834,208 (projected abundance) multiplied by $1 - F_{MSY}$ (1 − 0.78) or 183,526 returning spawners. S_{ABC} is 834,208 multiplied by $1 - F_{ABC}$ (1 − 0.70) (F_{MSY} reduced for scientific uncertainty = 0.70) or 250,262. The S_{ACL} is set equal to S_{ABC}. For KRFC in 2013, S_{OFL} is 230,473 (abundance projection) multiplied by $1 - F_{MSY}$ (1 − 0.71), or 66,837 returning spawners. S_{ABC} is 230,473 multiplied by $1 - F_{ABC}$ (1 − 0.68) (F_{MSY} reduced for scientific uncertainty = 0.68) or 73,751 returning spawners. S_{ACL} is set equal to S_{ABC}.

As explained in more detail below under ''Resource Status,'' fisheries south of Cape Falcon, which are the fisheries that impact SRFC and KRFC, are constrained by impact limits necessary to protect ESA-listed salmon stocks including California Coastal Chinook (CCC) and Sacramento River winter Chinook (SRWC). For 2013, abundance projections, in combination with the constraints for ESA-listed stocks, are expected to result in escapements that meet the ACL for KRFC and that exceed the ACL for SRFC.

Resource Status

Fisheries south of Cape Falcon, OR are limited in 2013 primarily by the status of SRWC and CCC, which are both evolutionarily significant units (ESUs) listed under the Endangered Species Act (ESA). Fisheries north of Cape Falcon are limited primarily by Lower Columbia River (LCR) Chinook salmon and LCR coho salmon, stocks which are also listed under the ESA, and by Thompson River coho from Canada. At the start of the preseason planning process for the 2013 management season, NMFS provided a letter to the Council, dated February 28, 2013, summarizing its ESA consultation standards for listed species as required by the Salmon FMP. The Council's recommended management measures comply with NMFS ESA consultation standards and guidance for those listed salmon species that may be affected by Council fisheries. In many cases, the recommended measures are more restrictive than NMFS's ESA requirements.

In 2010, NMFS consulted under ESA section 7 and provided guidance to the Council regarding the effects of Council area fisheries on SRWC. NMFS completed a Biological Opinion that includes a reasonable and prudent alternative (RPA) to avoid jeopardizing the continued existence of this ESU. The RPA included management area specific fishing season openings and closures, and minimum size limits for both commercial and recreational fisheries. In 2012, NMFS added a second component to the RPA based on a new abundance-based framework which supplements the above management restrictions with maximum allowable impact rates that apply when abundance is low. The Council's recommended 2013 management measures meet the requirements of the RPA.

NMFS last consulted under ESA section 7 regarding the effects of Council area fisheries on CCC in 2005. KRFC are used as a surrogate to set limits on ocean harvest impacts on CCC. The Biological Opinion requires that management measures result in a KRFC age-4 ocean harvest rate of no greater than 16 percent. This objective is met by the Council's recommended 2013 management measures.

In 2012, NMFS consulted under ESA section 7 and provided guidance to the Council regarding the effects of Council area fisheries on LCR Chinook salmon. NMFS completed a Biological Opinion that applies to fisheries beginning in 2012, concluding that the proposed fisheries, if managed consistent with the terms of the Biological Opinion, are not likely to jeopardize the continued existence of LCR Chinook salmon. The LCR Chinook salmon ESU is comprised of a spring component, a ''far-north'' migrating bright component, and a component of north migrating tules. The bright and tule components both have fall run timing. There are twenty-one separate populations within the tule component of this ESU. Unlike the spring or bright populations of the ESU, LCR tule populations are caught in large numbers in Council fisheries, as well as fisheries to the north and in the Columbia River. Therefore, this component of the ESU is the one most likely to constrain Council fisheries in the area north of Cape Falcon, Oregon. Under the 2012 Biological Opinion, NMFS uses an abundance-based management (ABM) framework to set annual exploitation rates for LCR tule Chinook salmon below Bonneville Dam. Applying the ABM framework to the 2013 preseason abundance forecast, the LCR tule exploitation rate is limited to a maximum of 41 percent. This objective is met by the Council's recommended 2013 management measures.

In 2008, NMFS conducted an ESA section 7 consultation and issued a Biological Opinion regarding the effects of Council fisheries and fisheries in the Columbia River on Lower Columbia River (LCR) coho. The opinion depends on use of a harvest matrix for LCR coho. Under the matrix the allowable harvest in a given year depends on indicators of marine survival and brood year escapement. In 2013, the marine survival indicator is in the ''low'' category, while brood year escapements for two indicator stocks are in the ''low'' and ''medium'' categories. Under these circumstances, ocean salmon fisheries under the Council's jurisdiction in 2013, and commercial and recreational salmon fisheries in the mainstem Columbia River, including select area fisheries (e.g., Youngs Bay), must be managed subject to a total exploitation rate limit on LCR coho not to exceed 15 percent. The recommended management measures that would affect LCR coho are consistent with this requirement.

The ESA listing status of Oregon Coast (OC) coho has changed over the years. On February 11, 2008, NMFS again listed OC coho as threatened under the ESA (73 FR 7816); that listing status was confirmed following a status review in 2011 (76 FR 35755, June 20, 2011). Regardless of their listing status, the Council has managed OC coho consistent with the terms of Amendment 13 of the Salmon FMP as modified by the expert advice provided by the 2000 ad hoc Work Group appointed by the Council. NMFS approved the management provisions for OC coho through its section 7 consultation on Amendment 13 in 1999, and has since supported use of the expert advice provided by the Council's ad hoc Work Group. For the 2013 season, the applicable spawner status is in the ''high'' category for three of the four sub-aggregate stocks and ''low'' for the southern sub-aggregate (although the southern sub-aggregate is included in the harvest matrix, it is a component of the Southern Oregon/Northern California Coastal Coho ESU). The marine survival index is in the ''medium'' category. Under these circumstances, the Work Group report requires that the exploitation rate be limited to no more than 30 percent. The recommended management measures that would affect OC coho are consistent with this requirement.

Interior Fraser (Thompson River) coho, a Canadian stock, continues to be depressed, remaining in the ''low''

status category under the Pacific Salmon Treaty and, along with LCR coho, is the coho stock most limiting the 2013 ocean fisheries north of Cape Falcon. The recommended management measures for 2013 satisfy the maximum 10.0 percent total U.S. exploitation rate called for by the Pacific Salmon Treaty agreements and the Salmon FMP.

Management Measures for 2013 Fisheries

The Council-recommended ocean harvest levels and management measures for the 2013 fisheries are designed to apportion the burden of protecting the weak stocks identified and discussed in PRE I equitably among ocean fisheries and to allow maximum harvest of natural and hatchery runs surplus to inside fishery and spawning needs. NMFS finds the Council's recommendations responsive to the goals of the Salmon FMP, the requirements of the resource, and the socioeconomic factors affecting resource users. The recommendations are consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act, U.S. obligations to Indian tribes with federally recognized fishing rights, and U.S. international obligations regarding Pacific salmon. Accordingly, NMFS has adopted the Council's recommendations.

North of Cape Falcon, the 2013 management measures for non-Indian commercial troll and recreational fisheries have slightly reduced quotas for coho and Chinook salmon, compared to 2012. Conservation constraints on Chinook salmon are largely unchanged, including the exploitation rate limit for ESA-listed LCR tule Chinook, which remains at 41 percent in 2013. Impacts in Alaskan and Canadian fisheries on Chinook salmon stocks originating north of Cape Falcon are reduced relative to 2012. The North of Falcon fisheries are also managed to protect threatened LCR coho, threatened Oregon Coastal Natural coho, and coho salmon from the Thompson River in Canada. Washington coastal and Puget Sound Chinook generally migrate to the far north and are not significantly affected by ocean salmon harvests from Cape Falcon, OR, to the U.S.-Canada border. Nevertheless, ocean fisheries in combination with fisheries inside Puget Sound are restricted in order to meet ESA related conservation objectives for Puget Sound Chinook. North of Cape Alava, WA, the Council recommended a provision prohibiting retention of chum salmon in the salmon fisheries during August and September to protect ESA listed Hood Canal summer chum. The Council has recommended such a prohibition since 2002 (67 FR 30616, May 7, 2002).

Large SRFC and KRFC abundance forecasts allow for substantial commercial fishing opportunity south of Cape Falcon in 2013 for all salmon except coho. Constraints on the commercial fishery in this region include the CCC consultation standard that limits the forecast KRFC age-4 ocean harvest rate to a maximum of 16 percent and the exploitation rate limit on ESA-listed LCR tule Chinook. Commercial fisheries south of Point Arena are also constrained by the maximum allowable age-3 impact rate of 12.9 percent on ESA-listed SRWC. Recreational fisheries south of Cape Falcon will be directed primarily at Chinook salmon, with opportunity for coho limited to the area between Cape Falcon and the Oregon/California Border. Recreational fisheries south of Cape Falcon will have area specific openings throughout the season. The projected abundance of SRFC in 2013 is similar to the 2012 projection. Under the management measures in this final rule, and including anticipated in-river fishery impacts, spawning escapement for SRFC is projected at 462,600. Projected abundance for Klamath River Fall Chinook (KRFC) is strong, but lower than the historic 2012 projection. Under the management measures in this final rule, and including anticipated in-river fishery impacts, spawning escapement for KRFC is projected at 73,800.

The treaty-Indian commercial troll fishery quota for 2013 is 52,500 Chinook salmon in ocean management areas and Washington State Statistical Area 4B combined. This quota is lower than the 55,000 Chinook salmon quota in 2012, for the same reasons discussed above for the non-tribal fishery. The treaty-Indian commercial troll fisheries include a Chinook-directed fishery in May and June with a quota of 26,250 Chinook salmon, and an all-salmon season beginning July 1 with a 26,250 Chinook salmon sub-quota. The coho quota for the treaty-Indian troll fishery in ocean management areas, including Washington State Statistical Area 4B, for the July-September period is 47,500 coho, the same as in 2012.

Management Measures for 2014 Fisheries

The timing of the March and April Council meetings makes it impracticable for the Council to recommend fishing seasons that begin before May 1 of the same year. Therefore, this action also establishes the 2014 fishing seasons that open earlier than May 1. The Council recommended, and NMFS concurs, that the commercial season off Oregon from Cape Falcon to the Oregon/California border, the commercial season off California from Horse Mountain to Point Arena, the recreational season off Oregon from Cape Falcon to Humbug Mountain, and the recreational season off California from Horse Mountain to the U.S./Mexico border will open in 2014 as indicated in the Season Description section of this document. At the March 2014 meeting, the Council may consider inseason recommendations to adjust the commercial and recreational seasons prior to May 1 in the areas off Oregon and California.

The following sections set out the management regime for the salmon fishery. Open seasons and days are described in Sections 1, 2, and 3 of the 2013 management measures. Inseason closures in the commercial and recreational fisheries are announced on the NMFS hotline and through the U.S. Coast Guard Notice to Mariners as described in Section 6. Other inseason adjustments to management measures are also announced on the hotline and through the Notice to Mariners. Inseason actions will also be published in the **Federal Register** as soon as practicable.

The following are the management measures recommended by the Council and approved and implemented here for 2013 and, as specified, for 2014.

Section 1. Commercial Management Measures for 2013 Ocean Salmon Fisheries

Parts A, B, and C of this section contain restrictions that must be followed for lawful participation in the fishery. Part A identifies each fishing area and provides the geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR

—U.S./Canada Border to Cape Falcon

May 1 through earlier of June 30 or 29,300 Chinook, no more than 8,700 of which may be caught in the area between the U.S./Canada border and the Queets River. Seven days per week (C.1). All salmon except coho (C.4, C.7). Chinook minimum size limit of 28 inches total length (B, C.1). Vessels in possession of salmon north of the Queets River may not cross the Queets River line without first notifying

Washington Department of Fish and Wildlife (WDFW) at 360–902–2739 with area fished, total Chinook and halibut catch aboard, and destination. Vessels in possession of salmon south of the Queets River may not cross the Queets River line without first notifying WDFW at 360–902–2739 with area fished, total Chinook and halibut catch aboard, and destination. Cape Flattery, Mandatory Yelloweye Rockfish Conservation Area, and Columbia Control Zones closed (C.4, C.5, C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3). An inseason conference call will occur when it is projected that 21,975 Chinook have been landed overall, or 6,525 Chinook have been landed in the area between the U.S/Canada border and the Queets River, to consider modifying the open period to five days per week and adding landing and possession limits to ensure the guideline is not exceeded. Vessels must land and deliver their fish within 24 hours of any closure of this fishery. Under state law, vessels must report their catch on a state fish receiving ticket. Vessels fishing or in possession of salmon while fishing north of Leadbetter Point must land and deliver their fish within the area and north of Leadbetter Point. Vessels fishing or in possession of salmon while fishing south of Leadbetter Point must land and deliver their fish within the area and south of Leadbetter Point, except that Oregon permitted vessels may also land their fish in Garibaldi, Oregon. Oregon State regulations require all fishers landing salmon into Oregon from any fishery between Leadbetter Point, Washington and Cape Falcon, Oregon must notify ODFW within one hour of delivery or prior to transport away from the port of landing by either calling 541–867–0300 Ext. 271 or sending notification via email to *nfalcon.trollreport@state.or.us*. Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery. Inseason actions may modify harvest guidelines in later fisheries to achieve or prevent exceeding the overall allowable troll harvest impacts (C.8).

July 1 through earlier of September 17 or attainment of the quota of 14,700 Chinook, no more than 6,100 of which may be caught in the area between the U.S./Canada border and the Queets River, or 14,220 marked coho (C.8.d). July 1 through 9, then Friday through Tuesday, July 12 through August 27 with a landing and possession limit of 50 Chinook and 40 coho per vessel per open period; Friday through Tuesday, August 30 through September 17 with a landing and possession limit of 20 Chinook and 50 coho per vessel per open period (C.1). Vessels in possession of salmon north of the Queets River may not cross the Queets River line without first notifying WDFW at 360–902–2739 with area fished, total Chinook, coho, and halibut catch aboard, and destination. Vessels in possession of salmon south of the Queets River may not cross the Queets River line without first notifying WDFW at 360–902–2739 with area fished, total Chinook, coho, and halibut catch aboard, and destination. No earlier than September 1, if at least 5,000 marked coho remain on the quota, inseason action may be considered to allow non-selective coho retention (C.8). All salmon except no chum retention north of Cape Alava, Washington in August and September (C.7). Chinook minimum size limit of 28 inches total length (B, C.1). All coho must be marked except as noted above (C.8.d). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3). Mandatory Yelloweye Rockfish Conservation Area, Cape Flattery and Columbia Control Zones, and beginning August 9, Grays Harbor Control Zone closed (C.5). Vessels must land and deliver their fish within 24 hours of any closure of this fishery. Vessels fishing or in possession of salmon while fishing north of Leadbetter Point must land and deliver their fish within the area and north of Leadbetter Point. Vessels fishing or in possession of salmon while fishing south of Leadbetter Point must land and deliver their fish within the area and south of Leadbetter Point, except that Oregon permitted vessels may also land their fish in Garibaldi, Oregon. Under state law, vessels must report their catch on a state fish receiving ticket. Oregon State regulations require all fishers landing salmon into Oregon from any fishery between Leadbetter Point, Washington and Cape Falcon, Oregon must notify ODFW within one hour of delivery or prior to transport away from the port of landing by either calling 541–867–0300 Ext. 271 or sending notification via email to *nfalcon.trollreport@state.or.us.* Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery. Inseason actions may modify harvest guidelines in later fisheries to achieve or prevent exceeding the overall allowable troll harvest impacts.

South of Cape Falcon, OR

—Cape Falcon to Humbug Mountain

April 1 through August 29;

September 4 through October 31 (C.9.a).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 28 inches total length (B, C.1). All vessels fishing in the area must land their fish in the State of Oregon. See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3) and Oregon State regulations for a description of special regulations at the mouth of Tillamook Bay.

Beginning September 4, no more than 100 Chinook per vessel per landing week (Wednesday through Tuesday).

In 2014, the season will open March 15 for all salmon except coho. Chinook minimum size limit of 28 inches total length (C.1). Gear restrictions same as in 2013. This opening could be modified following Council review at its March 2014 meeting.

—Humbug Mountain to Oregon/California Border (Oregon KMZ)

April 1 through May 31;

June 1 through earlier of June 30, or a 4,000 Chinook quota;

July 1 through earlier of July 31, or a 3,000 Chinook quota;

August 1 through earlier of August 29, or a 2,000 Chinook quota;

September 16 through earlier of September 27, or a 1,000 Chinook quota (C.9.a).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 28 inches total length (B, C.1). Prior to June 1, all fish caught in this area must be landed and delivered in the State of Oregon. June 1 through August 29 landing and possession limit of 30 Chinook per vessel per day. September 16 through 27 landing and possession limit of 20 Chinook per vessel per day. Any remaining portion of the June and/or July Chinook quotas may be transferred inseason on an impact neutral basis to the next open quota period (C.8). All vessels fishing in this area must land and deliver all fish within this area or Port Orford, within 24 hours of any closure of this fishery, and prior to fishing outside of this area. Oregon State regulations require all fishers landing salmon from any quota managed season within this area to notify ODFW within 1 hour of delivery or prior to transport away from the port of landing by either calling 541–867–0300 Ext. 252 or sending notification via email to *KMZOR.trollreport@state.or.us.* Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery.

See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

In 2014, the season will open March 15 for all salmon except coho, with a 28 inch Chinook minimum size limit (C.1). Gear restrictions same as in 2013. This opening could be modified following Council review at its March 2014 meeting.

—Oregon/California Border to Humboldt South Jetty (California KMZ)

May 1 through earlier of May 31, or a 3,000 Chinook quota;
June 1 through earlier of June 30, or a 3,000 Chinook quota;
July 15 through earlier of July 31, or a 2,000 Chinook quota;
August 1 through earlier of August 29, or a 1,500 Chinook quota;
September 16 through earlier of September 30, or 6,000 Chinook quota (C.9.b).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 27 inches total length (B, C.1). Landing and possession limit of 20 Chinook per vessel per day (C.8.g). Any remaining portion of the May, June and/or July Chinook quotas may be transferred inseason on an impact neutral basis to the next open quota period (C.8.c). All fish caught in this area must be landed within the area and within 24 hours of any closure of the fishery and prior to fishing outside the area (C.10). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3). Klamath Control Zone closed (C.5.e). See California State regulations for additional closures adjacent to the Smith and Klamath rivers. When the fishery is closed between the Oregon/California border and Humbug Mountain and open to the south, vessels with fish on board caught in the open area off California may seek temporary mooring in Brookings, Oregon prior to landing in California only if such vessels first notify the Chetco River Coast Guard Station via VHF channel 22A between the hours of 0500 and 2200 and provide the vessel name, number of fish on board, and estimated time of arrival (C.6).

—Humboldt South Jetty to Horse Mountain

Closed.

—Horse Mountain to Point Arena (Fort Bragg)

May 22 through 31;
June 1 through 8 and 21 through 30;
July 15 through 31;
August 1 through 29;
September 1 through 30 (C.9.b).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 27 inches total length (B, C.1). All fish must be landed in California and offloaded within 24 hours of the August 29 closure (C.6). When the California KMZ fishery is open, all fish caught in the area must be landed south of Horse Mountain (C.6). During September, all fish must be landed north of Point Arena (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

In 2014, the season will open April 16 through 30 for all salmon except coho, with a 27-inch Chinook minimum size limit and the same gear restrictions as in 2013. All fish caught in the area must be landed in the area. This opening could be modified following Council review at its March 2014 meeting.

—Point Arena to Pigeon Point (San Francisco)

May 1 through 31;
June 1 through 8 and 21 through 30;
July 15 through 31;
August 1 through 29;
September 1 through 30 (C.9.b).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 27 inches total length prior to September 1, 26 inches thereafter (B, C.1). All fish must be landed in California and offloaded within 24 hours of the August 29 closure (C.6). During September, all fish must be landed south of Point Arena (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

• Point Reyes to Point San Pedro (Fall Area Target Zone)

October 1 through 4, 7 through 11, and 14 through 15.

All salmon except coho (C.4, C.7). Chinook minimum size limit of 26 inches total length (B, C.1). All fish caught in this area must be landed between Point Arena and Pigeon Point (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

—Pigeon Point to U.S./Mexico Border (Monterey)

May 1 through 31;
June 1 through 8 and 21 through 30;
July 15 through 31;
August 1 through 29;
September 1 through 30 (C.9.b).

Seven days per week. All salmon except coho (C.4, C.7). Chinook minimum size limit of 27 inches total length prior to September 1, 26 inches thereafter (B, C.1). All fish must be landed in California and offloaded within 24 hours of the August 29 closure (C.6). During September, all fish must be landed south of Point Arena (C.6). See compliance requirements (C.1) and gear restrictions and definitions (C.2, C.3).

California State regulations require that all salmon be made available to a California Department of Fish and Wildlife (CDFW) representative for sampling immediately at port of landing. Any person in possession of a salmon with a missing adipose fin, upon request by an authorized agent or employee of the CDFW, shall immediately relinquish the head of the salmon to the state (California Fish and Game Code § 8226).

B. Minimum Size (Inches) (See C.1)

Area (when open)	Chinook		Coho		Pink
	Total length	Head-off	Total length	Head-off	
North of Cape Falcon, OR	28.0	21.5	16.0	12.0	None
Cape Falcon to OR/CA Border	28.0	21.5	.....	.....	None
OR/CA Border to Humboldt South Jetty	27.0	20.5	.....	.....	None
Horse Mountain to Point Arena	27.0	20.5	.....	.....	None
Point Arena to U.S./Mexico Border:					
Prior to Sept. 1	27.0	20.5	.....	.....	None
Sept. 1 to Oct. 15	26.0	19.5	.....	.....	None

Metric equivalents: 28.0 in = 71.1 cm, 27.0 in = 68.6 cm, 26.0 in = 66.0 cm, 21.5 in = 54.6 cm, 20.5 in = 52.1 cm, 19.5 in = 49.5 cm, 16.0 in = 40.6 cm, and 12.0 in = 30.5 cm.

C. Special Requirements, Definitions, Restrictions, or Exceptions

C.1. Compliance With Minimum Size or Other Special Restrictions

All salmon on board a vessel must meet the minimum size, landing/possession limit, or other special requirements for the area being fished and the area in which they are landed if the area is open or has been closed less than 96 hours for that species of salmon. Salmon may be landed in an area that has been closed for a species of salmon more than 96 hours only if the salmon meet the minimum size, landing/possession limit, or other special requirements for the area in which they were caught.

States may require fish landing/receiving tickets to be kept on board the vessel for 90 days after landing to account for all previous salmon landings.

C.2. Gear Restrictions

a. Salmon may be taken only by hook and line using single point, single shank, barbless hooks.

b. Cape Falcon, Oregon, to the Oregon/California border: No more than 4 spreads are allowed per line.

c. Oregon/California border to U.S./Mexico border: No more than 6 lines are allowed per vessel, and barbless circle hooks are required when fishing with bait by any means other than trolling.

C.3. Gear Definitions

Trolling defined: Fishing from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

Troll fishing gear defined: One or more lines that drag hooks behind a moving fishing vessel. In that portion of the fishery management area (FMA) off Oregon and Washington, the line or lines must be affixed to the vessel and must not be intentionally disengaged from the vessel at any time during the fishing operation.

Spread defined: A single leader connected to an individual lure and/or bait.

Circle hook defined: A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90° angle.

C.4. Vessel Operation in Closed Areas With Salmon on Board

a. Except as provided under C.4.b below, it is unlawful for a vessel to have troll or recreational gear in the water while in any area closed to fishing for a certain species of salmon, while possessing that species of salmon; however, fishing for species other than salmon is not prohibited if the area is open for such species, and no salmon are in possession.

b. When Genetic Stock Identification (GSI) samples will be collected in an area closed to commercial salmon fishing, the scientific research permit holder shall notify NOAA Office of Law Enforcement (OLE), U.S. Coast Guard (USCG), CDFW, and Oregon State Patrol (OSP) at least 24 hours prior to sampling and provide the following information: The vessel name, date, location, and time collection activities will be done. Any vessel collecting GSI samples in a closed area shall not possess any salmon other than those from which GSI samples are being collected. Salmon caught for collection of GSI samples must be immediately released in good condition after collection of samples.

C.5. Control Zone Definitions

a. Cape Flattery Control Zone—The area from Cape Flattery (48°23′00″ N. lat.) to the northern boundary of the U.S. EEZ; and the area from Cape Flattery south to Cape Alava (48°10′00″ N. lat.) and east of 125°05′00″ W. long.

b. Mandatory Yelloweye Rockfish Conservation Area—The area in Washington Marine Catch Area 3 from 48°00.00′ N. lat.; 125°14.00′ W. long. to 48°02.00′ N. lat.; 125°14.00′ W. long. to 48°02.00′ N. lat.; 125°16.50′ W. long. to 48°00.00′ N. lat.; 125°16.50′ W. long. and connecting back to 48°00.00′ N. lat.; 125°14.00′ W. long.

c. Grays Harbor Control Zone—The area defined by a line drawn from the Westport Lighthouse (46°53′18″ N. lat., 124°07′01″ W. long.) to Buoy #2 (46°52′42″ N. lat., 124°12′42″ W. long.) to Buoy #3 (46°55′00″ N. lat., 124°14′48″ W. long.) to the Grays Harbor north jetty (46°55′36″ N. lat., 124°10′51″ W. long.).

d. Columbia Control Zone—An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09″ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long.), and then along the north jetty to the point of intersection with the Buoy #10 line; and, on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

e. Klamath Control Zone—The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately six nautical miles north of the Klamath River mouth); on the west, by 124°23′00″ W. long. (approximately 12 nautical miles off shore); and on the south, by 41°26′48″ N. lat. (approximately six nautical miles south of the Klamath River mouth).

C.6. Notification When Unsafe Conditions Prevent Compliance With Regulations

If prevented by unsafe weather conditions or mechanical problems from meeting special management area landing restrictions, vessels must notify the U.S. Coast Guard and receive acknowledgment of such notification prior to leaving the area. This notification shall include the name of the vessel, port where delivery will be made, approximate amount of salmon (by species) on board, the estimated time of arrival, and the specific reason the vessel is not able to meet special management area landing restrictions.

In addition to contacting the U.S. Coast Guard, vessels fishing south of the Oregon/California border must notify CDFW within one hour of leaving the management area by calling 800–889–8346 and providing the same information as reported to the U.S. Coast Guard. All salmon must be offloaded within 24 hours of reaching port.

C.7. Incidental Halibut Harvest

During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches (81.28 cm) in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on. License applications for incidental harvest must be obtained from the International Pacific Halibut Commission (IPHC) (phone: 206–634–1838). Applicants must apply prior to April 1, 2013 for 2013 permits and mid-March 2014 (exact date to be set by the IPHC in early 2014) for 2014 permits. Incidental harvest is authorized only during May and June of the 2013 troll seasons and April, May, and June of the 2014 troll seasons and after June 30 in 2013 or 2014 if quota remains and if announced on the NMFS hotline (phone: 800–662–9825). WDFW, ODFW,

and CDFW will monitor landings. If the landings are projected to exceed the 30,600 pound preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to prohibit retention of halibut in the non-Indian salmon troll fishery.

Beginning May 1, 2013 through April 30, 2014, IPHC license holders may land or possess no more than one Pacific halibut per each three Chinook, except one Pacific halibut may be possessed or landed without meeting the ratio requirement, and no more than 15 halibut may be possessed or landed per trip. Pacific halibut retained must be no less than 32 inches in total length (with head on).

Incidental Pacific halibut catch regulations in the commercial salmon troll fishery adopted for 2013 will be in effect when incidental Pacific halibut retention opens on April 1, 2014 unless modified by inseason action.

A ''C-shaped'' yelloweye rockfish conservation area (YRCA) is an area to be voluntarily avoided for salmon trolling. NMFS and the Council request salmon trollers voluntarily avoid this area in order to protect yelloweye rockfish. The area is defined in Pacific coast groundfish regulations (50 CFR 660.70(a)) in the North Coast subarea (Washington marine area 3), with the following coordinates in the order listed:

48°18′ N. lat.; 125°18′ W. long.;
48°18′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 125°18′ W. long.;
and connecting back to 48°18′ N. lat.; 125°18′ W. long.

C.8. Inseason Management

In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance applies:

a. Chinook remaining from the May through June non-Indian commercial troll harvest guideline north of Cape Falcon may be transferred to the July through September harvest guideline, if the transfer would not result in exceeding preseason impact expectations on any stocks.

b. Chinook remaining from the June and/or July non-Indian commercial troll quotas in the Oregon KMZ may be transferred to the Chinook quota for the next open period if the transfer would not result in exceeding preseason impact expectations on any stocks.

c. Chinook remaining from the May, June, and/or July non-Indian commercial troll quotas in the California KMZ may be transferred to the Chinook quota for the next open period if the transfer would not result in exceeding preseason impact expectations on any stocks.

d. NMFS may transfer fish between the recreational and commercial fisheries north of Cape Falcon if there is agreement among the areas' representatives on the Salmon Advisory Subpanel (SAS), and if the transfer would not result in exceeding the preseason impact expectations on any stocks.

e. At the March 2014 meeting, the Council will consider inseason recommendations for special regulations for any experimental fisheries (proposals must meet Council protocol and be received in November 2013).

f. If retention of unmarked coho is permitted by inseason action, the allowable coho quota will be adjusted to ensure preseason projected impacts on all stocks are not exceeded.

g. Landing limits may be modified inseason to sustain season length and keep harvest within overall quotas.

C.9. State Waters Fisheries

Consistent with Council management objectives:

a. The State of Oregon may establish additional late-season fisheries in state waters.

b. The State of California may establish limited fisheries in selected state waters.

Check state regulations for details.

C.10. For the purposes of California Fish and Game Code, Section 8232.5, the definition of the Klamath Management Zone (KMZ) for the ocean salmon season is the area from Humbug Mountain, Oregon, to Horse Mountain, California.

Section 2. Recreational Management Measures for 2013 Ocean Salmon Fisheries

Parts A, B, and C of this section contain restrictions that must be followed for lawful participation in the fishery. Part A identifies each fishing area and provides the geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR

—U.S./Canada Border to Queets River

May 10 through 11, May 17 through 18, and June 22 through 28 or a coastwide marked Chinook quota of 8,000 (C.5).

Seven days per week. Two fish per day, all salmon except coho, all Chinook must be marked with a healed adipose fin clip (C.1). Chinook 24-inch total length minimum size limit (B). See gear restrictions (C.2). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

—Queets River to Leadbetter Point

June 8 through earlier of June 22 or a coastwide marked Chinook quota of 8,000 (C.5).

Seven days per week. Two fish per day, all salmon except coho, all Chinook must be marked with a healed adipose fin clip (C.1). Chinook 24-inch total length minimum size limit (B). See gear restrictions (C.2). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

—Leadbetter Point to Cape Falcon

June 8 through earlier of June 21 or a coastwide marked Chinook quota of 8,000 (C.5).

Seven days per week. Two fish per day, all salmon except coho, all Chinook must be marked with a healed adipose fin clip (C.1). Chinook 24-inch total length minimum size limit (B). See gear restrictions (C.2). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

—U.S./Canada Border to Cape Alava (Neah Bay)

June 29 through earlier of September 22 or 7,780 marked coho subarea quota with a subarea guideline of 4,900 Chinook (C.5).

Seven days per week. All salmon except no chum beginning August 1; two fish per day, plus two additional pink salmon. All coho must be marked (C.1). Beginning August 1, Chinook non-retention east of the Bonilla-Tatoosh line (C.4.a) during Council managed ocean fishery. See gear restrictions and definitions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within the overall Chinook and coho recreational TACs for north of Cape Falcon (C.5).

—Cape Alava to Queets River (La Push Subarea)

June 29 through earlier of September 22 or 1,890 marked coho subarea quota with a subarea guideline of 1,650 Chinook (C.5).

September 28 through earlier of October 13 or 50 marked coho quota or 50 Chinook quota (C.5) in the area north of 47°50′00″ N. lat. and south of 48°00′00″ N. lat.

Seven days per week. All salmon; two fish per day, plus two additional pink salmon. All coho must be marked (see Ocean Boat Limits, C.1). See gear restrictions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within the overall Chinook and coho recreational TACs for north of Cape Falcon (C.5).

—Queets River to Leadbetter Point (Westport Subarea)

June 23 through earlier of September 30 or 27,660 marked coho subarea quota with a subarea guideline of 23,500 Chinook (C.5).

Sunday through Thursday. All salmon; two fish per day, no more than one of which can be a Chinook. All coho must be marked (C.1). See gear restrictions and definitions (C.2, C.3). Grays Harbor Control Zone closed beginning August 11 (C.4). Inseason management may be used to sustain season length and keep harvest within the overall Chinook and coho recreational TACs for north of Cape Falcon (C.5).

—Leadbetter Point to Cape Falcon (Columbia River Subarea)

June 22 through earlier of September 30 or 37,380 marked coho subarea quota with a subarea guideline of 9,900 Chinook (C.5).

Seven days per week. All salmon; two fish per day, only one of which can be a Chinook. All coho must be marked (C.1). See gear restrictions and definitions (C.2, C.3). Columbia Control Zone closed (C.4). Inseason management may be used to sustain season length and keep harvest within the overall Chinook and coho recreational TACs for north of Cape Falcon (C.5).

South of Cape Falcon, OR

—Cape Falcon to Humbug Mountain

March 15 through October 31 (C.6), except as provided below during the all-salmon mark-selective and September non-mark-selective coho fisheries.

Seven days per week. All salmon except coho; two fish per day (B, C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

Non-mark-selective coho fishery: September 1 through the earlier of September 30 or a landed catch of 16,000 non-mark-selective coho quota (C.5).

September 1 through 2, then Thursday through Saturday thereafter; all salmon, two fish per day (C.5);

September 3 through 4, then Sunday through Wednesday thereafter; all salmon except coho, two fish per day. The all salmon except coho season reopens the earlier of October 1 or attainment of the coho quota. Open days may be adjusted inseason to utilize the available coho quota (C.5).

In 2014, the season between Cape Falcon and Humbug Mountain will open March 15 for all salmon except coho, two fish per day (B, C.1, C.2, C.3).

Fishing in the Stonewall Bank yelloweye rockfish conservation area restricted to trolling only on days the all depth recreational halibut fishery is open (call the halibut fishing hotline 1–800–662–9825 for specific dates) (C.3.b, C.4.d).

—Cape Falcon to Oregon/California Border

All-salmon mark-selective coho fishery: July 1 through earlier of July 31 or a landed catch of 10,500 marked coho.

Seven days per week. All salmon, two fish per day. All retained coho must be marked (C.1). Any remainder of the mark selective coho quota will be transferred on an impact neutral basis to the September non-selective coho quota from Cape Falcon to Humbug Mountain (C.5). The all salmon except coho season reopens the earlier of August 1 or attainment of the coho quota.

Fishing in the Stonewall Bank yelloweye rockfish conservation area restricted to trolling only on days the all depth recreational halibut fishery is open (call the halibut fishing hotline 1–800–662–9825 for specific dates) (C.3.b, C.4.d).

—Humbug Mountain to Oregon/California Border (Oregon KMZ)

May 1 through September 8, except as provided above during the all-salmon mark-selective coho fishery (C.6).

All salmon except coho, except as noted above in the all-salmon mark-selective coho fishery. Seven days per week, two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

—Oregon/California Border to Horse Mountain (California KMZ)

May 1 through September 8 (C.6).

Seven days per week. All salmon except coho, two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B). See gear restrictions and definitions (C.2, C.3). Klamath Control Zone closed in August (C.4.e). See California State regulations for additional closures adjacent to the Smith, Eel, and Klamath Rivers.

—Horse Mountain to Point Arena (Fort Bragg)

April 6 through November 10.

Seven days per week. All salmon except coho, two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B). See gear restrictions and definitions (C.2, C.3).

In 2014, season opens April 5 for all salmon except coho, two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B); and the same gear restrictions as in 2013 (C.2, C.3). This opening could be modified following Council review at its March 2014 meeting.

—Point Arena to Pigeon Point (San Francisco)

April 6 through November 10.

Open five days per week (Wednesday through Sunday) June 1 through July 9, seven days per week otherwise. All salmon except coho, two fish per day (C.1). Chinook minimum size limit of 24 inches total length through July 31; 20 inches thereafter (B). See gear restrictions and definitions (C.2, C.3).

In 2014, season opens April 5 for all salmon except coho, two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B); and the same gear restrictions as in 2013 (C.2, C.3). This opening could be modified following Council review at its March 2014 meeting.

—Pigeon Point to U.S./Mexico Border (Monterey)

April 6 through October 6.

Open five days per week (Wednesday through Sunday) June 1 through July 9, seven days per week otherwise. All salmon except coho, two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

In 2014, season opens April 5 for all salmon except coho, two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B); and the same gear restrictions as in 2013 (C.2, C.3). This opening could be modified following Council review at its March 2014 meeting.

California State regulations require that all salmon be made available to a CDFW representative for sampling immediately at port of landing. Any person in possession of a salmon with a missing adipose fin, upon request by an authorized agent or employee of the CDFW, shall immediately relinquish the head of the salmon to the state (California Fish and Game Code § 8226).

B. Minimum Size (Total Length in Inches) (See C.1)

Area (when open)	Chinook	Coho	Pink
North of Cape Falcon	24.0	16.0	None
Cape Falcon to Humbug Mountain	24.0	16.0	None
Humbug Mt. to OR/CA Border	24.0	16.0	None
OR/CA Border to Horse Mountain	20.0		20.0
Horse Mountain to Point Arena	20.0		20.0
Point Arena to Pigeon Point:			
April 6 to July 31	24.0		24.0
August 1 to November 10	20.0		20.0
Pigeon Point to U.S./Mexico Border	24.0		24.0

Metric equivalents: 24.0 in = 61.0 cm, 20.0 in = 50.8 cm, and 16.0 in = 40.6 cm.

C. Special Requirements, Definitions, Restrictions, or Exceptions

C.1. Compliance With Minimum Size and Other Special Restrictions

All salmon on board a vessel must meet the minimum size or other special requirements for the area being fished and the area in which they are landed if that area is open. Salmon may be landed in an area that is closed only if they meet the minimum size or other special requirements for the area in which they were caught.

Ocean Boat Limits: Off the coast of Washington, Oregon, and California, each fisher aboard a vessel may continue to use angling gear until the combined daily limits of Chinook and coho salmon for all licensed and juvenile anglers aboard have been attained (additional state restrictions may apply).

C.2. Gear Restrictions

Salmon may be taken only by hook and line using barbless hooks. All persons fishing for salmon, and all persons fishing from a boat with salmon on board, must meet the gear restrictions listed below for specific areas or seasons.

a. U.S./Canada Border to Point Conception, California: No more than one rod may be used per angler; and no more than two single point, single shank barbless hooks are required for all fishing gear. [Note: ODFW regulations in the state-water fishery off Tillamook Bay may allow the use of barbed hooks to be consistent with inside regulations.]

b. Horse Mountain, California, to Point Conception, California: Single point, single shank, barbless circle hooks (see gear definitions below) are required when fishing with bait by any means other than trolling, and no more than two such hooks shall be used. When angling with two hooks, the distance between the hooks must not exceed five inches when measured from the top of the eye of the top hook to the inner base of the curve of the lower hook, and both hooks must be permanently tied in place (hard tied). Circle hooks are not required when artificial lures are used without bait.

C.3. Gear Definitions

a. *Recreational fishing gear defined:* Off Oregon and Washington, angling tackle consists of a single line that must be attached to a rod and reel held by hand or closely attended; the rod and reel must be held by hand while playing a hooked fish. No person may use more than one rod and line while fishing off Oregon or Washington. Off California, the line must be attached to a rod and reel held by hand or closely attended; weights directly attached to a line may not exceed four pounds (1.8 kg). While fishing off California north of Point Conception, no person fishing for salmon, and no person fishing from a boat with salmon on board, may use more than one rod and line. Fishing includes any activity which can reasonably be expected to result in the catching, taking, or harvesting of fish.

b. *Trolling defined:* Angling from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

c. *Circle hook defined:* A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90° angle.

C.4. Control Zone Definitions

a. The Bonilla-Tatoosh Line—A line running from the western end of Cape Flattery to Tatoosh Island Lighthouse (48°23′30″ N. lat., 124°44′12″ W. long.) to the buoy adjacent to Duntze Rock (48°24′37″ N. lat., 124°44′37″ W. long.), then in a straight line to Bonilla Point (48°35′39″ N. lat., 124°42′58″ W. long.) on Vancouver Island, British Columbia.

b. Grays Harbor Control Zone—The area defined by a line drawn from the Westport Lighthouse (46°53′18″ N. lat., 124°07′01″ W. long.) to Buoy #2 (46°52′42″ N. lat., 124°12′42″ W. long.) to Buoy #3 (46°55′00″ N. lat., 124°14′48″ W. long.) to the Grays Harbor north jetty (46°55′36″ N. lat., 124°10′51″ W. long.).

c. Columbia Control Zone—An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09″ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long.) and then along the north jetty to the point of intersection with the Buoy #10 line; and on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

d. Stonewall Bank yelloweye rockfish conservation area—The area defined by the following coordinates in the order listed:

44°37.46′ N. lat.; 124°24.92′ W. long.;
44°37.46′ N. lat.; 124°23.63′ W. long.;
44°28.71′ N. lat.; 124°21.80′ W. long.;
44°28.71′ N. lat.; 124°24.10′ W. long.;
44°31.42′ N. lat.; 124°25.47′ W. long.;
and connecting back to 44°37.46′ N. lat.; 124°24.92′ W. long.

e. Klamath Control Zone—The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately six nautical miles north of the Klamath River mouth); on the west, by 124°23′00″ W. long. (approximately 12 nautical miles off shore); and, on the south, by 41°26′48″ N. lat. (approximately 6 nautical miles south of the Klamath River mouth).

C.5. Inseason Management

Regulatory modifications may become necessary inseason to meet preseason

management objectives such as quotas, harvest guidelines, and season duration. In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance applies:

a. Actions could include modifications to bag limits, or days open to fishing, and extensions or reductions in areas open to fishing.

b. Coho may be transferred inseason among recreational subareas north of Cape Falcon to help meet the recreational season duration objectives (for each subarea) after conferring with representatives of the affected ports and the Council's SAS recreational representatives north of Cape Falcon, and if the transfer would not result in exceeding preseason impact expectations on any stocks.

c. Chinook and coho may be transferred between the recreational and commercial fisheries north of Cape Falcon if there is agreement among the representatives of the SAS, and if the transfer would not result in exceeding preseason impact expectations on any stocks.

d. Fishery managers may consider inseason action modifying regulations restricting retention of unmarked coho. To remain consistent with preseason expectations, any inseason action shall consider, if significant, the difference between observed and preseason forecasted mark rates. Such a consideration may also include a change in bag limit of two salmon, no more than one of which may be a coho.

e. Marked coho remaining from the July Cape Falcon to Oregon/California border recreational coho quota may be transferred inseason to the September Cape Falcon to Humbug Mountain non-mark-selective recreational fishery if the transfer would not result in exceeding preseason impact expectations on any stocks.

C.6. Additional Seasons in State Territorial Waters

Consistent with Council management objectives, the States of Washington, Oregon, and California may establish limited seasons in state waters. Check state regulations for details.

Section 3. Treaty Indian Management Measures for 2013 Ocean Salmon Fisheries

Parts A, B, and C of this section contain requirements that must be followed for lawful participation in the fishery.

A. Season Descriptions

May 1 through the earlier of June 30 or 26,250 Chinook quota. All salmon except coho. If the Chinook quota for the May through June fishery is not fully utilized, the excess fish may be transferred into the later all-salmon season (C.5.a). If the Chinook quota is exceeded, the excess will be deducted from the later all-salmon season (C.5). See size limit (B) and other restrictions (C).

July 1 through the earlier of September 15, or 26,250 preseason Chinook quota (C.5), or 47,500 coho quota. All salmon. See size limit (B) and other restrictions (C).

B. Minimum Size (Inches)

Area (when open)	Chinook		Coho		Pink
	Total	Head-off	Total	Head-off	
North of Cape Falcon	24.0	18.0	16.0	12.0	None

Metric equivalents: 24.0 in = 61.0 cm, 18.0 in = 45.7 cm, 16.0 in = 40.6 cm, and 12.0 in = 30.5 cm.

C. Special Requirements, Restrictions, and Exceptions

C.1. Tribe and Area Boundaries.

All boundaries may be changed to include such other areas as may hereafter be authorized by a Federal court for that tribe's treaty fishery.

S'KLALLAM—Washington State Statistical Area 4B (All).

MAKAH—Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″ W. long.

QUILEUTE—That portion of the FMA between 48°07′36″ N. lat. (Sand Pt.) and 47°31′42″ N. lat. (Queets River) and east of 125°44′00″ W. long.

HOH—That portion of the FMA between 47°54′18″ N. lat. (Quillayute River) and 47°21′00″ N. lat. (Quinault River) and east of 125°44′00″ W. long.

QUINAULT—That portion of the FMA between 47°40′06″ N. lat. (Destruction Island) and 46°53′18″ N. lat. (Point Chehalis) and east of 125°44′00″ W. long.

C.2. Gear Restrictions

a. Single point, single shank, barbless hooks are required in all fisheries.

b. No more than eight fixed lines per boat.

c. No more than four hand held lines per person in the Makah area fishery (Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″ W. long.).

C.3. Quotas

a. The quotas include troll catches by the S'Klallam and Makah tribes in Washington State Statistical Area 4B from May 1 through September 15.

b. The Quileute Tribe will continue a ceremonial and subsistence fishery during the time frame of September 15 through October 15 in the same manner as in 2004 through 2012. Fish taken during this fishery are to be counted against treaty troll quotas established for the 2013 season (estimated harvest during the October ceremonial and subsistence fishery: 100 Chinook; 200 coho).

C.4. Area Closures

a. The area within a six nautical mile radius of the mouths of the Queets River (47°31′42″ N. lat.) and the Hoh River (47°45′12″ N. lat.) will be closed to commercial fishing.

b. A closure within two nautical miles of the mouth of the Quinault River (47°21′00″ N. lat.) may be enacted by the Quinault Nation and/or the State of Washington and will not adversely affect the Secretary of Commerce's management regime.

C.5. Inseason Management

In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance applies:

a. Chinook remaining from the May through June treaty-Indian ocean troll harvest guideline north of Cape Falcon may be transferred to the July through September harvest guideline on a fishery impact equivalent basis.

Section 4. Halibut Retention

Under the authority of the Northern Pacific Halibut Act, NMFS promulgated regulations governing the Pacific halibut fishery, which appear at 50 CFR part 300, subpart E. On March 15, 2013, NMFS published a final rule (78 FR 16423) to implement the IPHC's recommendations, to announce fishery

regulations for U.S. waters off Alaska and fishery regulations for treaty commercial and ceremonial and subsistence fisheries, some regulations for non-treaty commercial fisheries for U.S. waters off the West Coast, and approval of and implementation of the Area 2A Pacific halibut Catch Sharing Plan and the Area 2A management measures for 2013. The regulations and management measures provide that vessels participating in the salmon troll fishery in Area 2A (all waters off the States of Washington, Oregon, and California), which have obtained the appropriate IPHC license, may retain halibut caught incidentally during authorized periods in conformance with provisions published with the annual salmon management measures. A salmon troller may participate in the halibut incidental catch fishery during the salmon troll season or in the directed commercial fishery targeting halibut, but not both.

The following measures have been approved by the IPHC, and implemented by NMFS. During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches (81.28 cm) in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on. License applications for incidental harvest must be obtained from the International Pacific Halibut Commission (IPHC) (phone: 206–634–1838). Applicants must apply prior to April 1, 2013 for 2013 permits and mid-March 2014 (exact date to be set by the IPHC in early 2014) for 2014 permits. Incidental harvest is authorized only during May and June of the 2013 troll seasons and April, May, and June of the 2014 troll seasons and after June 30 in 2013 or 2014 if quota remains and if announced on the NMFS hotline (phone: 800–662–9825). Washington Department of Fish and Wildlife (WDFW), ODFW, and CDFW will monitor landings. If the landings are projected to exceed the 30,600 pound preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to prohibit retention of halibut in the non-Indian salmon troll fishery.

Beginning May 1, 2013 through April 30, 2014, IPHC license holders may land or possess no more than one Pacific halibut per each three Chinook, except one Pacific halibut may be possessed or landed without meeting the ratio requirement, and no more than 15 halibut may be possessed or landed per trip. Pacific halibut retained must be no less than 32 inches in total length (with head on).

Incidental Pacific halibut catch regulations in the commercial salmon troll fishery adopted for 2013 will be in effect when incidental Pacific halibut retention opens on April 1, 2014 unless modified by inseason action.

NMFS and the Council request that salmon trollers voluntarily avoid a ''C-shaped'' YRCA (also known as the Salmon Troll YRCA) in order to protect yelloweye rockfish. Coordinates for the Salmon Troll YRCA are defined at 50 CFR 660.70(a) in the North Coast subarea (Washington marine area 3). See Section 1.C.7. in this document for the coordinates.

Section 5. Geographical Landmarks

Wherever the words ''nautical miles off shore'' are used in this document, the distance is measured from the baseline from which the territorial sea is measured.

Geographical landmarks referenced in this document are at the following locations:

Cape Flattery, WA	48°23′00″ N. lat.
Cape Alava, WA	48°10′00″ N. lat.
Queets River, WA	47°31′42″ N. lat.
Leadbetter Point, WA	46°38′10″ N. lat.
Cape Falcon, OR	45°46′00″ N. lat.
Florence South Jetty, OR	44°00′54″ N. lat.
Humbug Mountain, OR	42°40′30″ N. lat.
Oregon-California Border	42°00′00″ N. lat.
Humboldt South Jetty, CA.	40°45′53″ N. lat.
Horse Mountain, CA	40°05′00″ N. lat.
Point Arena, CA	38°57′30″ N. lat.
Point Reyes, CA	37°59′44″ N. lat.
Point San Pedro, CA	37°35′40″ N. lat.
Pigeon Point, CA	37°11′00″ N. lat.
Point Sur, CA	36°18′00″ N. lat.
Point Conception, CA	34°27′00″ N. lat.

Section 6. Inseason Notice Procedures

Actual notice of inseason management actions will be provided by a telephone hotline administered by the Northwest Region, NMFS, 206–526–6667 or 800–662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts. These broadcasts are announced on Channel 16 VHF–FM and 2182 KHz at frequent intervals. The announcements designate the channel or frequency over which the Notice to Mariners will be immediately broadcast. Inseason actions will also be filed with the **Federal Register** as soon as practicable. Since provisions of these management measures may be altered by inseason actions, fishermen should monitor either the telephone hotline or Coast Guard broadcasts for current information for the area in which they are fishing.

Classification

This final rule is necessary for conservation and management of Pacific coast salmon stocks and is consistent with the Magnuson-Stevens Act and other applicable law. These regulations are being promulgated under the authority of 16 U.S.C. 1855(d) and 16 U.S.C. 773(c).

This notification of annual management measures is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries finds good cause under 5 U.S.C. 553(b)(3)(B), to waive the requirement for prior notice and opportunity for public comment, as such procedures are impracticable and contrary to the public interest.

The annual salmon management cycle begins May 1 and continues through April 30 of the following year. May 1 was chosen because the pre-May harvests constitute a relatively small portion of the annual catch. The time-frame of the preseason process for determining the annual modifications to ocean salmon fishery management measures depends on when the pertinent biological data are available. Salmon stocks are managed to meet annual spawning escapement goals or specific exploitation rates. Achieving either of these objectives requires designing management measures that are appropriate for the ocean abundance predicted for that year. These pre-season abundance forecasts, which are derived from the previous year's observed spawning escapement, vary substantially from year to year, and are not available until January or February because spawning escapement continues through the fall.

The preseason planning and public review process associated with developing Council recommendations is initiated in February as soon as the forecast information becomes available. The public planning process requires coordination of management actions of four states, numerous Indian tribes, and the Federal Government, all of which have management authority over the stocks. This complex process includes the affected user groups, as well as the general public. The process is compressed into a 2-month period culminating with the April Council meeting at which the Council adopts a recommendation that is forwarded to NMFS for review, approval, and implementation of fishing regulations effective on May 1.

Providing opportunity for prior notice and public comments on the Council's recommended measures through a proposed and final rulemaking process

would require 30 to 60 days in addition to the two-month period required for development of the regulations. Delaying implementation of annual fishing regulations, which are based on the current stock abundance projections, for an additional 60 days would require that fishing regulations for May and June be set in the previous year, without the benefit of information regarding current stock status. For the 2013 fishing regulations, the current stock status was not available to the Council until February. Because a substantial amount of fishing occurs during May and June, managing the fishery with measures developed using the prior year's data could have significant adverse effects on the managed stocks, including ESA-listed stocks. Although salmon fisheries that open prior to May are managed under the prior year's measures, as modified by the Council at its March meeting, relatively little harvest occurs during that period (e.g., on average, less than 5 percent of commercial and recreational harvest occurred prior to May 1 during the years 2001 through 2010). Allowing the much more substantial harvest levels normally associated with the May and June salmon seasons to be promulgated under the prior year's regulations would impair NMFS' ability to protect weak and ESA-listed salmon stocks, and to provide harvest opportunity where appropriate. The choice of May 1 as the beginning of the regulatory season balances the need to gather and analyze the data needed to meet the management objectives of the Salmon FMP and the need to manage the fishery using the best available scientific information.

If these measures are not in place on May 1, the 2012 management measures will continue to apply in most areas. This would result in excessive impacts to some salmon stocks, most notably ESA-listed Sacramento River winter Chinook salmon.

Overall, the annual population dynamics of the various salmon stocks require managers to vary the season structure of the various West Coast area fisheries to both protect weaker stocks and give fishers access to stronger salmon stocks, particularly hatchery produced fish. Failure to implement these measures immediately could compromise the status of certain stocks, or result in foregone opportunity to harvest stocks whose abundance has increased relative to the previous year thereby undermining the purpose of this agency action.

In addition, public comment is received and considered by the Council and NMFS throughout the process of developing these management measures. As described above, the Council takes comment at its March and April meetings, and hears summaries of comments received at public meetings held between the March and April meetings in each of the coastal states. NMFS also invited comments in a notice published prior to the March Council meeting, and considered comments received by the Council through its representative on the Council. Thus, these measures were developed with significant public input.

Based upon the above-described need to have these measures effective on May 1 and the fact that there is limited time available to implement these new measures after the final Council meeting in April and before the commencement of the ocean salmon fishing year on May 1, NMFS has concluded it is impracticable, unnecessary, and contrary to the public interest to provide an opportunity for prior notice and public comment under 5 U.S.C. 553(b)(3)(B).

The Assistant Administrator for Fisheries also finds that good cause exists under 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness of this final rule. As previously discussed, data are not available until February and management measures are not finalized until mid-April. These measures are essential to conserve threatened and endangered ocean salmon stocks, and to provide for harvest of more abundant stocks. Delaying the effectiveness of these measures by 30 days could compromise the ability of some stocks to attain their conservation objectives, preclude harvest opportunity, and negatively impact anticipated international, state, and tribal salmon fisheries, thereby undermining the purposes of this agency action and the requirements of the Magnuson-Stevens Act.

To enhance the fishing industry's notification of these new measures, and to minimize the burden on the regulated community required to comply with the new regulations, NMFS is announcing the new measures over the telephone hotline used for inseason management actions and is posting the regulations on both of its West Coast regional Web sites (*www.nwr.noaa.gov* and *swr.nmfs.noaa.gov*). NMFS is also advising the States of Washington, Oregon, and California on the new management measures. These states announce the seasons for applicable state and Federal fisheries through their own public notification systems.

This action contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA), and which have been approved by the Office of Management and Budget (OMB) under control number 0648–0433. The public reporting burden for providing notifications if landing area restrictions cannot be met is estimated to average 15 minutes per response. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, 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 a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

NMFS has current ESA biological opinions that cover fishing under these regulations on all listed salmon species. NMFS reiterated their consultation standards for all ESA listed salmon and steelhead species in their annual Guidance letter to the Council dated February 28, 2013. Some of NMFS past biological opinions have found no jeopardy, and others have found jeopardy, but provided reasonable and prudent alternatives to avoid jeopardy. The management measures for 2013 are consistent with the biological opinions that found no jeopardy, and with the reasonable and prudent alternatives in the jeopardy biological opinions. The Council's recommended management measures therefore comply with NMFS' consultation standards and guidance for all listed salmon species which may be affected by Council fisheries. In many cases, the recommended measures are more restrictive than NMFS' ESA requirements.

In 2009, NMFS consulted on the effects of fishing under the Salmon FMP on the endangered Southern Resident Killer Whale Distinct Population Segment (SRKW) and concluded the salmon fisheries were not likely to jeopardize SRKW. The 2013 salmon management measures are consistent with the terms of that biological opinion.

This final rule was developed after meaningful consultation and collaboration with the affected tribes. The tribal representative on the Council made the motion for the regulations that apply to the tribal vessels.

Authority: 16 U.S.C. 773–773k; 1801 *et seq.*

Dated: April 29, 2013.

Alan D. Risenhoover,

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

[FR Doc. 2013–10462 Filed 4–30–13; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 121018563–3148–02]

RIN 0648–XC654

Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Atka mackerel in the Central Aleutian district (CAI) of the Bering Sea and Aleutian Island management area (BSAI) by vessels participating in the BSAI trawl limited access fishery. This action is necessary to prevent exceeding the A season allowance of the 2013 Atka mackerel total allowable catch (TAC) in the CAI allocated to vessels participating in the BSAI trawl limited access fishery.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), April 30, 2013, through 1200 hrs, A.l.t., June 10, 2013.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allowance of the 2013 Atka mackerel TAC, in the CAI, allocated to vessels participating in the BSAI trawl limited access fishery was established as a directed fishing allowance of 332 metric tons by the final 2013 and 2014 harvest specifications for groundfish in the BSAI (78 FR 13813, March 1, 2013).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS, finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the CAI by vessels participating in the BSAI trawl limited access fishery.

After the effective dates of this closure, the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Acting Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the directed fishing closure of the Atka mackerel fishery in the CAI for vessels participating in the BSAI trawl limited access fishery. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of April 29, 2013. The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: April 30, 2013.

James P. Burgess,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–10527 Filed 4–30–13; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 86
Friday, May 3, 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.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Document Number AMS–NOP–11–0003; NOP–10–13PR]

RIN 0581–AD13

National Organic Program (NOP); Sunset Review (2013)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would address recommendations submitted to the Secretary of Agriculture (Secretary) by the National Organic Standards Board (NOSB) following their November 2011 and May 2012 meetings. These recommendations pertain to the 2013 Sunset Review of substances on the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List). Consistent with the recommendations from the NOSB, this proposed rule would continue the allowed uses of multiple synthetic and nonsynthetic substances and the prohibition of one nonsynthetic substance on the National List (along with any restrictive annotations). This proposed rule would also remove one synthetic substance from the National List.

DATES: Comments must be received by June 3, 2013.

ADDRESSES: Interested persons may comment on the proposed rule using the following procedures:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Toni Strother, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave. SW., Room 2646-So., Ag Stop 0268, Washington, DC 20250–0268.

Instructions: All submissions received must include the docket number AMS–NOP–11–0003; NOP–10–13PR, and/or Regulatory Information Number (RIN) 0581–AD13 for this rulemaking. You should clearly indicate the topic and section number of this proposed rule to which your comment refers. You should clearly indicate whether you support the action being proposed for the substances in this proposed rule. You should clearly indicate the reason(s) for your position. You should also supply information on alternative management practices, where applicable, that support alternatives to the proposed action. You should also offer any recommended language change(s) that would be appropriate to your position. Please include relevant information and data to support your position (e.g. scientific, environmental, manufacturing, industry, impact information, etc.). Only relevant material supporting your position should be submitted. All comments received and any relevant background documents will be posted without change to *http://www.regulations.gov.*

Document: For access to the document and to read background documents or comments received, go to *http://www.regulations.gov.* Comments submitted in response to this proposed rule will also be available for viewing in person at USDA–AMS, National Organic Program, Room 2646-South Building, 1400 Independence Ave. SW., Washington, DC, from 9 a.m. to 12 noon and from 1 p.m. to 4 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South Building to view comments received in response to this proposed rule are requested to make an appointment in advance by calling (202) 720–3252.

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

SUPPLEMENTARY INFORMATION:

I. Background

The Organic Foods Production Act of 1990 (OFPA) (7 U.S.C. 6501–6522) authorizes the establishment of the National List. The National List, codified within the USDA organic regulations at 7 CFR 205.600 through 205.607, identifies synthetic substances that may be used in organic production and nonsynthetic (natural) substances that are prohibited in organic crop and livestock production. The National List also identifies nonagricultural nonsynthetic, nonagricultural synthetic and nonorganic agricultural substances that may be used in organic handling.

The exemptions and prohibitions granted on the National List are required to be reviewed every 5 years under OFPA by the National Organic Standards Board (NOSB). The Secretary of Agriculture has authority under OFPA to renew such exemptions and prohibitions. If they are not reviewed by the NOSB within 5 years of their inclusion on the National List and renewed by the Secretary, their authorized use or prohibition expires. The Secretary published an Advanced Notice of Proposed Rulemaking (ANPR) (76 FR 31495) in the **Federal Register** on June 1, 2011, to announce the review of 11 exempt substances and one prohibited nonsynthetic substance authorized under the USDA organic regulations. This ANPR established November 3, 2013, as the date by which the Sunset 2013 review and renewal process must be concluded. The ANPR explained that the exemptions and prohibitions not renewed by this date will be removed from the National List. This ANPR also requested public comment on the continued use or prohibition of these substances. The public comment period lasted 60 days. A list of these substances is provided as Table 1 in the Overview of Proposed Actions section. These substances were originally added to the National List on November 3, 2003 (68 FR 61987), and November 4, 2003 (68 FR 62215), and were previously renewed under the Sunset process on November 3, 2008 (73 FR 59479).

The Agricultural Marketing Service (AMS) received 25 comments on the substances in response to the ANPR. AMS received comments from producers, handlers, distributors, organic associations, a certifying agent, and various industry groups. Some of these comments addressed more than one substance. We received general comments stating that the listings should remain as they are currently codified. We received one general comment that did not address the substances under this Sunset review. Most comments indicated support for substances that the commenters' promoted, represented, or relied upon. Comments specifically supported a

continued allowance for the following substances: copper sulfate, ozone gas, peracetic acid, EPA List 3 Inerts,[1] agar-agar, animal enzymes, calcium sulfate, carrageenan, glucono delta-lactone, tartaric acid, and cellulose. Two comments specifically supported a continued prohibition on calcium chloride as annotated on the National List. One commenter requested that the annotations for two listings of copper sulfate, one at section 205.601(a)(3) and one at section 205.601(e)(4) for use in aquatic rice systems, be amended to remove the restriction based on the number of applications during a specified timeframe. The commenter requested that the restriction limiting application rates to those which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent be maintained, but the restriction on number of applications during any 24-month period be eliminated.

The NOSB reviewed the comments received from the ANPR and developed recommendations regarding the continued use and prohibition of the substances under review. The NOSB received additional public comments concerning the pending sunset of these substances in response to two **Federal Register** notices announcing meetings of the NOSB and its planned deliberations on Sunset 2013 recommendations. The notices were published in the **Federal Register** as follows: October 7, 2011 (76 FR 62336), and April 9, 2012 (77 FR 21067). The NOSB received further written and oral testimony at both of these public meetings which occurred in Savannah, GA on November 29–December 2, 2011, and Albuquerque, NM on May 22–25, 2012. The written comments can be retrieved via *http://www.regulations.gov* by searching for the document ID numbers: AMS–NOP–11–0081 (November 2011 meeting) and AMS–NOP–12–0017 (May 2012 meeting). The oral comments were recorded in the meeting transcripts which are available on the NOP Web site at *http://www.ams.usda.gov/nop.*

At its November 2011 and May 2012 meetings, the NOSB addressed multiple National List exemptions and a prohibition under the 2013 Sunset review. The NOSB recommended that the Secretary: (1) Renew multiple exemptions and one prohibition without change, (2) remove an exemption for one synthetic substance, tartaric acid, and (3) amend the exemptions for two synthetic substances, EPA List 3—Inerts of unknown toxicity and cellulose, and one nonsynthetic substance, carrageenan. In accordance with NOSB's published policies and procedures, it also issued a second round of recommendations to renew the existing listings for EPA List 3—Inerts of unknown toxicity, cellulose, and carrageenan without change.[2] These second recommendations authorize the Secretary to renew these three listings ''as is'' considering the expiration date of November 3, 2013.

Because the NOSB's sole justification for restricting the allowance of carrageenan was on the basis of food safety concerns, despite the fact that FDA regulations provide for its use as a safe food additive when used in accordance with 21 CFR 172.5, 21 CFR 172.620 and 21 CFR 172.626, AMS is renewing carrageenan as codified based on the NOSB's second recommendation. Based on concern over the impact of changing the annotation for cellulose, AMS is renewing the listing for cellulose as codified based on the NOSB's second recommendation. For EPA List 3—Inerts of unknown toxicity, AMS is concerned that including an expiration date as part of its annotation during the Sunset review would complicate the NOSB's established inerts review process. Therefore, AMS is renewing the listing for EPA List 3—Inerts of unknown toxicity as codified based on the NOSB's second recommendation. In summary, this rule proposes to renew multiple listings without change and remove one listing (tartaric acid—made from malic acid).

Under the authority of OFPA, the National List can be amended by the Secretary based on proposed amendments developed by the NOSB. Since established, AMS has published multiple amendments to the National List beginning on October 31, 2003 (68 FR 61987). AMS published the most recent amendment to the National List on September 27, 2012 (77 FR 59287).

II. Overview of Proposed Actions

At its November 2011 and May 2012 meetings, the NOSB reviewed the listings set to sunset on November 3, 2013, for multiple exemptions and one prohibition that are authorized on the National List. On December 2, 2011, the NOSB finalized its recommendations on the following substances: animal enzymes, calcium chloride, copper sulfate (two uses), glucono delta-lactone, ozone gas, peracetic acid (two uses), and tartaric acid (two sources). On May 25, 2012, the NOSB finalized its recommendations on agar-agar, calcium sulfate, carrageenan, cellulose, and EPA List 3—Inerts of unknown toxicity.

The NOSB's recommendations to continue existing exemptions and prohibitions are based on consideration of public comments and applicable supporting evidence that express a continued need for the use or prohibition of the substance(s) as required by OFPA.

Concerning OFPA criteria used to make recommendations regarding the discontinuation of an authorized exempted synthetic substance (7 U.S.C. 6517(c)(1)), the NOSB's decision is based on consideration of public comments and applicable supporting evidence that demonstrates the currently authorized exempted substance is: (a) Harmful to human health or the environment; (b) no longer necessary for organic production due to the availability of alternative wholly nonsynthetic substitute products or practices; and (c) inconsistent with organic farming and handling practices.

Based on the NOSB recommendations, AMS' proposed actions for the Sunset 2013 proposed rule are outlined in Table 1.

[1] EPA refers to the Environmental Protection Agency.

[2] In October 2010, the NOSB changed its Sunset policy to enable the NOSB to make recommendations to add or change annotations (restrictions) on applicable National List substances under Sunset review. This change in policy ensures that the NOSB can address new use patterns and scientific information on substances allowed in organic production. This policy limits such annotations to those which clarify the existing annotation or make the annotation more restrictive. The policy does not provide for an annotation change that would result in expanded use of an exempted material. This is described starting on p. 56 of the NOSB Policies and Procedures Manual available on the NOP Web site at: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3013893.*

TABLE 1—OVERVIEW OF PROPOSED ACTIONS FOR SUNSET 2013

National List Section	Substance listing	Proposed action
Synthetic substances allowed for use in organic crop production.		
205.601(a)(3)	Copper sulfate—for use as an algicide in aquatic rice systems, is limited to one application per field during any 24-month period. Application rates are limited to those which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent.	Renew.
205.601(a)(5)	Ozone gas—for use as an irrigation system cleaner only	Renew.
205.601(a)(6)	Peracetic acid—for use in disinfecting equipment, seed, and asexually propagated planting material.	Addressed through separate rulemaking action; see February 5, 2013 proposed rule (78 FR 8040).
205.601(e)(4)	Copper sulfate—for use as tadpole shrimp control in aquatic rice production, is limited to one application per field during any 24-month period Application rates are limited to levels which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent.	Renew.
205.601(i)(8)	Peracetic acid—for use to control fire blight bacteria	Addressed through separate rulemaking action; see February 5, 2013 proposed rule (78 FR 8040).
205.601(m)(2)	EPA List 3—Inerts of unknown toxicity—for use only in passive pheromone dispensers.	Renew.
Nonsynthetic substances prohibited for use in organic crop production		
205.602(c)	Calcium chloride, brine process is natural and prohibited for use except as a foliar spray to treat a physiological disorder associated with calcium uptake.	Renew.
Nonsynthetic, nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s)).''		
205.605(a)	Agar-agar	Renew.
205.605(a)	Animal enzymes—(Rennet—animals derived; Catalase—bovine liver; Animal lipase; Pancreatin; Pepsin; and Trypsin).	Renew.
205.605(a)	Calcium sulfate—mined	Renew.
205.605(a)	Carrageenan	Renew.
205.605(a)	Glucono delta-lactone—production by the oxidation of D-glucose with bromine water is prohibited.	Renew.
205.605(a)	Tartaric acid—made from grape wine	Renew.
Synthetic, nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s)).''		
205.605(b)	Cellulose—for use in regenerative casings, as an anti-caking agent (non-chlorine bleached) and filtering aid.	Renew. NOSB recommendation for annotation change under consideration for a separate rulemaking action.
205.605(b)	Tartaric acid—made from malic acid	Remove.

The following *Renewals* and *Nonrenewals* sections provide explanations for AMS' proposed actions.

Renewals

AMS has reviewed and accepts the NOSB recommendations for the continued exemption or prohibition of certain substances. Accordingly, this proposed rule would:

1. Renew the exemptions at section 205.601, along with any restrictive annotations, for the following synthetic substances allowed for use in organic crop production as shown in Table 1: copper sulfate (2 uses), ozone gas, and EPA List 3 Inerts;

2. Renew the prohibition at section 205.602, along with its restrictive annotation, for the following nonsynthetic substance prohibited for use in organic crop production as shown in Table 1: calcium chloride; and

3. Renew the exemptions at section 205.605, along with any restrictive annotations, for the following nonagricultural (nonorganic) substances allowed as ingredients in or on processed products labeled as ''organic'' or ''made with organic (specified ingredients or food group(s))'' as shown in Table 1: agar-agar, animal enzymes, carrageenan, cellulose, calcium sulfate, glucono delta-lactone, and tartaric acid made from grape wine.

AMS is accepting NOSB's second recommendations rather than the NOSB's first recommendations to add or amend restrictive annotations for the following substances under Sunset review: EPA List 3 Inerts, carrageenan, and cellulose. The specific circumstances for implementing the NOSB's second recommendations for these substances are outlined below.

EPA List 3—Inerts of Unknown Toxicity

An inert ingredient is defined in section 205.2 the USDA organic

regulations as ''any substance (or group of substances with similar chemical structures if designated by the Environmental Protection Agency) other than an active ingredient which is intentionally included in any pesticide product (40 CFR 152.3(m)).'' There are currently two categories of inert ingredients allowed on the National List with restrictive annotations: EPA List 3—Inerts of unknown toxicity (section 205.601(m)), and EPA List 4—Inerts of minimal concern (sections 205.601(m) and 205.603(e)).

In 2006, EPA reassessed all inert ingredients used in pesticide formulations allowed on food crops. This reassessment resulted in a new classification system which made the EPA List system obsolete. This means that the National List references to EPA List 3 and EPA List 4 inerts are now out-of-date when compared with current EPA regulations.[3] In June 2010, NOP convened an NOSB–NOP–EPA inerts working group (IWG) for the purpose of addressing these obsolete references to EPA inert lists.

At the NOSB May 2012 meeting, the NOSB recommended several changes to the allowance for inerts as part of its Sunset review for EPA List 3 Inerts.[4] The changes included: (1) Modification to the introductory text at section 205.601(m); (2) amending the listing and annotation for EPA List 3 Inerts to read as follows: ''Inert ingredients exempt from the requirement of a tolerance under 40 CFR 180.1122 that were formerly on EPA List 3 in passive polymeric dispenser products may be used until October 21, 2017;'' and (3) amending section 205.2 to add a definition for ''passive polymeric dispenser products'' that is intended to be removed in coordination with the proposed expiration date of October 21, 2017, at section 205.601(m). Concurrent with Sunset Review policy, the NOSB also issued a second recommendation to renew the existing listing for EPA List 3 Inerts.

On October 16, 2012, the NOSB passed a recommendation which outlined the procedure by which the NOSB would review both EPA List 3 and EPA List 4 inerts over a four-year timespan, with the goal of completing the majority of the reviews by October 2017, the sunset date for EPA List 4 inerts. As of October 2012, the IWG had compiled a list of 16 classes or groups comprising 126 individual substances for review. In its recommendation, the NOSB acknowledged that, ''Given the scope of [technical evaluation reports] and NOSB evaluation of these materials, it is recognized that the completion of this process will take substantial resources and time . . . Because of the challenge that this represents, the NOSB will assess the viability of the timeline after it completes the recommendation on the first few groups of materials.'' AMS recognizes the recommendation's intent to address the complex challenges presented by the out-of-date listings in a timely manner. However, a rulemaking action to add an expiration date at this time may be problematic in the event that the timeline for inerts review takes longer than the projected four years; therefore, we are not proposing the addition of an expiration date to the exemption for EPA List 3 Inerts. This rule proposes to implement the NOSB's second recommendation to renew the exemption for EPA List 3—Inerts of unknown toxicity at section 205.601 as codified, along with its current restrictive annotation. This approach would meet the timeframe required by the sunset provision of OFPA and the listing for EPA List 3 Inerts would subsequently have a sunset date of November 3, 2018. Furthermore, the IWG's continuing review of inerts may result in additional outcomes beyond the NOSB's other recommendations to modify the introductory text for section 205.601(m) and add a definition in section 205.2 for passive polymeric dispenser products. This may in turn influence AMS' future considerations for a rulemaking on EPA List 3 Inerts.

Carrageenan

Carrageenan is currently permitted as a nonagricultural, nonsynthetic ingredient in organic handling in section 205.605(a) of the National List. Under U.S. Food and Drug Administration (FDA) regulations, carrageenan and its salts can be used as a food additive under the conditions specified at 21 CFR 172.5 (General Provisions for Direct Food Additives), and at 21 CFR 172.620 and 21 CFR 172.626 (Specific Provisions for Carrageenan and Its Salts). In addition, *Chondrus* extract (carrageenin)[5] is listed as Generally Recognized as Safe at 21 CFR 182.7255 when used in accordance with good manufacturing practice. Under FDA's prescribed conditions, carrageenan can be safely used in the amount necessary as an emulsifier, stabilizer, or thickener in foods, except those standardized foods that do not provide for such use.

Consistent with a 1995 NOSB recommendation, AMS first included carrageenan on the National List as an allowed nonsynthetic in organic processed products on November 3, 2003 (68 FR 61987).[6] The NOSB reviewed carrageenan again as part of the 2008 Sunset Review and recommended that its allowance in organic handling be renewed without any restrictive annotation. Based on the NOSB recommendation, AMS renewed the allowance for carrageenan through a final rule effective on November 3, 2008 (73 FR 59479). In the November 3, 2008 final rule, AMS described the comments received on substances under the 2008 Sunset Review, citing that we received five comments specifically in support for renewing carrageenan on the National List. At that time, AMS did not receive any comments that opposed its continued use in organic processed products.

On June 1, 2011, AMS published an ANPR to inform stakeholders that the NOSB would be reviewing carrageenan as part of its 2013 Sunset Review. AMS received 15 comments specifically supporting a continued allowance for carrageenan. Many comments cited carrageenan's function as a unique stabilizer in a range of organic foods, particularly in dairy products, as the basis for their support. Three of these comments stated that carrageenan has been used safely as an ingredient in foods for many years. Two comments specifically referenced FDA as the regulatory agency that authorizes the use of carrageenan as a safe food additive under the conditions specified in FDA regulations. At that time, AMS did not receive any comments that opposed its continued use in organic processed products.

In preparation for its Sunset 2013 review, the NOSB Handling Subcommittee reviewed the comments submitted in response to the ANPR and obtained a new technical evaluation report for carrageenan.[7] On February 21, 2012, the NOSB Handling

[3] On September 30, 2010, NOP issued NOP 5008: Reassessed Inert Ingredients, a guidance document describing the applicability of NOP's regulatory references to List 3 and 4 inerts (EPA is no longer using these lists in their classification system) used in pesticide products. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5086874.*

[4] NOSB Recommendation on List 3 Inert Ingredients. May 2012. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5098912.*

[5] This is the spelling provided at this regulatory reference.

[6] This final rule added ''carageenan'' to the National List rather than the correct spelling ''carrageenan''. The spelling for this substance was corrected as a technical correction in the final rule for the 2008 Sunset Review (73 FR 59480).

[7] Technical Evaluation Report on Carrageenan. October 3, 2011. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5096567.*

Subcommittee finalized its 2013 Sunset Review proposal for carrageenan; this proposal was published for public comment on April 9, 2012 in conjunction with the NOSB May 2012 public meeting notice (77 FR 21067). In its proposal, the NOSB Handling Subcommittee proposal stated that the technical evaluation report confirmed the food uses of carrageenan have not changed substantially since the original Technical Advisory Panel (TAP) review was conducted in 1995. The proposal explained that carrageenan continues to be an important material used by the organic community. The NOSB Handling Subcommittee proposal also stated that carrageenan may be safely used as a food additive for human consumption as long as its use is in accordance with FDA requirements at 21 CFR 172.620. The NOSB Handling Subcommittee further stated that, based on information in the 2011 technical evaluation report, it believed that different manufacturing methods of carrageenan could change the classification of the substance from nonsynthetic to synthetic.[8]

As a result of this information, the NOSB Handling Subcommittee proposed to continue the allowance for carrageenan in all organic processed products by removing carrageenan as an allowed nonsynthetic from section 205.605(a) and instead listing carrageenan as an allowed synthetic without restriction under section 205.605(b) of the National List. The NOSB Handling Subcommittee proposed this classification change to address the different manufacturing processes described by the 2011 technical evaluation report.

After publication of this NOSB Handling Subcommittee proposal, some public comments raised concerns regarding potential adverse health effects caused by the use of carrageenan, particularly degraded carrageenan, a low-molecular weight polysaccharide, in food. Other comments cited evidence in support of the safety of food-grade carrageenan in food, and stated that degraded carrageenan is not used in food products. Numerous other stakeholders stated that organic handlers producing a wide range of products that rely on carrageenan do not have functional alternatives to the substance. The comments in response to the NOSB Handling Subcommittee proposal can be retrieved at *www.regulations.gov* (search for docket number AMS–NOP–12–0017).

At its May 2012 public meeting, the NOSB Handling Subcommittee chose to present a revised proposal. The NOSB Handling Subcommittee recommended to relist carrageenan as a nonsynthetic, rather than change its classification to synthetic, and to include new language in its listing that would specify the food grade forms of carrageenan using Chemical Abstract Service (CAS) numbers. The CAS numbers are intended to align with the forms that have been approved by FDA for use as food ingredients. The proposal also included an annotation that, if codified through rulemaking, would prohibit the use of any form of carrageenan in infant formula. The revised proposal from the NOSB Handling Subcommittee further stated that carrageenan would still be allowed in foods for older infants (older than six months) and ''weaning foods'' for ''young children''. The NOSB passed this proposal as its first recommendation with a vote of 10 ''yes'' and 5 ''no.'' Aligned with the NOSB's Sunset Review policy, the NOSB also issued a second recommendation with a vote of 11 ''yes'' and 4 ''no'' to renew the existing listing for carrageenan which does not have any restrictive annotation.[9]

In its first recommendation, the NOSB stated that the restrictive annotation to prohibit the use of carrageenan in infant formula was based on concerns, specifically related to newborns, raised by a March 2003 opinion of the EU Scientific Committee on Food (SCF). The SCF provided scientific advice to the EU Commission.[10] The NOSB stated that the SCF's concern was based on facts from the Pediatric Nutrition Handbook, a publication of American Association of Pediatrics (AAP), in that newborn infants have immature digestive systems that may absorb macromolecules.

In considering the May 2012 NOSB recommendation, AMS reviewed the March 2003 opinion of the EU SCF as NOSB's justification for restricting the use of carrageenan. The EU SCF opinion cited in the May 2012 NOSB recommendation concluded that ''there is no evidence of any adverse effects in humans from exposure to food-grade carrageenan, or that exposure to degraded carrageenan from use of food-grade carrageenan is occurring'' (p. 5).[11] The EU SCF opinion cited in the May 2012 NOSB recommendation further states that, given the absence of information on potential absorption of carrageenan in the digestive system of young infants, carrageenan in infant formula is ''inadvisable'' (p. 6). The EU SCF opinion, however, does not reference the AAP's Pediatric Nutrition Handbook, and the Handbook does not reference any concerns with carrageenan. Therefore, it is unclear how the Handbook is linked to the EU SCF opinion or supportive of the NOSB's proposed prohibition on the use of carrageenan in infant formula.

In the U.S., carrageenan is allowed under FDA regulations at 21 CFR 172.620 as a direct food additive and is considered safe when used in the amount necessary as an emulsifier, stabilizer, or thickener in foods, except those standardized foods that do not provide for such use. The FDA, as the U.S. food safety authority, has not prohibited the use of carrageenan in infant formula. If used in infant formula, FDA reviews carrageenan in a given formulation as part of the infant formula notification process required by section 412 of the Federal Food, Drug, and Cosmetic Act (FFDCA) (21 U.S.C. 350(a)).

The NOSB's recommendation to prohibit the use of carrageenan in infant formula was based solely on food safety concerns despite carrageenan's status as a safe food additive when used as specified by FDA regulations and despite FDA's review of carrageenan in infant formula formulations under the FFDCA. Therefore, AMS is not implementing this recommendation. This proposed rule would implement the NOSB's second recommendation by renewing the exemption for carrageenan as currently listed as a nonsynthetic substance at section 205.605(a).

Cellulose

Cellulose is currently included on the National List in section 205.605(a) as an allowed nonagricultural, synthetic substance for use in organic handling. As part of the 2013 Sunset review, the NOSB Handling Subcommittee reviewed the original NOSB recommendation, the 2001 Technical Advisory Panel (TAP) review, historical documents, the 2007 Sunset recommendation, and public comments on cellulose.[12] The NOSB Handling

[8] NOSB Handling Subcommittee Proposal on Carrageenan. February 21, 2012. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5097825&acct=nosb.*

[9] NOSB Recommendation on Carrageenan. May 25, 2012. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5098921.*

[10] After 2003, the SCF was transferred to the European Food Safety Authority. *http://ec.europa.eu/food/committees/scientific/index_en.htm.*

[11] Opinion of the Scientific Committee on Food on Carrageenan (2003). *http://ec.europa.eu/food/fs/sc/scf/out164_en.pdf.*

[12] Technical Advisory Panel Report on Cellulose. September 28, 2001. Available at the NOP Web site:

Continued

Subcommittee issued a proposal to renew the listing for cellulose at section 205.605(b) that was considered by the NOSB at its May 2012 meeting.[13] At this meeting, the NOSB received public comment in support of relisting. One commenter requested that the NOSB ensure the microcrystalline form of cellulose is not allowed, and another commenter requested a new technical review and opposed the listing of the microcrystalline form of cellulose.[14] The NOSB responded that the 2001 TAP review examined three forms of cellulose that were considered for various uses: Powdered cellulose, regenerated cellulose casing, and microcrystalline cellulose, and the intent of the current annotation was to allow powdered cellulose and the form used in regenerative casings. At its meeting, the NOSB acknowledged that both powdered and microcrystalline cellulose can be used to serve the same functions, namely as a filtering aid or an anti-caking agent. The NOSB then recommended changing the annotation to explicitly state which forms are allowed, thereby prohibiting the use of the microcrystalline form.[15] Concurrent with Sunset Review policy, the NOSB also issued a second recommendation to renew the existing listing for cellulose.

Evidence gathered at the meeting suggested that the organic industry is not using the microcrystalline form of cellulose. However, AMS needs more information from the industry to confirm that the microcrystalline form of cellulose is not currently in use in organic processed products. Therefore, through this proposed rule, AMS is proposing to address the NOSB's second recommendation to renew the exemption for cellulose as currently listed at section 205.605(b) and is seeking public comments on the NOSB's first recommendation to restrict its use in organic processed products. This approach would meet the timeframe required by the Sunset provision of OFPA and, based on the public comment, enable AMS to consider a restriction on its use for a future rulemaking.

Nonrenewals

Tartaric Acid

As indicated in Table 1, there are two sources of tartaric acid currently on the National List: Nonsynthetic tartaric acid made from grape wine on section 205.605(a), and synthetic tartaric acid made from malic acid on section 205.605(b). As part of its Sunset 2013 review, the NOSB requested and obtained a new technical evaluation report for tartaric acid.[16] The NOSB Handling Subcommittee also received a petition to remove the synthetic source of tartaric acid.[17] The petition argued that: (1) The annotation for synthetic tartaric acid is incorrect; (2) the two listings of tartaric acid are the same form and serve the same function; and (3) tartaric acid made from grape wine is widely commercially available. The technical evaluation report findings confirmed the petitioner's three arguments: (1) Synthetic tartaric acid is typically manufactured from maleic anhydride, not malic acid as written in the current annotation; (2) both the nonsynthetic and synthetic listings are the same form of tartaric acid, which is generally referred to as the 'dextro form'; and (3) tartaric acid from grape wine is commercially available from a large number of distributors throughout the world. Based on review of the technical report and public comment, the NOSB agreed there is insufficient evidence to support the continued need for the synthetic form of tartaric acid and recommended its removal from the National List at section 205.605(b). This rule proposes removal of this substance as part of this Sunset 2013 rulemaking.

Peracetic Acid

On August 12, 2008, a petition was submitted to NOP requesting that the annotation for peracetic acid be amended on the National List.[18] The petition was submitted to ensure that hydrogen peroxide products can also list peracetic acid as an active ingredient on the product label. This would be consistent with EPA labeling requirements. The NOSB reviewed the petition in 2009 and issued a recommendation for an annotation change for the two peracetic acid listings at section 205.601.[19] To date, AMS has not implemented these recommendations for peracetic acid.

During its Sunset 2013 deliberations, the NOSB received public comments in support of the continued need for peracetic acid. As a result, the NOSB recommended renewing the two listings for peracetic acid in organic crop production at section 205.601 of the National List. Given that OFPA recognizes the authority of the Administrator of the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. 136–136(y)), AMS addressed the two listings for peracetic acid in a proposed rule (78 FR 8040) published on February 5, 2013 to implement the 2009 NOSB recommendation and ensure the listings for peracetic acid on the National List allow for conformance to EPA labeling requirements. AMS intends to conclude that rulemaking prior to the November 3, 2013 sunset date. As a result, the renewals for peracetic acid are not addressed in this proposed rule for Sunset 2013.

III. Related Documents

An advanced notice of proposed rulemaking with request for comments was published in **Federal Register** on June 1, 2011 (76 FR 31495) to notify the public that the listings discussed in this proposed rule would expire on November 3, 2013 if not reviewed by the NOSB and renewed by the Secretary.

IV. Statutory and Regulatory Authority

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

http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5066975&acct=nopgeninfo.

[13] NOSB Handling Subcommittee Proposal on Cellulose. March 20, 2012. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5097827&acct=nosb.*

[14] Transcript from the May 22–25, 2012 NOSB meeting is available under the NOSB section of the NOP Web site at: *http://www.ams.usda.gov/nop.*

[15] NOSB Recommendation on Cellulose. May 25, 2012. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5098923.*

[16] Technical Evaluation Report on Tartaric Acid. October 13, 2011. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5094932.*

[17] The petition was submitted by Brenn-O-Kem and is available at the NOP Web site: *http://www.ams.usda.gov/NOPPetitionedSubstances Database.*

[18] The petition was submitted by BioSafe Systems LLC, and is available from the NOP Web site in the Petitioned Substances Database: *http:www.ams.usda.gov/NOPPetitionedSubstances Database.*

[19] NOSB Recommendation on Peracetic Acid. November 2009. Available at the NOP Web site: *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5092050&acct=nosb.*

A. Executive Order 12866

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

B. Executive Order 12988

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

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

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

Pursuant to section 2120(f) of OFPA (7 U.S.C. 6519(f)), this proposed rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601–624), the Poultry Products Inspection Act (21 U.S.C. 451–471), or the Egg Products Inspection Act (21 U.S.C. 1031–1056), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301–399), nor the authority of the Administrator of EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136–136(y)).

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

C. Regulatory Flexibility Act

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

Pursuant to the requirements set forth in the RFA, AMS performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000 (65 FR 80548). AMS has also considered the economic impact of this action on small entities. The impact on entities affected by this proposed rule would not be significant. The effect of this proposed rule would be to allow the continued use of additional substances in agricultural production and handling. AMS concludes that the economic impact of continuing the allowance for Sunset 2013 substances would avoid market disruption and would be beneficial to small agricultural service firms. The effect of the removal of one substance, tartaric acid, would be minimal to small agricultural firms since another form of tartaric acid from grape wine is commercially available and is proposed to be renewed under this rule. Accordingly, AMS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

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

According to USDA, National Agricultural Statistics Service (NASS), certified organic acreage exceeded 3.5 million acres in 2011.[20] According to NOP's Accreditation and International Activities Division, the number of certified U.S. organic crop and livestock operations totaled over 17,750 in 2012. AMS believes that most of these entities would be considered small entities under the criteria established by the SBA. U.S. sales of organic food and non-food have grown from $1 billion in 1990 to $31.4 billion in 2011. Sales in 2011 represented 9.5 percent growth over 2010 sales.[21] In addition, the USDA has 85 accredited certifying agents who provide certification services to producers and handlers. A complete list of names and addresses of accredited certifying agents may be found on the AMS NOP Web site, at *http://www.ams.usda.gov/nop.* AMS believes that most of these accredited certifying agents would be considered small entities under the criteria established by the SBA. Certifying agents reported approximately 25,000 certified operations worldwide in 2012.

D. Paperwork Reduction Act

No additional collection or recordkeeping requirements are imposed on the public by this proposed rule. Accordingly, OMB clearance is not required by section 350(h) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, Chapter 35, or OMB's implementing regulations at 5 CFR part 1320.

E. Executive Order 13175

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

F. General Notice of Public Rulemaking

This proposed rule reflects recommendations submitted to the Secretary by the NOSB for substances on the National List of Allowed and Prohibited Substances that, under the Sunset review provisions of OFPA, would otherwise expire on November 3, 2013. A 30-day period for interested

[20] U.S. Department of Agriculture, National Agricultural Statistics Service. October 2012. 2011 Certified Organic Productions Survey. *http://usda01.library.cornell.edu/usda/current/OrganicProduction/OrganicProduction-10-04-2012.pdf.*

[21] Organic Trade Association. 2012. Organic Industry Survey. *www.ota.com.*

persons to comment on this rule is provided. Thirty days is deemed appropriate because the review of these listings was widely publicized through an ANPR and two NOSB meeting notices; the use or prohibition of these substances, as applicable, are critical to organic production and handling; and this rulemaking must be completed before the sunset date of November 3, 2013.

List of Subjects in 7 CFR Part 205

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

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

PART 205—NATIONAL ORGANIC PROGRAM

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

Authority: 7 U.S.C. 6501–6522.

§ 205.605 [Amended]

■ 2. Section 205.605 is amended by removing ''Tartaric acid—made from malic acid'' from paragraph (b).

Dated: April 30, 2013.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2013–10556 Filed 5–2–13; 8:45 am]

BILLING CODE 3410–02–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN 3150–AI30

[NRC–2009–0044]

Revisions to the Petition for Rulemaking Process

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to streamline its process for addressing petitions for rulemaking (PRMs). The proposed amendments are intended to improve transparency and make the PRM process more efficient and effective.

DATES: Submit comments by July 17, 2013. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2009–0044. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov*. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

FOR FURTHER INFORMATION CONTACT: Christina England, Office of Nuclear Reactor Regulation, telephone: 301–415–3138, email: *Christina.England@nrc.gov*, or Cindy Bladey, Office of Administration, telephone: 301–492–3667, email: *Cindy.Bladey@nrc.gov*; U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments
II. Background
III. Discussion
IV. Availability of Documents
V. Section-by-Section Analysis
VI. Plain Writing
VII. Voluntary Consensus Standards
VIII. Environmental Impact: Categorical Exclusion
IX. Paperwork Reduction Act Statement
X. Regulatory Analysis
XI. Regulatory Flexibility Certification
XII. Backfitting and Issue Finality

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2009–0044 when contacting the NRC about the availability of information for this proposed rule. You may access information related to this proposed rule, which the NRC possesses and is publicly available, by any of the following methods:

- Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for Docket ID NRC–2009–0044.
- *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.* In addition, for the convenience of the reader, the ADAMS accession numbers are provided in a table in the section of this document 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.

B. Submitting Comments

Please include Docket ID NRC–2009–0044 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

The NRC's requirements, policies, and practices governing the PRM process have remained substantially unchanged since their initial issuance in 1979 (44 FR 61322; October 25, 1979). During the past 20 years, the NRC has received an average of nine PRMs per year and plans its budget and assigns resources based

on this average. Recently, however, some years have experienced a dramatic increase in the number of PRMs submitted for consideration, docketing 25 PRMs in Fiscal Year (FY) 2011 alone. Those increases in PRMs have presented a significant resource challenge to the NRC.

In a memorandum to the other Commissioners entitled ''Streamlining the NRR [Office of Nuclear Reactor Regulation] Rulemaking Process'' (COMNJD–06–0004/COMEXM–06–0006) and dated April 7, 2006 (ADAMS Accession No. ML060970295), Chairman Nils J. Diaz and Commissioner Edward McGaffigan, Jr., proposed that, because of the general increase in rulemaking activities, the NRC staff should streamline its rulemaking process by removing unnecessary constraints, while simultaneously enhancing transparency of and public participation in the process. The memorandum also invited the development of additional mechanisms for ''streamlining and increasing the transparency of the rulemaking process, thus allocating the appropriate level of resources for the most important rulemaking actions and ensuring that the staff's hands are not tied by perceived or real procedural prerequisites that are necessary for a given rulemaking.''

In a staff requirements memorandum (SRM) dated May 31, 2006 (ADAMS Accession No. ML061510316), responding to COMNJD–06–0004/COMEXM–06–0006, the Commission directed the NRC staff to undertake numerous measures to streamline the rulemaking process, including a direction to evaluate the overall effectiveness of the recently completed interoffice Rulemaking Process Improvement Implementation Plan (ADAMS Accession No. ML031360205) and to ''further seek to identify any other potential options that could streamline the rulemaking process.'' The Commission also instructed the NRC staff to identify other potential options that could streamline the rulemaking process for all program offices.

In response to the Commission's directives, the NRC staff provided its recommendations to the Commission in SECY–07–0134, ''Evaluation of the Overall Effectiveness of the Rulemaking Process Improvement Implementation Plan,'' dated August 10, 2007 (ADAMS Accession No. ML071780644). A recommendation to review the NRC's PRM process with the objective to reduce the time needed to complete an action was included in SECY–07–0134. The NRC staff also recommended that the NRC review the procedures used by other Federal agencies to process PRMs in order to identify best practices that could make the NRC's PRM process more timely and responsive, while also ensuring that PRMs are handled in an open and transparent manner and in compliance with the Administrative Procedure Act (APA), Title 5 of the *United States Code* (U.S.C.), Section 551 *et seq.* In an SRM responding to SECY–07–0134, dated October 25, 2007 (ADAMS Accession No. ML072980427), the Commission indicated support for the NRC staff's recommendation to review the PRM process: ''The Petition for Rulemaking process needs some increased attention and improvement. The staff's overall effort to improve the petition for rulemaking process should focus on provisions that would make the NRC's process more efficient while improving the process' transparency and consistency.''

Concurrently, in an SRM responding to COMGBJ–07–0002, ''Closing Out Task Re: Rulemaking on [part 51 of Title 10 of the *Code of Federal Regulations* (10 CFR)] Tables S–3 and S–4,'' dated August 6, 2007 (ADAMS Accession No. ML072180094), the Commission directed the NRC staff to ''consider developing a process for dispositioning a petition in a more effective and efficient manner so that existing petitions that are deemed old can be closed out in a more timely manner and prevent future petitions from remaining open for periods longer than necessary.''

To implement the Commission's directions, the NRC staff examined the regulations, policies, procedures, and practices that govern the NRC's PRM process, as well as the practices and processes used by several other Federal agencies to resolve PRMs. This proposed rule reflects the NRC's goal to make its PRM process more efficient and effective, while enhancing transparency and maintaining the opportunity for public participation.

III. Discussion

The administrative procedures that a Federal agency must follow in issuing a rule are codified in the APA, 5 U.S.C. 553. Paragraph 553(e) provides that ''[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.'' In addition, 5 U.S.C. 555(e) provides that ''[p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding'' and that ''[e]xcept in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.'' However, the APA does not provide further detail on how agencies should disposition a PRM or what constitutes ''prompt'' notice.

The NRC's requirements for rulemaking are set forth in 10 CFR part 2, ''Agency Rules of Practice and Procedure,'' subpart H, ''Rulemaking.'' In particular, 10 CFR 2.802, ''Petition for rulemaking,'' and 2.803, ''Determination of petition,'' establish the NRC framework for disposition of a petition for rulemaking concerning NRC regulations. The NRC's requirements for PRMs have remained substantially unchanged since their initial issuance in 1979, and the NRC's processes and procedures for PRMs historically have been established by and implemented through internal NRC policies and practices. To improve the PRM process, the NRC has reviewed both its regulatory framework associated with the PRM process and its internal policies, procedures, and practices.

A. NRC's Current PRM Process

Much of the NRC's PRM process historically has been established by and implemented through internal policies and practices. The proposed rule would codify NRC requirements currently included in its internal policies and practices regarding PRMs to increase transparency, and provide greater clarity to the public.

In the current process, upon receipt of a PRM, the NRC acknowledges receipt to the petitioner and publishes a notice of receipt in the **Federal Register** to inform the public that the NRC has received the PRM. The NRC also notifies the petitioner in writing of the agency's action when it publishes a final rule or denial notice related to the PRM. The proposed rule would codify these actions. If the NRC determines that the petition has merit and should be considered in a rulemaking, the NRC's rulemaking process (including regulatory basis development, as described in the following paragraphs) may delay final disposition of a PRM by several years.

After docketing a PRM, the NRC evaluates the PRM and determines the course of action it will take with regard to the petitioner's requests. The NRC may deny the PRM, in whole or in part, and inform the petitioner of its reasons for the denial. In the alternative, the NRC may decide that the PRM has merit by considering it, in whole or in part, in a new, planned, or ongoing rulemaking. Though the NRC has made this determination, final disposition of the PRM does not occur until the NRC has completed all regulatory action on the

PRM by formally denying the PRM requests or by publishing a final rule that addresses the requested changes. For PRM issues considered in a new, planned, or ongoing rulemaking action, final disposition of the PRM issues does not occur until the final rule is published. If the new, planned, or ongoing rulemaking action is subsequently determined to be unnecessary and abandoned, final disposition does not occur until the NRC formally denies the PRM issues that were to be included in the abandoned rulemaking action.

Generally, the NRC strives to complete rulemakings within 2 years of initiation. However, initiation of a new rule does not occur until the regulatory basis for the rulemaking is complete. Developing the regulatory basis for a rulemaking requires consideration of all applicable technical, policy, and legal issues, as well as the costs and benefits, related to the potential rulemaking. This process may take several years. Because of resource constraints, completing a regulatory basis for rulemakings categorized as lower priority may take even longer. As such, 3 or more years may pass between the NRC's determination of which course of action to follow on a PRM and the agency's final disposition of the PRM by publishing the final rule addressing the PRM issues in the **Federal Register**.

Under current regulations, PRMs are considered ''open'' until the final rule is published, despite the NRC's decision to address the petitioner's issues in a rulemaking action and its progress toward final disposition of the PRM. Because of this ''open'' status, the petitioner, other stakeholders, and the public are likely to be unaware of the NRC's progress or determination of the PRM's merits. As part of its internal practice, the NRC strives to notify the petitioner and the public once it has made a determination on whether to consider the PRM issues in the rulemaking process. This proposed rule would codify and explain the process for administratively closing a PRM docket and notifying the public of the NRC's determination on the merits. This process would result in greater transparency of the NRC's course of action toward final disposition of a PRM.

B. Need for Improvements in the PRM Process

The NRC has limited resources available for processing PRMs, and the increases in PRMs have presented significant resource challenges to the NRC. For example, the NRC historically publishes for public review and comment the majority of PRMs that it receives. However, the PRMs published for public comment include some PRMs that do not provide sufficient information for NRC staff or public stakeholder evaluation. Additionally, some PRMs are published for public comment that do not warrant further consideration (i.e., when the NRC's regulations already provide what the PRM is requesting or when the scope of the PRM is outside the regulatory authority of the NRC). An earlier review identifying insufficient and infeasible PRMs would reduce the number of PRMs that are docketed and require full review by the NRC. Additionally, an initial sufficiency and feasibility screening review would promote more efficient use of rulemaking resources by focusing efforts on the remaining PRMs that contain sufficient information for a detailed review.

C. Proposed Changes to the PRM Process

The proposed rule would: (1) Clarify and codify NRC's current policies and practices on the NRC's actions upon receipt of a PRM and at other stages of the PRM process; (2) clarify and improve the current policies and practices for evaluating PRMs, and communicating to the petitioner and the public information on the status of PRMs and rulemaking activities addressing PRMs; and (3) improve the process for resolving PRMs, including establishing an administrative process for closing the PRM docket to reflect agency action for the PRM. The proposed amendments are intended to enhance the consistency, timeliness, and transparency of the NRC's actions and to increase the efficient use of the NRC's resources in the PRM process.

The NRC is proposing the following changes to its regulations for the PRM process:

1. Section 2.802(a) would be amended to reflect updates in the NRC's internal system for receiving electronic submissions of PRMs. Petitioners submitting PRMs through email would be instructed to send the PRM to *Rulemaking.Comments@nrc.gov.*

2. Section 2.802(b), which contains the requirements concerning consultation assistance that the NRC staff may provide to the petitioner, would be expanded beyond the pre-filing stage, allowing petitioners to consult directly with the NRC staff before and after filing a PRM with the NRC. The proposed language in paragraphs (b)(1)–(3) would clarify what consultation assistance is permitted.

3. The information that a petitioner must include in a PRM pursuant to § 2.802(c) would be clarified and expanded. With these revisions, the NRC intends to reduce the number of insufficient PRMs submitted at the onset of the PRM review process by specifying the information that must be included for a PRM to be accepted for docketing. The existing criteria at § 2.802(c)(1)–(3) used to determine whether a PRM is complete would be revised to improve clarity and to specify information requirements such as a statement of the problems or issues addressed in the petition; a statement of the petitioner's proposed solution; an analysis, discussion, or argument linking how the proposed solution would solve the identified problems or issues; and other relevant information, including specific technical, scientific, or other information needed to support the petitioner's request. It would also include a cross reference to the requirements of 10 CFR 51.68 that must be met by certain petitioners seeking exemptions from 10 CFR parts 30, 31, 32, 33, 34, 35, 36, 39, 40 or part 70 of this chapter concerning the exemption from licensing and regulatory requirements of or authorizing general licenses for any equipment, device, commodity or other product containing byproduct material, source material or special nuclear material. These revisions would reduce the potential for delay associated with requesting additional information needed to clarify or support insufficient PRMs.

4. The proposed amendments in § 2.802(e) would distinguish requirements for petitioners who are participants in an NRC licensing proceeding from requirements for petitioners who are not participants in an NRC licensing proceeding. Further, the proposed amendments would provide more precise instructions for petitioners requesting suspension of licensing proceedings related to a petition for rulemaking. Petitioners who are participants in an NRC licensing proceeding related to their PRMs would be required to file a motion that complies with the requirements in 10 CFR part 2, subpart C, ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings.'' Requirements for petitioners who are not participants in an NRC licensing proceeding related to their PRMs would be listed in § 2.802(e)(2), including the following requirements: concurrent submission of both the suspension request and the PRM,

service on the applicant by the petitioner of both the suspension request and the PRM, and certification that copies of both the suspension request and the PRM have been provided to all participants and the presiding officer of the related licensing proceeding.

5. Section 2.802(e) would be replaced with new information that would inform petitioners where to submit a request to amend or withdraw their PRMs and what information to include in their request, namely the docket number the NRC assigned to the PRM (e.g., PRM–50–52) and the date the PRM was submitted originally. The proposed replacement language would ease administrative difficulties on the NRC staff because an amendment or withdrawal request would be linked more quickly with the related PRM docket, which would streamline the PRM process. Also, the proposed replacement language would advise the petitioner where to submit these requests, which would enhance the availability of information and transparency of the PRM process.

6. All current provisions in § 2.802 addressing the NRC's actions on a PRM would be removed from this section and transferred to § 2.803. As restructured, § 2.803 would contain all of the NRC's actions on a PRM, with the exception of PRMs on design certification rules from applicants that intend to supply the design (currently in §§ 2.811–2.817). The NRC currently performs the following actions upon receipt of a PRM: The NRC notifies the petitioner of receipt as described in proposed § 2.803(a) and evaluates the PRM, including any information submitted under proposed § 2.803(c), according to the acceptance criteria in proposed § 2.803(b). Internal policy has historically dictated this process, and the NRC is proposing to add a provision in the regulations to codify this process.

7. The acceptance criteria and acceptance review process described in existing § 2.802(e) would be moved to proposed § 2.803(b) and amended to state clearly that the NRC will not accept a PRM for review if it does not include the information required under current § 2.802(c). The acceptance review process also would be modified to add two new criteria in § 2.803(b) and (c): Before accepting a PRM for docketing, the NRC would perform a screening review to ensure that the changes requested in the petition are within the legal authority of the NRC and that the PRM raises a potentially valid issue that warrants further detailed consideration by the NRC (e.g., confirm that the NRC's regulations do not already provide what the PRM is requesting and that the issue is not already under consideration by the Commission).

8. Information on the NRC's discretion to request public comment on a PRM, currently in § 2.802(e), and the NRC's discretion to hold a hearing on a PRM, currently discussed in § 2.803, would be moved to proposed § 2.803(g) and amended for clarity.

9. The addition of specific criteria under proposed § 2.803(h) for the NRC's full review of a PRM would establish the considerations that the NRC may take into account when making a determination on the course of action to resolve a PRM. The NRC's process for disposition of a PRM historically has been contained in internal policy, and the NRC is proposing to place these considerations in the regulations to enhance the transparency of its PRM process. These proposed considerations for resolving a PRM are based on the NRC's last 30 years of experience in processing PRMs, insights from the NRC initiative to streamline its PRM process, and information from the NRC's review of other agencies' PRM regulations and practices. The proposed considerations would allow the NRC to examine the merits of the PRM, the immediacy of the concern, the availability of NRC resources, whether the NRC is already considering the issues in other NRC processes, the relative priority of the issues raised in the PRM, any public comments (if comments are requested), and the NRC's past decisions and current policy on the issues raised in the PRM.

10. The process for administrative closure of a PRM docket, once the NRC has determined its course of action for the PRM would be provided in § 2.803(h)(2). The proposed requirements would provide two categories, derived from the NRC's recent review of the PRM process, for closing a PRM docket once the NRC has determined its course of action: (1) Denial of the PRM in its entirety, indicating a determination not to pursue a rulemaking action to address the issues raised in the PRM (this would also constitute final ''resolution'' of the PRM); or (2) initiation of a rulemaking action addressing some or all the requested rule changes in the PRM. Initiation of a rulemaking action may take one of two forms: (i) Initiation of a new, ''standalone'' rulemaking focused on some or all of the matters raised in the PRM; or (ii) integration of the PRM into an existing or planned rulemaking process (including the early stages of an NRC effort to decide whether to pursue rulemaking, e.g., when the NRC is considering whether to develop a regulatory basis or to issue an advance notice of proposed rulemaking). In either case, the PRM docket would be closed, although the PRM itself would not be completely and finally ''resolved'' until the NRC acts on the last remaining portion of the PRM's request. Final NRC action on the PRM (''resolution'') would be a final rule addressing the petitioner's requested changes, a final rule addressing some (but not all) of the petitioner's requested changes, or a notice published in the **Federal Register** of the NRC's decision not to address the petitioner's requested changes in a rulemaking action.

11. In § 2.803(h)(2)(ii), three common examples of potential rulemaking actions would be provided to inform the petitioner of potential rulemaking paths for granting a PRM: (1) Initiate a new rulemaking; (2) address the PRM in an ongoing rulemaking; or (3) address the PRM in a planned rulemaking. The NRC would publish a **Federal Register** notice to inform the public of its determined course of action, which would enhance transparency of the NRC's PRM process and communicate better the NRC's planned approach to the PRM. Implementing this process would enhance the NRC's ability to close PRMs efficiently and effectively.

12. Section 2.803(i)(2) would explain that the NRC will notify the petitioner in writing and also publish a notice in the **Federal Register** if the NRC closes a PRM under § 2.802(h)(2)(ii) but subsequently decides not to carry out the planned rulemaking to publication of a final rule. These notices would explain the basis for the NRC's decision not to carry out the planned rulemaking to publication and not to include the PRM in a rulemaking action.

13. The addition of § 2.803(i) would explain how a PRM ultimately is resolved under the APA and would distinguish final resolution of a PRM from administrative closure of a PRM docket, described in proposed § 2.803(h)(2). Resolution of a PRM occurs when the NRC publishes a **Federal Register** notice informing the public that any planned regulatory action related to the PRM has been concluded. For rulemaking actions, resolution requires publication in the **Federal Register** of the final rule related to the PRM, which would include a discussion of how the published final rule addresses the issues raised in the PRM. Also, proposed § 2.803(i) would note that the NRC's denial of the PRM or the petitioner's withdrawal of the PRM at any stage of the regulatory process would conclude all planned regulatory action related to the PRM. As

applicable, the **Federal Register** notice resolving the PRM would include a discussion of the NRC's grounds for denial or information on the withdrawal request that the petitioner submitted. The NRC is no longer publishing a semiannual summary of PRMs, so language in existing § 2.802(g) would be removed. Proposed new paragraphs § 2.803(j)(1) and (3) would explain that the public may view the status of rulemakings currently active with the Commission at *http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/rulemaking-dockets/index.html* and the most current information on PRMs at *http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/petitions-by-year.html*. The new language would inform the public that it also may view the status of currently active rulemakings and PRMs at *http://www.regulations.gov*. Using the Federal rulemaking Web site, *http://www.regulations.gov* (regulations.gov), would meet the requirement in the e-Government Act of 2002 that agencies use a single, Governmentwide resource for rulemaking activities to enhance transparency to the public. Proposed § 2.803(j)(2) would establish that the NRC will include a summary of planned and ongoing rulemakings in the Governmentwide *Unified Agenda of Federal Regulatory and Deregulatory Actions* (Unified Agenda). The Unified Agenda is a semiannual compilation of summaries of the proposed and final rules that each Federal agency expects to issue during the next year. Summaries from the Unified Agenda for rules that are likely to have a significant economic impact on a substantial number of small entities are published in the **Federal Register**; and the full edition of the Unified Agenda is available online at the Office of Management and Budget (OMB) Web site *http://www.Reginfo.gov* and at the NRC Web site *http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/unified-agenda.html.* By providing information about using online resources to determine the status of disposition of PRMs, the proposed regulatory language would enhance the availability of information and transparency of the PRM process.

14. In addition, the NRC is proposing certain administrative changes to the regulations, including the reorganization of regulatory sections in §§ 2.802 and 2.803 as described herein. These changes would include amending § 2.811 to conform to the proposed changes to §§ 2.802 and 2.803.

IV. Availability of Documents

The following documents referenced in this **Federal Register** notice are available either through ADAMS or at the NRC's PDR:

Document	PDR	ADAMS	ADAMS Accession No.
COMNJD–06–0004/COMEXM–06–0006—"Streamlining the NRR Rulemaking Process"	X	X	ML060970295
SRM–COMNJD–06–0004/COMEXM–06–0006—"Streamlining the NRR Rulemaking Process"	X	X	ML061510316
SECY–03–0131—"Rulemaking Process Improvement Implementation Plan"	X	X	ML031360205
SECY–07–0134—"Evaluation of the Overall Effectiveness of the Rulemaking Process Improvement Implementation Plan"	X	X	ML071780644
SRM–SECY–07–0134—"Evaluation of the Overall Effectiveness of the Rulemaking Process Improvement Implementation Plan"	X	X	ML072980427
SRM–COMGBJ–07–0002—"Closing out Task Re: Rulemaking on Tables S–3 and S–4"	X	X	ML072180094

V. Section-by-Section Analysis

A. Section 2.802 Petition for Rulemaking—Requirements for Filing

Paragraph (a) of § 2.802, which informs petitioners on how to submit a PRM, would be revised to clarify and update the PRM filing process. Proposed paragraph (a) would describe the subject of the paragraph by providing a heading, *Filing a petition for rulemaking;* specify the regulations subject to a PRM by indicating that the regulations governing nuclear energy are contained under chapter I of Title 10 of the CFR; remove the option for petitioners to transmit PRMs by facsimile; establish that PRMs may be submitted electronically, by email, to *Rulemaking.Comments@nrc.gov*; and remove all references to the guidance available for electronic submissions.

Paragraph (b) of § 2.802, which provides the process by which a prospective petitioner may consult with the NRC before filing a PRM, would be revised to permit consultation with the NRC both before and after filing a PRM. Proposed paragraph (b) would add a heading, *Consultation with the NRC,* which would describe the subject of the paragraph; specify that consultation is permitted both before and after filing a PRM by adding ''and after'' and removing the word ''prospective'' to include all petitioners; clarify that a petitioner may consult directly with the NRC staff; and update the mailing address and telephone number for this consultation. Proposed paragraph (b) also would update the name of the rulemaking branch, which is now called the ''Rules, Announcements, and Directives Branch.''

Paragraph (b)(1), which establishes limitations on the content of petitioner consultations with the NRC staff regarding a PRM, would be revised to permit consultation with NRC staff both before and after filing of a PRM. Proposed paragraph (b)(1) would remove the phrase ''prior to the filing of'' and replace it with the phrase ''regarding the drafting or amendment of.''

Paragraph (b)(1)(i), which establishes that petitioners may consult with the NRC staff about the process of filing and responding to a PRM, would be revised to include other stages of the PRM process. Additionally, the word ''procedure'' would be removed from the paragraph. Proposed paragraph (b)(1)(i) would limit NRC staff consultation on a PRM to describing the process for filing, accepting, tracking, closing, amending, withdrawing, and resolving a PRM. These limitations would be consistent with the existing limitations on NRC participation in the filing of PRMs.

Paragraph (b)(1)(ii), which establishes that petitioners may consult with the NRC staff to clarify an existing NRC regulation and the basis for that regulation, would remain unchanged.

Paragraph (b)(1)(iii), which establishes that petitioners may consult with the NRC staff to clarify a potential PRM, would not be revised substantively. Proposed paragraph (b)(1)(iii) would remove the phrase ''nature of'' and the words ''prospective'' and ''potential'' to conform with other edits.

Paragraph (b)(2), which permits limited consultation with the NRC before filing a PRM, would continue to prohibit NRC staff from participating in

drafting or developing text or alternative approaches to address matters in a PRM. However, the revised language would permit consultation with NRC staff both before and after filing a PRM. Proposed paragraph (b)(2) would remove the phrase ''prior to the filing of'' and replace it with the phrase ''regarding the drafting or amendment of'' and would remove the word ''prospective.''

Proposed new paragraph (b)(3) would be added to specify clearly that the NRC staff will not advise a petitioner on whether a petition for rulemaking should be amended or withdrawn.

Paragraph (c), which generally describes the content requirements of a PRM, would be restructured and revised. The heading, *Content of petition,* would be added to describe the subject of the paragraph. Proposed paragraph (c)(1) would establish that a petitioner must clearly and concisely articulate the information required under proposed new paragraphs (c)(1)(i) through (c)(1)(viii) in a PRM. Proposed paragraph (c)(1) would add the terms ''clearly and concisely'' to convey the NRC's expectation that PRMs be ''clear'' (i.e., do not contain ambiguous or confusing arguments, terminology, or phraseology) and ''concise'' (i.e., do not present the perceived problem or proposed solution with longer than necessary description).

Proposed paragraphs (c)(1)(i) through (c)(1)(viii) would specify information that must be provided in each PRM. The existing text of paragraph (c)(1), which requires that a petition for rulemaking set forth a general solution to a problem or specify the regulation that is to be revoked or amended, would be revised and redesignated as proposed new paragraph (c)(1)(v). The additional text under proposed paragraphs (c)(1)(i) through (c)(1)(viii) would describe the specific information required to be included in a PRM. Most of the requirements generally are similar to the information requirements in the existing rule, except that each topic is listed separately for increased clarity.

Proposed new paragraph (c)(1)(i) would require all petitioners to specify contact information—including a name, telephone, mailing address, and email address (if available)—that the NRC may use to contact the petitioner. Proposed new paragraph (c)(1)(ii) would specify additional information for petitioners who are organizations or corporations to submit: the petitioner's organizational status, the petitioner's State of incorporation, the petitioner's registered agent, and the name and authority of the individual signing the PRM on behalf of the corporation or organization. By adding this proposed paragraph, the NRC intends to reduce the likelihood of misleading the public about the organizational or corporate status and identity of a petitioner.

Proposed new paragraph (c)(1)(iii) would include information from existing paragraph (c)(3) and would require a petitioner to present the problems or issues that the petitioner believes the NRC should address through rulemaking. This paragraph would be added to clarify that a petitioner must specifically state the problems or issues that the requested rulemaking would address, including any specific circumstances in which the NRC's codified requirements are incorrect, incomplete, inadequate, or unnecessarily burdensome. Proposed paragraph (c)(1)(iii) would clarify that the submittal of specific examples of incompleteness or unnecessary burden to support the petitioner's assertion that a problem or issue exists that the NRC should address through rulemaking, would be of interest to the NRC when reviewing the PRM. Providing this information in the PRM would result in clearer and more concise problems or issues being presented by a petitioner and would increase the efficiency of the NRC's review of the PRM.

Proposed new paragraph (c)(1)(iv) would require the petitioner to cite, enclose, or reference any publicly available data used to support the petitioner's assertion of a problem or issue. This requirement currently is in existing paragraph (c)(3) but would be modified to add the phrase ''Cite, enclose, or reference'' to provide options to the petitioner for providing the supporting data. Proposed paragraph (c)(1)(iv) would specify that the citations, enclosures, or references to technical, scientific, or other data would be submitted to support the petitioner's assertion that a problem or issue exists and that all submitted data must be publicly available, so the word ''relevant'' and the phrase ''reasonably available to the petitioner'' in current paragraph (c)(3) would be removed.

Proposed new paragraph (c)(1)(v) would include information from existing paragraph (c)(1) and would require a petitioner to present a proposed solution to the problems or issues identified in the PRM; this may include revision or removal of specific regulations under 10 CFR chapter I. Rather than providing a ''general solution'' as required by existing paragraph (c)(1), proposed paragraph (c)(1)(v) would require a petitioner to present a ''proposed solution'' to clarify that the solution is only a proposal for NRC consideration. Proposed paragraph (c)(1)(v) also would provide an example—including ''specific regulations or regulatory language to add, amend, or delete in 10 CFR chapter I''—to guide petitioners in preparing a proposed solution to the problems or issues identified in the PRM.

Proposed new paragraph (c)(1)(vi) would require a petitioner to provide an analysis, discussion, or argument linking the problems or issues identified in the PRM with the proposed solution. The first part of this requirement currently is in existing paragraph (c)(3). The second part is new and would require the petitioner to explain through an analysis, discussion, or argument how the proposed solution would solve the problems or issues raised in the PRM.

Proposed new paragraph (c)(1)(vii) would include information from existing paragraph (c)(1) and would require the petitioner to cite, enclose, or reference any other publicly available data or information that the petitioner deems necessary to support the proposed solution and otherwise prepare the PRM for the NRC's acceptance review under § 2.803(b). Similar to proposed paragraph (c)(1)(iv), the phrase ''Cite, enclose, or reference'' would be added to provide options to the petitioner for providing the supporting data.

Text from existing paragraph (c)(1) would be revised and incorporated into proposed new paragraph (c)(1)(v), as previously described. As a result, existing paragraph (c)(1) would be removed.

Text from existing paragraph (c)(2) would be removed because it is generally incorporated into proposed new paragraphs (c) and (c)(1)(i) through (c)(1)(iii), making the existing paragraph (c)(2) unnecessary.

Text from existing paragraph (c)(3), which requires a petitioner to include various kinds of supporting information, would be revised and incorporated into proposed new paragraphs (c)(1)(iii), (c)(1)(iv), (c)(1)(vi), and (c)(1)(vii), as previously described. As a result, existing paragraph (c)(3) would be removed.

In addition to the requirements in § 2.802(c)(1)(i)–(vii), proposed paragraph (c)(2) would encourage the petitioner to consider the two other acceptance review criteria listed in § 2.803(b) when preparing a PRM. The NRC does not intend to require specialized explanations that might preclude potential petitioners from submitting PRMs. Proposed paragraphs (c)(2)(i) and (ii) are intended to provide petitioners the opportunity to include information that would assist the NRC in its evaluation of the PRM under

§ 2.803(b). However, the NRC will not automatically deny a petition solely on the basis that the petition did not provide information addressing paragraphs (c)(2)(i) and (ii).

Proposed paragraph (c)(3) would require the PRM to designate a lead petitioner if the petition is signed by multiple petitioners. The NRC's current practice is to treat the first signature listed on a petition as that of the lead petitioner. Proposed new paragraph (c)(3) would require designation of a lead petitioner and codify the NRC's practice of sending communications about the petition to the lead petitioner. Proposed new paragraph (c)(3) also would alert the public of the lead petitioner's responsibility to disseminate communications received from the NRC to all petitioners.

Proposed paragraph (c)(1)(viii) would include a cross reference to the requirements of 10 CFR 51.68.

Paragraph (d) will be reserved and paragraph (e)—which provides that a petitioner may request a suspension, pending disposition of the PRM, of all or any part of a licensing proceeding to which the petitioner is a party—would be revised and expanded to permit submission of these types of requests by petitioners who are *not* part of the licensing proceeding. The title, *Request for suspension of adjudicatory licensing proceedings related to a petition for rulemaking* would be added to describe the subject of the paragraph.

Proposed new paragraph (e)(1) would explain that petitioners who are participants in an NRC adjudicatory licensing proceeding related to their PRM must file a motion in accordance with the requirements of 10 CFR part 2, subpart C, to request suspension of that proceeding. Proposed new paragraph (e) would specify that petitioners who are not participants in an NRC adjudicatory licensing proceeding related to their PRM also may request that the NRC suspend all or any part of an adjudicatory licensing proceeding pending disposition of the PRM. Proposed paragraphs (e)(2)(i)–(iii) would require petitioners who are not participants in an NRC proceeding related to their PRM to submit the suspension request concurrently with the PRM, serve the applicant in the licensing proceeding with both the suspension request and the PRM in accordance with service requirements in § 2.305, and certify that the petitioner has provided copies of the suspension request and the PRM to all of the participants and the presiding officer in the licensing proceeding.

Paragraphs (e), (f), and (g) in § 2.802 would be moved to § 2.803. As a result, existing paragraphs (e), (f), and (g) in § 2.802 would be removed.

Proposed new paragraph (f), which discusses amendment or withdrawal of a PRM by a petitioner, would be added to inform petitioners on where to submit these requests and what information should be included. The heading, *Amendment; Withdrawal,* would be added to describe the subject of the paragraph. The proposed paragraph encourages petitioners to include the docket number assigned to the PRM and the date the PRM was originally submitted with any request to amend or withdraw their PRMs. This amendment would result in greater efficiency for the NRC staff in retrieving and linking amendment and withdrawal requests with the associated PRM. Also, proposed paragraph (f) would clearly inform petitioners how and where to submit requests to amend or withdraw their PRMs.

B. Section 2.803 Petition for Rulemaking—NRC Action

Proposed new paragraph (a) would codify how the NRC processes a PRM upon its receipt. The heading, *Notification of Receipt,* would be added to describe the subject of the paragraph. Proposed new paragraph (a)(1) would codify the NRC's process of notifying the petitioner to acknowledge receipt of a PRM, and proposed new paragraph (a)(2) would state clearly that the NRC evaluates the submitted PRM in accordance with the acceptance criteria in proposed paragraph (b).

The acceptance criteria and acceptance review process described in current § 2.802(f) would be moved to proposed § 2.803(b) and amended to state clearly that the NRC will deny the PRM if it does not include the information required under § 2.802(c). The acceptance review process, currently described in § 2.802(f), also would be modified to add two new criteria in proposed new § 2.803(b). Before accepting a petition for docketing, the NRC would perform a screening review to ensure that the changes requested in the petition are within the legal authority of the NRC and that the PRM raises a potentially valid issue that warrants further detailed consideration by the NRC (e.g., confirm that the NRC's regulations do not already provide what the PRM is requesting). By adding the new criteria, the NRC would establish that a PRM would not be accepted for docketing if the issues in a PRM are outside the NRC's legal authority. Also, proposed new paragraph (b) would add the heading, *Acceptance Review,* to indicate the subject of the paragraph.

Proposed new paragraph (b) would remove the existing requirement that only the Executive Director for Operations may determine whether a PRM will be accepted, thus providing the NRC with the flexibility to make this determination at the most appropriate organizational level. Proposed new paragraph (b) also would remove the estimated timeframe in which a determination of acceptance will be completed (the existing text provides 30 days from the date of receipt of the PRM). The NRC would remove the 30-day timeframe to ensure that sufficient time would be available, if needed, for thorough examination of the issues raised in complex or complicated PRMs. Although the 30-day guideline would be removed from the regulations, the NRC still expects to complete the acceptance review of most PRMs within a 30-day period.

The existing text of § 2.802(f) provides a 90-day period for a petitioner to fix and resubmit an insufficient PRM, with the deficiencies corrected. However, in practice, petitioners may resubmit their PRM with the deficiencies corrected at any time during or after the 90 days, and the 90-day period for submitting additional data serves only to delay resolution of a deficient PRM. Proposed new paragraph § 2.803(b) would remove the 90-day period and would inform the petitioner that deficient PRMs may be resubmitted with deficiencies fixed or addressed at any time, without prejudice and without a time limitation.

The existing text of § 2.802(e), which identifies the process by which a PRM that is accepted for review is docketed and made available to the public, would be moved to § 2.803(c) and amended to add the heading, *Acceptance and Docketing* to indicate the subject of the paragraph, specify the NRC's acceptance review process for PRMs, require that the NRC assign a docket number to PRMs accepted for review, and describe how a PRM found acceptable for review would be made available to the public. Proposed new paragraph (c)(1) would state clearly that the NRC will accept and assign a docket number to a PRM if the NRC determines that it satisfies the acceptance review criteria in proposed new paragraphs (c)(1)(i) through (c)(1)(iii). Proposed new paragraphs (c)(1)(i) through (c)(1)(iii) would explain that a PRM would be accepted for review if it contains the information required by proposed § 2.802(c), if the requested changes are determined to be within the legal authority of the NRC, and if the PRM is determined to raise a potentially valid issue to warrant further consideration by the NRC.

Proposed new paragraph (c)(2) would describe how a docketed PRM would be made available to the public. Proposed paragraph (c)(2) of § 2.803 is not substantively changed from the first part of existing text in § 2.802(e), but the proposed paragraph does include an administrative change to the location of publicly available information associated with docketed PRMs. The proposed text would specify that a copy of the docketed PRM will be made available to the public through both ADAMS and *http://www.regulations.gov*, the Federal electronic rulemaking portal. It would also specify that the NRC would publish a **Federal Register** notice that identifies the docket number of the PRM, informs the public that the NRC is reviewing the merits of the PRM, and explains how the public may track the status of the PRM online at *http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/petitions-by-year.html* and track the status of rulemakings currently active with the NRC online at *http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/rulemaking-dockets/index.html*.

Proposed new paragraph (d) would notify the public that the NRC will send all communications to the lead petitioner identified in the petition, according to proposed new paragraph 2.802(c)(3), and that this communication would constitute notification to all petitioners. Thus, any NRC obligation to inform a petitioner is satisfied when the NRC sends the required notification to the lead petitioner. The heading, *NRC communications with multiple petitioners,* would be added to describe the subject of the paragraph.

Newly designated § 2.803(e) through (f) would be marked ''Reserved.''

Proposed new paragraph (g) would add the heading, *Public comment on a petition for rulemaking; Hearings,* to indicate the subject of the paragraph. Proposed new paragraph § 2.803(g)(1) would incorporate information from existing § 2.802(e) text pertaining to the NRC's discretion to request public comment on a docketed PRM. Information in existing § 2.802(e) that specifies how a PRM may be published for public comment in the **Federal Register** would be replaced by a concise statement specifying that the NRC, at its discretion, may solicit public comment on a docketed PRM.

When the NRC publishes an FRN requesting public comment on a PRM, the NRC's current practice is to include standard language in the FRN cautioning the public not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Proposed new § 2.803(g)(2) would include this caveat in the NRC's regulations to increase the likelihood that affected stakeholders will be aware of this practice.

Proposed new § 2.803(g)(3) would denote that no hearings will be held on a PRM unless the Commission determines to hold a hearing as a matter of discretion. This requirement currently exists in § 2.803, but it would be moved to new paragraph (g)(3) and amended for clarity. The text ''the Commission deems it advisable'' would be replaced with ''the Commission determines to do so, at its discretion.'' This proposed amendment would clarify that the NRC has discretionary authority to hold a hearing on a docketed PRM.

Proposed new paragraph (h) would add the heading, *Determination of a petition for rulemaking; closure of docket on a petition for rulemaking* to indicate the subject of the paragraph. Existing regulations in § 2.803 require the NRC to resolve PRMs by either issuing a notice of proposed rulemaking or denying the petition. Proposed new paragraph (h)(1) of § 2.803 would codify a nonexclusive list of the methods and criteria that the NRC uses to determine a course of action for a PRM. Those methods and criteria include consideration of the issues raised in the PRM about its merits, the immediacy of an identified safety or security concern, the relative availability of resources, the relative issue priority compared to other NRC rulemaking activities, whether the NRC is already considering the issues in other NRC processes, the substance of public comments received, if requested, and the NRC's past decisions and current policy.

Proposed new paragraph (h)(1)(i) would establish that determination of a PRM may be based upon the merits of the PRM. For the purpose of this rule, the term ''merits'' would include the completeness and technical accuracy of the documents, logic associated with the petitioner's desired rule changes, and the appropriateness or worthiness of the desired changes compared to the current regulatory structure (i.e., existing regulations, associated regulatory guidance, and inspection program guidance).

Proposed new paragraph (h)(1)(ii) would indicate that determination of a PRM may be based upon the immediacy of the safety or security concerns raised in the PRM. By adding this paragraph, the NRC intends to first determine whether immediate regulatory action (e.g., a regulatory order) is needed.

Proposed new paragraph (h)(1)(iii) would denote that determination of a PRM may be based upon the availability of NRC resources and priority of the issues raised in the PRM compared with other NRC rulemaking activities. By adding this paragraph, the NRC would establish that if immediate action is not necessary, the NRC would consider the availability of resources and compare the issues raised in the PRM to other NRC rulemaking issues to determine the PRM's priority relative to other rulemaking activities.

Proposed new paragraph (h)(1)(iv) would establish that determination of a PRM may be based on whether the NRC is already considering the issues raised in the PRM in other NRC processes. The NRC has multiple processes for considering potential issues related to its mission, which is to regulate the Nation's civilian use of byproduct, source, and special nuclear materials to ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment. Other NRC processes include (non-exhaustive list) the allegation process, formal and informal hearings, and Commission deliberation to determine appropriate action on issues not related to rulemaking. Resulting action could be initiation of a rulemaking, but the Commission has other options available such as addressing the issue in a regulatory order or through a management directive. Proposed new paragraph (h)(1)(iv) would be included to prevent duplicative effort and inefficient use of NRC resources when the NRC is already considering issues raised by the PRM in other NRC processes.

Proposed new paragraph (h)(1)(v) would provide that determination of a PRM may be based on the substance of any public comments received, if public comments are requested. Although the NRC might not request public comments on all PRMs, if public comments are requested, the NRC would consider the information commenters provided when determining a course of action for a PRM.

Proposed new paragraph (h)(1)(vi) would denote that determination of a PRM may be based on the NRC's past decisions and current policy related to the issues raised in the PRM. This paragraph would establish that the NRC could consider past Commission decisions when determining a course of action for a PRM.

Proposed new paragraph (h)(2) would establish a process for administrative closure of a PRM docket once the NRC has determined its course of action for

the PRM using the methodology and criteria in proposed paragraph (h)(1). Proposed paragraph (h)(2) with the heading, *PRM Docket Closure,* would establish that a PRM docket would be administratively closed when the NRC responds to the PRM by taking a regulatory action and publishing a document in the **Federal Register** that describes this action. Proposed new paragraphs (h)(2)(i) and (ii) provide two specific categories for administrative closure of a PRM docket. In proposed paragraph (h)(2), the NRC would administratively close a PRM docket by taking a regulatory action in response to the PRM that establishes a course of action for the PRM. The NRC would publish a notice in the **Federal Register** describing the determined regulatory action, including the related Docket Identification Number (Docket ID), as applicable. Proposed paragraph (h)(2)(i) would explain that the NRC may administratively close a PRM docket by deciding not to undertake a rulemaking to address the issues that the PRM raised, effectively denying the PRM, and notifying the petitioner in writing why the PRM was denied. Proposed paragraph (h)(2)(ii) would explain that the NRC may administratively close a PRM docket by initiating a rulemaking action, such as addressing the PRM in an ongoing or planned rulemaking or initiating a new rulemaking activity. The NRC would inform the petitioner in writing of its determination and the associated Docket ID of the rulemaking action.

Proposed new paragraph (h)(2)(i) would provide that the NRC may administratively close a PRM docket if the NRC decides not to engage in rulemaking to address the issues in the PRM. The NRC would publish a notice in the **Federal Register** informing the public of the grounds for denial, addressing the petitioner's request and relevant public comments (if requested). The PRM docket would be closed by this method when the NRC concludes that rulemaking should not be conducted in response to the PRM. In certain cases, the NRC may deny some of the issues raised in a PRM but also decide to address the remaining issues by initiating a rulemaking action, as described in proposed paragraph (h)(2)(ii). In these instances, as applicable, the **Federal Register** notice would identify the rulemaking Docket ID for the related rulemaking.

With regard to new rulemakings, proposed new paragraph (h)(2)(ii) would provide that the NRC may administratively close a PRM docket if the NRC decides to address the subject matter of the PRM in a new rulemaking. The NRC would publish a notice in the **Federal Register** explaining the NRC's decision to initiate the new rulemaking and informing the public of the Docket ID of the new rulemaking. The NRC also would add a description of the new rulemaking in the Governmentwide Unified Agenda. The PRM docket would be closed by this method when the NRC determines that issues raised in the PRM merit consideration in a rulemaking and that there is currently no other rulemaking (ongoing or planned) into which the petitioner's requested rulemaking could be incorporated.

With regard to planned rulemakings, proposed paragraph (h)(2)(ii) would provide that a PRM docket may be administratively closed if the NRC is currently planning a rulemaking related to the subject of the PRM and the NRC decides to address the PRM in that planned rulemaking. The NRC would publish a notice in the **Federal Register** explaining the NRC's decision to address the PRM in a planned rulemaking and informing the public of the Docket ID of the planned rulemaking. A PRM docket would be closed by this method when the NRC determines that issues raised in the PRM merit consideration in a rulemaking and a planned rulemaking exists in which the issues raised in the PRM could be addressed.

With regard to ongoing rulemakings, proposed new paragraph (h)(2)(ii) would provide that a PRM docket may be administratively closed if the NRC has a rulemaking in progress that is related to the issues raised in the PRM. The NRC would publish a notice in the **Federal Register** notifying the public that the subject of the PRM will be addressed as part of the ongoing rulemaking. The PRM docket would be closed by this method when the NRC determines that issues raised in the PRM merit consideration in a rulemaking and an ongoing rulemaking exists in which the issues in the PRM can be addressed.

The list of potential rulemaking actions in proposed new paragraph (h)(2)(ii) is not intended to be exhaustive because the NRC may initiate other rulemaking actions, at its discretion, on issues raised in the PRM. For example, the NRC could extend the comment period for a proposed rule that addresses the subject matter of the PRM to allow it to be addressed in the ongoing rulemaking.

For all PRM dockets that are closed by initiating a rulemaking action, as described in proposed paragraph (h)(2), the NRC will include supplementary information in the published final rule discussing how the NRC decided to address the issues raised in the PRM.

As further discussed in proposed paragraph (i)(2), if the NRC closes a PRM docket under proposed paragraph (h)(2)(ii) by initiating a rulemaking action, resolution would require publication of a final rule discussing how the PRM is addressed in the published final rule. However, if later in the rulemaking process the NRC decides to terminate the associated rulemaking, termination of that rulemaking also constitutes denial of the PRM. The NRC would describe the agency's grounds for denial in a **Federal Register** notice, which would include the reason for the NRC's decision not to publish a final rule on the rulemaking associated with the PRM. The **Federal Register** notice also would address the issues raised in the PRM and significant public comments, if public comments were solicited. As with denials earlier in the PRM process, the NRC would notify the petitioner of denial of the PRM.

Under § 2.803, the NRC is currently required to resolve PRMs either by addressing the PRM issues in a final rule or by denying the petition. Proposed new paragraph (i) with heading, *PRM Resolution,* would expand and clarify how a PRM is resolved. Resolution of a PRM would require the NRC to conclude all planned regulatory action on the issues presented by the PRM and to publish a **Federal Register** notice to inform the public that all planned regulatory action on the PRM is concluded. Resolution of a PRM may occur in whole or in part; however, complete resolution of a PRM does not occur until all PRM issues are finally addressed by NRC. Proposed paragraph (i) would describe three methods for resolving a PRM: (1) Publication of a final rule; (2) withdrawal of the PRM by the petitioner at any stage of the regulatory process; or (3) denial of the PRM by the NRC at any stage of the process. For resolution of a PRM through publication of a final rule, the NRC would include a discussion in the **SUPPLEMENTARY INFORMATION** section of the published final rule of how the regulatory action addresses the issues raised by the petitioner. For resolution of a PRM through denial by the NRC at any stage of the regulatory process, the NRC would publish a **Federal Register** notice discussing the grounds for denial of the PRM. For resolution of a PRM through withdrawal by the petitioner, the NRC would publish a notice in the **Federal Register** to inform the public that the petitioner has withdrawn the docketed PRM. Although the NRC expects that withdrawal requests would be submitted infrequently, proposed

paragraph (i) would provide a mechanism for the NRC to resolve the petition and inform members of the public of the withdrawal and resolution of the PRM.

The existing text of § 2.802, paragraph (g), which indicates that a semiannual summary of PRMs before the Commission will be publicly available for inspection and copying, would be removed because the NRC no longer publishes this semiannual summary. Proposed new paragraph (j) of § 2.803 would explain where the public can view the status of PRMs and would add the heading, *Status of PRMs and rulemakings,* to indicate the subject of the paragraph. Proposed new paragraph (j)(1) would provide the Web site addresses for the most current information on PRMs and on rulemakings that are active with the Commission. Proposed new paragraph (j)(2) would indicate that the NRC will provide a summary of planned and existing rulemakings in the Governmentwide Unified Agenda. Proposed new paragraph (j)(3) would explain that information on all docketed PRMs, rulemakings, and public comments will be made available online in ADAMS and in the Federal Governmentwide rulemaking Web site at *http://www.regulations.gov*.

As previously discussed, if the NRC closes a PRM docket by initiating a rulemaking action under § 2.803(h)(2)(ii) but later determines that a final rule should not be published, the NRC will publish a notice in the **Federal Register** explaining the grounds for its denial of the PRM, including the reason for the NRC's decision not to issue a final rule. The notice will be added to the file of the previously closed PRM docket, and the status of the PRM will be updated and made available to the public as described in proposed paragraphs (j)(1) through (j)(3).

C. Section 2.811 Filing of Standard Design Certification Application; Required Copies

Paragraph (e), *Pre-application consultation,* of § 2.811 explains the pre-application consultation process for standard design certification applications and would be revised by correcting references and updating the email address for pre-application consultation. Proposed corrections to paragraph (e) consist of removing the references to ''§ 2.802(a)(1)(i) through (iii)'' and replacing them with ''§ 2.802(b)(1),'' with respect to the subject matters permitted for pre-application consultation; and replacing the reference ''§ 2.802(a)(2)'' with ''§ 2.802(b)(2),'' regarding limitations on pre-application consultations. In addition, the email address for pre-application consultation would be updated by replacing ''*NRCREP@nrc.gov*'' with ''*Rulemaking.Comments@nrc.gov*.''

VI. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883). The NRC requests comment on the proposed rule with respect to the clarity and effectiveness of the language used.

VII. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires Federal agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this proposed rule, the NRC would revise its regulations to streamline the process the NRC uses when it receives a PRM. This action concerns the NRC's procedures governing its consideration and resolution of petitions for rulemaking. These procedures would not constitute a ''government unique standard'' within the meaning and intention of the National Technology Transfer and Advancement Act of 1995.

VIII. Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

IX. Paperwork Reduction Act Statement

This proposed rule does not contain information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid Office of Management and Budget control number.

X. Regulatory Analysis

The NRC did not prepare a draft regulatory analysis for this proposed rule because it is considered a minor, nonsubstantive amendment and does not meet the threshold economic and policy requirements of OMB Circular A–4 guidance for the preparation of regulatory analyses. The amendments will neither impose new safety requirements nor relax existing ones and therefore do not call for the sort of safety/cost analysis described in the NRC's regulatory analysis guidelines in NUREG/BR–0058, Revision 4, ''Regulatory Analysis Guidelines of the US NRC,'' September 2004 (ADAMS Accession No. ML042820192).

XI. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule would not, if issued, have a significant economic impact on a substantial number of small entities.

XII. Backfitting and Issue Finality

The NRC has determined that the backfit rule does not apply to this proposed rule because these amendments are administrative in nature and do not involve any provisions that would impose backfitting as defined in 10 CFR chapter 1, or are inconsistent with any of the issue finality provisions in 10 CFR part 52.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552, the NRC is proposing to adopt the following amendments to 10 CFR part 2.

PART 2—AGENCY RULES OF PRACTICE AND PROCEDURE

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

Authority: Atomic Energy Act secs.161, 181, 191 (42 U.S.C. 2201, 2231, 2241); Energy Reorganization Act sec. 201 (42 U.S.C. 5841); FOIA 5 U.S.C. 552; Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note).

Section 2.101 also issued under Atomic Energy Act secs. 53, 62, 63, 81, 103, 104 (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); Nuclear Waste Policy Act sec. 114(f) (42 U.S.C. 10143(f)); National Environmental Protection Act sec. 102 (42 U.S.C. 4332); Energy Reorganization Act sec. 301 (42 U.S.C. 5871).

Sections 2.102, 2.103, 2.104, 2.105, 2.321 also issued under Atomic Energy Act secs. 102, 103, 104, 105, 183i, 189 (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Sections 2.200–2.206 also issued under Atomic Energy Act secs. 161, 186, 234 (42 U.S.C. 2201 (b), (i), (o), 2236, 2282); sec. 206 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101–410, as amended by section 3100(s), Pub. L. 104–134 (28 U.S.C. 2461 note). Subpart C also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239). Section 2.301 also issued under 5 U.S.C. 554. Sections 2.343, 2.346, 2.712 also issued under 5 U.S.C. 557. Section 2.340 also issued under Nuclear Waste Policy Act secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.390 also issued under 5 U.S.C. 552. Sections 2.600–2.606 also issued under sec. 102 (42 U.S.C. 4332). Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553; AEA sec. 29 (42 U.S.C. 2039). Subpart K also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239); Nuclear Waste Policy Act sec. 134 (42 U.S.C. 10154). Subpart L also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239). Subpart M also issued under Atomic Energy Act sec. 184, 189 (42 U.S.C. 2234, 2239). Subpart N also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239).

■ 2. Revise § 2.802 to read as follows:

§ 2.802 Petition for rulemaking—requirements for filing.

(a) *Filing a petition for rulemaking.* Any person may petition the Commission to issue, amend, or rescind any regulation in 10 CFR chapter I. The petition for rulemaking should be addressed to the Secretary, Attention: Rulemakings and Adjudications Staff, and sent by mail addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; by email to *Rulemaking.Comments@nrc.gov;* or by hand delivery to 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern time) on Federal workdays.

(b) *Consultation with the NRC.* A petitioner may consult with the NRC staff before and after filing a petition for rulemaking by contacting the Chief, Rules, Announcements, and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 1–800–368–5642.

(1) In any consultation regarding the drafting or amendment of a petition for rulemaking, the assistance that the NRC staff may provide is limited to the following:

(i) Describing the process for filing, accepting, tracking, closing, amending, withdrawing, and resolving a petition for rulemaking;

(ii) Clarifying an existing NRC regulation and the basis for the regulation; and

(iii) Assisting the petitioner to clarify a petition for rulemaking so that the Commission is able to understand the issues of concern to the petitioner.

(2) In any consultation regarding the drafting or amendment of a petition for rulemaking, in providing the assistance permitted in paragraph (b)(1) of this section, the NRC staff will not draft or develop text or alternative approaches to address matters in the petition for rulemaking.

(3) In any consultation regarding a petition for rulemaking, the NRC staff will not advise a petitioner on whether a petition should be amended or withdrawn.

(c) *Content of petition.* (1) Each petition for rulemaking filed under this section must clearly and concisely:

(i) Specify the name of the petitioner, a telephone number, a mailing address, and an email address (if available), which the NRC may use to communicate with the petitioner;

(ii) If the petitioner is an organization, provide additional identifying information (as applicable) including the petitioner's organizational or corporate status, the petitioner's State of incorporation, the petitioner's registered agent, the name and authority of the individual who signed the petition on behalf of the organizational or corporate petitioner.

(iii) Present the specific problems or issues that the petitioner believes should be addressed through rulemaking, including any specific circumstances in which the NRC's codified requirements are incorrect, incomplete, inadequate, or unnecessarily burdensome;

(iv) Cite, enclose, or reference publicly available technical, scientific, or other data supporting the petitioner's assertion of the problems or issues;

(v) Present the petitioner's proposed solution to the problems or issues raised in the petition for rulemaking (e.g., a proposed solution may include specific regulations or regulatory language to add, amend, or delete in 10 CFR chapter I);

(vi) Provide an analysis, discussion, or argument that explains how the petitioner's proposed solution solves the problems or issues identified by the petitioner; and

(vii) Cite, enclose, or reference any other publicly available data or information supporting the petitioner's proposed solution.

(viii) For petitions requesting amendments of 10 CFR parts 30, 31, 32, 33, 34, 35, 36, 39, 40, or 70 of this chapter concerning the exemption from licensing and regulatory requirements of or authorizing general licenses for any equipment, device, commodity or other product containing byproduct material, source material or special nuclear material, comply with 10 CFR 51.68 by submitting a separate document entitled ''Petitioner's Environmental Report,'' which must contain the information specified in 10 CFR 51.45.

(2) To assist the NRC in its evaluation of the PRM, the petitioner should clearly and concisely:

(i) Explain why the proposed rulemaking solution is within the authority of the NRC to adopt; and

(ii) Explain why rulemaking is the most favorable approach to address the problems or issues, as opposed to other NRC actions such as licensing, issuance of an order, or referral to another Federal or State agency.

(3) If the petition is signed by multiple petitioners, the petition must designate a lead petitioner who is responsible for disseminating communications received from the NRC with co-petitioners.

(d) [RESERVED]

(e) *Request for suspension of adjudicatory licensing proceedings related to a petition for rulemaking.* (1) A petitioner who is a participant in an NRC adjudicatory proceeding related to their petition for rulemaking may only request suspension of that proceeding by filing a motion in accordance with the requirements in 10 CFR part 2, subpart C, ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings.''

(2) A petitioner who is not a participant in an NRC adjudicatory proceeding related to their petition for rulemaking may request that the Commission suspend all or any part of the proceeding, to which the petitioner is not a party, pending disposition of the petition for rulemaking.

(i) The request for suspension of adjudicatory licensing proceedings must be submitted to the NRC concurrent with the related petition for rulemaking.

(ii) The petitioner must serve, in accordance with the requirements of 10 CFR 2.305, a copy of the petition for rulemaking and the request for suspension of the adjudicatory licensing

proceeding on the applicant in the proceeding.

(iii) Copies of this request must be filed with all of the participants in the proceeding and with the presiding officer.

(f) *Amendment; Withdrawal.* If the petitioner wants to amend or withdraw a docketed petition for rulemaking, then the petitioner should include the docket number and the date that the original petition for rulemaking was submitted in a request addressed to the Secretary, Attention: Rulemakings and Adjudications Staff, and sent by mail addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; or by email to *Rulemaking.Comments@nrc.gov.*

■ 3. Revise § 2.803 to read as follows:

§ 2.803 Petition for rulemaking—NRC action.

(a) *Notification of Receipt.* Upon receipt of a petition for rulemaking, the NRC will:

(1) Acknowledge its receipt to the petitioner; and

(2) Evaluate the petition for rulemaking, including supporting data submitted under § 2.802(c), for sufficiency according to the acceptance review criteria in § 2.803(b).

(b) *Acceptance Review.* If the NRC determines that the petition for rulemaking does not include the information required by § 2.802(c), that the regulatory change sought by the petitioner is not within the legal authority of the NRC, or that the petition for rulemaking does not raise a potentially valid issue that warrants further consideration, then the NRC will notify the petitioner in writing and explain the deficiencies in the petition for rulemaking. The petitioner may resubmit the petition for rulemaking without prejudice. If the NRC determines that the petition for rulemaking includes the information required by § 2.802(c), then the NRC will docket the petition in accordance with the provisions of paragraph (c) of this section.

(c) *Acceptance and Docketing.* (1) The NRC will accept and assign a docket number to the petition for rulemaking if the NRC determines that:

(i) The petition for rulemaking includes the information required by paragraph 2.802(c),

(ii) The regulatory change sought by the petitioner is within the NRC's legal authority, and

(iii) The petition for rulemaking raises a potentially valid issue that warrants further consideration.

(2) A copy of the docketed petition for rulemaking will be posted in the NRC's Agencywide Documents Access and Management System (ADAMS) and on the Federal rulemaking Web site at: *http://www.regulations.gov.* The NRC will publish a notice of receipt in the **Federal Register** informing the public that the NRC is reviewing the merits of the petition for rulemaking. The notice of receipt will include the docket number and explain how the public may track the status of the petition for rulemaking.

(d) *NRC communications with multiple petitioners.* If the petition is signed by multiple petitioners, any NRC obligation to inform a petitioner (as may be required under 10 CFR part 2, Subpart H) is satisfied, with respect to all petitioners, when the NRC transmits the required notification to the lead petitioner.

(e) through (f) [Reserved]

(g) *Public comment on a petition for rulemaking; Hearings.* (1) At its discretion, the NRC may request public comment on a docketed petition for rulemaking.

(2) The NRC will post all comment submissions at *http://www.regulations.gov* and enter the comment submissions into ADAMS, without removing identifying or contact information from comment submissions. Anyone requesting or aggregating comments from other persons for submission to the NRC is responsible for informing those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submissions.

(3) No adjudicatory or legislative hearing under the procedures of 10 CFR part 2 will be held on a petition for rulemaking unless the Commission determines to do so, at its discretion.

(h) *Determination of a petition for rulemaking; closure of docket on a petition for rulemaking*—(1) *Determination.* Following acceptance of a petition for rulemaking, the NRC's determination on the petition for rulemaking may be based upon, but is not limited to, the following considerations:

(i) The merits of the petition for rulemaking;

(ii) The immediacy of the safety, environmental, or security concern raised in the petition for rulemaking;

(iii) The availability of NRC resources and the priority of the issues raised in the petition for rulemaking in relation to other NRC rulemaking issues;

(iv) Whether the problems or issues raised in the petition for rulemaking are already under consideration by the NRC in other NRC processes;

(v) The substance of any public comments received, if comments are requested; and

(vi) The NRC's past decisions and current policy on the issues raised in the petition for rulemaking.

(2) *PRM Docket Closure.* After making a determination on the PRM, the NRC will administratively close the docket for a petition for rulemaking by taking a regulatory action in response to the PRM and publishing a notice describing that action with the related Docket Identification number (Docket ID), as applicable, in the **Federal Register**. The NRC may make a determination on a petition for rulemaking and administratively close the docket for the PRM by:

(i) Deciding not to undertake a rulemaking to address the issues raised by the petition for rulemaking, and informing the petitioner in writing of the grounds for denial.

(ii) Initiating a rulemaking action (e.g., initiate new rulemaking, address the petition for rulemaking in an ongoing rulemaking, address the petition for rulemaking in a planned rulemaking) that considers the issues raised by a petition for rulemaking, and informing the petitioner in writing of its decision and the associated Docket ID of the rulemaking action, if applicable.

(i) *PRM Resolution*—(1) *PRM resolution published in the* ***Federal Register***. The NRC will publish a **Federal Register** notice informing the public that it has concluded all planned regulatory action with respect to some or all of the issues presented in a petition for rulemaking. This may occur by adoption of a final rule related to the petition for rulemaking, denial by the NRC of the petition for rulemaking at any stage of the regulatory process, or the petitioner's withdrawal of the petition for rulemaking at any stage of the regulatory process. As applicable, the **Federal Register** notice will include a discussion of how the regulatory action addresses the issues raised by the petitioner, the NRC's grounds for denial of the petition for rulemaking, or information on the withdrawal request submitted by the petitioner. The notice will also include the NRC's response to any public comments received (if comments are requested), unless the NRC has indicated that it will not be providing formal written responses to each comment received.

(2) *NRC decision not to proceed with rulemaking after closure of a PRM docket.* If the NRC closes a PRM docket under paragraph (h)(2) of this section but subsequently decides not to carry out the planned rulemaking to publication of a final rule, then the NRC

will notify the petitioner in writing of this decision and publish a notice in the **Federal Register** explaining the basis for its decision. The decision not to complete the rulemaking action will be documented as denial of the PRM in the docket file of the closed petition for rulemaking, in the Web sites, in the Unified Agenda, online in ADAMS and at *http://www.regulations.gov* as described in paragraph (j) of this section.

(j) *Status of PRMs and rulemakings.* (1) The NRC will document the most current information on active rulemakings at *http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/rulemaking-dockets/index.html* and the most current information on petitions for rulemaking at *http://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/petitions-by-year.html.*

(2) The NRC will include a summary of the NRC's planned and ongoing rulemakings in the Governmentwide *Unified Agenda of Federal Regulatory and Deregulatory Actions* (the Unified Agenda), published semiannually. This Unified Agenda is available at *http://www.reginfo.gov/public/do/eAgendaMain/.*

(3) All docketed petitions, rulemakings, and public comments will be posted online in ADAMS and at *http://www.regulations.gov.*

■ 4. In § 2.811, revise paragraph (e) to read as follows:

§ 2.811 Filing of standard design certification application; required copies.

* * * * *

(e) *Pre-application consultation.* A prospective applicant for a standard design certification may consult with NRC staff before filing an application by writing to the Director, Division of New Reactor Licensing, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, with respect to the subject matters listed in § 2.802(b)(1). A prospective petitioner also may telephone the Rules, Announcements, and Directives Branch, toll free on 1–800–368–5642, or send an email to *Rulemaking.Comments@nrc.gov* on these subject matters. In addition, a prospective applicant may confer informally with NRC staff BEFORE filing an application for a standard design certification, and the limitations on consultation in § 2.802(b)(2) do not apply.

Dated at Rockville, Maryland, this 24th day of April 2013.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2013–10117 Filed 5–2–13; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0364; Directorate Identifier 2011–NM–114–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to certain The Boeing Company Model 747 series airplanes. The existing AD currently requires inspection of the fuselage skin lap splice between body station (BS) 340 and BS 400 at stringers (S)–6L and S–6R, and repair, if necessary. Since we issued that AD, analysis results indicated that the protruding head fastener modification and related post-modification inspections currently required are not adequate to prevent cracking at the upper row of fasteners in the stringer 6 lap joint before the cracks reach a critical length. This proposed AD would add new repetitive inspections for cracking in the stringer 6 skin lap splice, which would terminate the existing inspections; and eventual modification of the lap splice, which would terminate the repetitive inspections; post-modification inspections; and corrective actions if necessary. This proposed AD would also add airplanes to the applicability. We are proposing this AD to detect and correct cracking at the upper row of fasteners in the stringer(s) 6 lap joint, which could result in a sudden loss of cabin pressurization and the inability of the fuselage to withstand failsafe loads.

DATES: We must receive comments on this proposed AD by June 17, 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 proposed 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 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: Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6432; fax: 425–917–6590; email: *bill.ashforth@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–2013–0364; Directorate Identifier 2011–NM–114–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 October 25, 1990, we issued AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990), for certain The Boeing Company Model 747 series airplanes. AD 90–23–14 superseded AD 85–17–05, Amendment 39–5123 (Docket No. 85–NM–36–AD; 50 FR 33334, August 19, 1985). AD 90–23–14 requires inspection of the fuselage skin lap splice between BS 340 and BS 400 at S–6L and S–6R, and repair if necessary. AD 90–23–14 resulted from the FAA's determination to remove the crack repair deferral option permitted in AD 85–17–05. We issued AD 90–23–14 to prevent a sudden loss of cabin pressurization and the inability of the fuselage to withstand failsafe loads.

Actions Since Existing AD (AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990)) Was Issued

Since we issued AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990), analysis results have indicated that the post-modification inspections required by that AD for airplanes with an (optional) protruding head fastener modification are not adequate to prevent cracking at the upper row of fasteners in the stringer 6 lap joint before they reach a critical length.

We have also determined that the stretched upper deck (SUD) modified airplanes that were added in Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, have a unique configuration at the S–6 lap splice in Section 41. This configuration was determined not to be equivalent to the improved configuration used after line number 603 in terms of fatigue life. This determination was made after the S–6 splice was re-evaluated to remove the protruding head fastener modification option, which was incorporated in Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. For the SUD modified airplanes, inspections specified in Boeing Alert Service Bulletin 747–53A2809, dated June 18, 2009, are currently required by other ADs. In addition, the external doubler modification specified in Boeing Service Bulletin 747–53–2272, is currently required by other ADs. Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, therefore added the post-mod inspections for the SUD modified airplanes in lieu of revising the existing service information that is required by other ADs.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2013–0364.

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 the requirements of AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990). This proposed AD would add new repetitive inspections for cracking in the stringer 6 skin lap splice, which would terminate the existing inspections; eventual modification of the lap splice, which would terminate the repetitive inspections; post-modification inspections; and corrective actions if necessary. This proposed AD would also add airplanes to the applicability. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

The phrase ''related investigative actions'' might be used in this proposed AD. ''Related investigative actions'' are follow-on actions that (1) are related to the primary actions, and (2) further investigate the nature of any condition found. Related investigative actions in an AD could include, for example, inspections.

In addition, the phrase ''corrective actions'' might be used in this proposed AD. ''Corrective actions'' are actions that correct or address any condition found. Corrective actions in an AD could include, for example, repairs.

Differences Between the Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Change to Existing AD

This proposed AD would retain certain requirements of AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990). Since AD 90–23–14 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD;55 FR 46652, November 6, 1990)	Corresponding requirement in this proposed AD
paragraph (A)	paragraph (g)
paragraph (B)	paragraph (h)
paragraph (C)	paragraph (i)
paragraph (D)	paragraph (j)

We have also added new paragraph (o)(3) to this proposed AD to clarify that if any cracking is found during any inspection required by this proposed AD, and Boeing Special Attention Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990, specifies to contact Boeing for appropriate action, this proposed AD would require repairing the crack using a method approved in accordance with the procedures specified in paragraph (q) of this proposed AD.

Costs of Compliance

We estimate that this proposed AD affects 76 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained inspections from AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990).	8 work-hours × $85 per hour = $680 per inspection cycle.	$0	$680 per inspection cycle.	$51,680 per inspection cycle
New proposed pre-modification inspections	8 work-hours × $85 per hour = $680 per inspection cycle.	$0	$680 per inspection cycle.	$51,680 per inspection cycle
New proposed modification	204 work-hours × $85 per hour = $17,340.	$0	$17,340	$1,317,840
New proposed post-modification inspections	12 work-hours × $85 per hour = $1,020 per inspection cycle.	$0	$1,020 per inspection cycle.	$77,520

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing airworthiness directive (AD) 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990), and adding the following new AD:

The Boeing Company: Docket No. FAA–2013–0364; Directorate Identifier 2011–NM–114–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by June 17, 2013.

(b) Affected ADs

This AD supersedes AD 90–23–14, Amendment 39–6801 (55 FR 46652, November 6, 1990).

(c) Applicability

This AD applies to The Boeing Company Model 747–100, 747–100B, 747–200B, 747–200C, 747–200F, 747–300, 747SR, and 747SP series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by analysis results indicating that the protruding head fastener modification and related post-modification inspections currently required are not adequate to prevent cracking at the upper row of fasteners in the stringer (S)–6 lap joint before the cracks reach a critical length. We are issuing this AD to detect and correct cracking at the upper row of fasteners in the S–6 lap joint, which could result in a sudden loss of cabin pressurization and the inability of the fuselage to withstand failsafe loads.

(f) Compliance

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

(g) Retained Inspection for Unmodified Airplanes With Revised Service Information

This paragraph restates the requirements of paragraph (A) of AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990), with revised service information. For airplanes identified in Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990, and that have not been modified as specified in Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990; In accordance with the schedule indicated below, perform a high frequency eddy current (HFEC) inspection of the fuselage lap joint for cracks between body station (BS) 340 and BS 400, or aft as far as the crew door, at stringer S–6L and S–6R, in accordance with Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990; or Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. As of the effective date of this AD, only Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, may be used to accomplish the actions required by this paragraph.

(1) Inspection Schedule:

(i) Unless previously accomplished within the last 2,750 landings, perform the initial inspection within the next 250 landings after December 11, 1990 (the effective date of AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990)), or prior to the accumulation of 10,000 landings after the modification, whichever occurs later.

(ii) Repeat the inspection thereafter at intervals not to exceed 3,000 landings.

(2) If cracks are found, repair prior to further flight, in accordance with Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990; or Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. As of the effective date of this AD, only Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, may be used to accomplish the actions required by this paragraph.

(h) Retained Inspection for Modified Airplanes With Revised Service Information

This paragraph restates the requirements of paragraph (B) of AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990), with revised service information. For airplanes identified in Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990, and that have been modified as specified in Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990; In accordance with the schedule below, perform an HFEC inspection of the fuselage lap joint for cracks between BS 340 and BS 400, or aft as far as the crew door, at S–6L and S–6R, in accordance with Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990, or Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. As of the effective date of this AD, use only Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, to accomplish the action required by this paragraph. Accomplishment of the actions required by paragraph (k) of this AD terminates the requirements of this paragraph.

(1) Inspection Schedule:

(i) Unless previously accomplished within the last 2,750 landings, perform the initial inspection within the next 250 landings after December 11, 1990 (the effective date of AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990)), or prior to the accumulation of 10,000 landings after the modification, whichever occurs later.

(ii) Repeat the inspection thereafter at intervals not to exceed 3,000 landings.

(2) If cracks are found, repair prior to further flight, in accordance with Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990; or Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. As of the effective date of this AD, only Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, may be used to accomplish the actions required by this paragraph.

(i) Retained Landing Determination

This paragraph restates the provisions of paragraph (C) of AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990), with compliance time limitation. For purposes of complying with paragraphs (g) and (h) of this AD, the number of landings may be determined to be equal to the number of pressurization cycles where the cabin pressure differential was greater than 1.5 pounds per square inch (psi); After the effective date of this AD, the 1.5 psi cabin pressure differential is not allowed.

(j) Retained Inspection Adjustment Factor

This paragraph restates the requirements of paragraph (D) of AD 90–23–14, Amendment 39–6801 (55 FR 46652, November 6, 1990) with compliance time limitation. For Model 747SR airplanes only: Based on a continued mixed operation of lower cabin differentials, the initial inspection thresholds and the repetitive inspection intervals specified in paragraphs (g) and (h) of this AD may be multiplied by a 1.2 adjustment factor; After the effective date of this AD, the 1.2 adjustment factor is not allowed.

(k) New Inspections: Groups 1 Through 5 Airplanes

For airplanes in Groups 1 through 5, as identified in Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010: At the time specified in Table 1 of paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, except where Table 1 of paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, refers to a compliance time of 250 flight cycles after December 11, 1990 (the effective date of AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990)), the compliance time in this AD is 250 flight cycles after the effective date of this AD; do external detailed and HFEC inspections for cracks in the stringer 6 skin lap splice, and do all applicable corrective actions, as applicable; in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, except as required by paragraph (o) of this AD. Do all applicable corrective actions at the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. Accomplishment of the actions required by this paragraph terminates the requirements of paragraphs (g) and (h) of this AD.

(l) New Repetitive Pre-modification Inspections: Groups 1 Through 5 Airplanes

For airplanes in Groups 1 through 5, as identified in Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010: Repeat the inspections required by paragraph (k) of this AD at the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, until accomplishment of the modification required by paragraph (m) of this AD.

(m) New Modification: Groups 1 Through 5 Airplanes

(1) For airplanes in Groups 1 through 5, as identified in Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, on which the structural repair manual (SRM) repair specified in Part 1 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, has not been done: Before the accumulation of 20,000 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, install the doubler modification, and do all applicable related investigative and corrective actions, in accordance with Part 3 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. All applicable related investigative and corrective actions must be done before further flight. Compliance with the requirements of this paragraph terminates the requirements of paragraphs (k) and (l) of this AD.

(2) For airplanes in Groups 1 through 5, as identified in Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, on which the SRM repair specified in Part 1 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, has been done: Within 3,000 flight cycles after accomplishing the SRM repair or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, install the doubler modification, and do all applicable related investigative and corrective actions, in accordance with Part 3 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. All applicable related investigative and corrective actions must be done before further flight. Compliance with the requirements of this paragraph terminates the requirements of paragraphs (k) and (l) of this AD.

(n) New Repetitive Post-modification Inspections: Modified Airplanes

For airplanes modified as specified in Part 3 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, at the applicable time specified in Table 3 or 4 of paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010: Do detailed and eddy current inspections to detect cracking of the skin, frames, and tear straps, as applicable, in accordance with Part 4 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010. If any crack is found, repair before further flight using a method approved in accordance with the procedures specified in paragraph (q) of this AD. Repeat the applicable inspections thereafter at the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010.

(o) Exceptions to Service Information Specifications

(1) If any cracking is found during any inspection required by this AD, and Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010; specifies to contact Boeing for appropriate action: Before further flight, repair the crack using a method approved in accordance with

the procedures specified in paragraph (q) of this AD.

(2) Although Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(3) As of the effective date of this AD, if any cracking is found during any inspection required by this AD, and Boeing Special Attention Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990, specifies to contact Boeing for appropriate action: Before further flight, repair the crack using a method approved in accordance with the procedures specified in paragraph (q) of this AD.

(p) Credit for Previous Actions

This paragraph provides credit for the repairs and doubler modifications required by paragraphs (k) and (m) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (p)(1) through (p)(4) of this AD. Post-modification inspections must continue, as required by paragraph (n) of this AD.

(1) Boeing Service Bulletin 747–53–2253, dated December 14, 1984, which is not incorporated by reference in this AD.

(2) Boeing Service Bulletin 747–53–2253, Revision 1, dated January 25, 1990, which is not incorporated by reference in this AD.

(3) Boeing Service Bulletin 747–53–2253, Revision 2, dated March 29, 1990.

(4) Boeing Service Bulletin 747–53–2253, Revision 3, dated March 24, 1994, which is not incorporated by reference in this AD.

(q) 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.

(4) AMOCs approved previously in accordance with AD 90–23–14, Amendment 39–6801 (Docket No. 90–NM–110–AD; 55 FR 46652, November 6, 1990), are approved as AMOCs for the corresponding provisions of this AD:

(5) AMOCs approved previously for the ADs specified in paragraphs (q)(5)(i) through (q)(5)(vi) of this AD, for repair and doubler modification installations in the area affected by Boeing Special Attention Service Bulletin 747–53–2253, Revision 4, dated September 9, 2010, are approved as AMOCs for the actions specified in paragraphs (g), (h), (k), (l), and (m) of this AD. The post-modification inspections required by paragraph (n) of this AD must be accomplished.

(i) AD 2010–10–05, Amendment 39–16284 (75 FR 27424, May 17, 2010).

(ii) AD 2010–09–03, Amendment 39–16268 (75 FR 22514, April 29, 2010).

(iii) AD 2009–04–16, Amendment 39–15822 (74 FR 8737, February 26, 2009). (iv) AD 91–11–01, Amendment 39–6997 (56 FR 22306, May 15, 1991).

(v) AD 90–06–06 Amendment 39–6490 (55 FR 8374, March 7, 1990).

(vi) AD 2006–24–02 Amendment 39–14831 (71 FR 67445, November 22, 2006).

(r) Related Information

(1) For more information about this AD, contact Bill Ashforth, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6432; fax: 425–917–6590; email: *bill.ashforth@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.* 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.

Issued in Renton, Washington, on April 24, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–10481 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0363; Directorate Identifier 2013–NM–031–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A330–200, –300 and –200 Freighter series airplanes, and Model A340–200, –300, –500, and –600 series airplanes. This proposed AD would require, for certain airplanes, revising the airplane flight manual (AFM) to advise the flight crew of emergency procedures for addressing Angle of Attack (AOA) sensor blockage. This proposed AD would also mandate replacing the AOA sensor conic plates with AOA sensor flat plates, which is a terminating action for the AFM revision. This proposed AD was prompted by a report that an airplane equipped with AOA sensors installed with conic plates recently experienced blockage of all sensors during climb, leading to autopilot disconnection and activation of the alpha protection (Alpha Prot) when Mach number was increased. We are proposing this AD to prevent reduced control of the airplane.

DATES: We must receive comments on this proposed AD by June 17, 2013.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330–A340@airbus.com;* Internet *http://www.airbus.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 Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations

office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–227–1138; fax: 425–227–1149; email: *vladimir.ulyanov@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–2013–0363; Directorate Identifier 2013–NM–031–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2013–0023, dated February 1, 2013 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

An A330 aeroplane experienced a blockage of all Angle of Attack (AOA) probes during climb leading to Autopilot (AP) disconnection and activation of the alpha protection (Alpha Prot) when Mach number increased.

Analysis showed that this aeroplane was equipped with AOA probes having conic plates, and it is suspected that these plates might have contributed to the event. Investigations are on-going to determine the root cause of this AOA probes blockage. The AOA conic plates can also be installed on A340 aeroplanes.

These AOA conic plate could have been installed in production through Airbus modification (mod.) 201609 (associated to Thales Avionics AOA probes Part Number (P/N) C16291AA and P/N C16291AB) or mod. 201610, associated to Goodrich AOA probes P/N 0861ED, or in service through Airbus Service Bulletin (SB) A340–34–4250 or SB A340–34–5081.

The blockage of two or three AOA probes of the same angle may cause the Alpha Prot of the normal law to activate.

Under normal flight conditions (in normal law), if the Alpha Prot activates and Mach number increases, the flight control laws order a pitch down of the aeroplane that the flight crew may not be able to counteract with a sidestick deflection, even in the full backward position.

This condition, if not corrected, could result in reduced control of the aeroplane.

To address this condition, Airbus developed a ''Blocked AOA probes'' emergency procedure included in Airbus Airplane Flight Manual (AFM) A330 Temporary Revision (TR) TR293 issue 1 and Airbus AFM A340 TR294 issue 1.

Consequently, EASA issued Emergency AD 2012–0258–E to require amendment of the AFM to ensure that flight crews, in case of AOA probe blockage, apply the applicable emergency procedure.

Since that AD was issued, Airbus published approved instructions to re-install AOA probe flat plates on A330/A340 family aeroplanes.

For the reasons described above, this [EASA] AD retains the requirements of EASA [Emergency] AD 2012–0258–E which is superseded, and requires installation of AOA probe flat plates, after which the AFM operational procedure must be removed.

You may obtain further information by examining the MCAI in the AD docket.

Other Related Rulemaking

On December 27, 2012, the FAA issued AD 2012–26–51, Amendment 39–17312 (78 FR 1723, January 9, 2013), applicable to all Airbus Model A318, A319, A320, and A321 series airplanes. That AD requires revising the AFM to advise the flight crew of emergency procedures for addressing AOA sensor blockage. The actions required by that AD are intended to prevent reduced control of the airplane.

Relevant Service Information

We reviewed Airbus A330 Temporary Revision TR293, Issue 1.0, dated December 4, 2012, and Airbus A340 Temporary Revision TR294, Issue 1.0, dated December 4, 2012, to the Airbus A330 and A340 Airplane Flight Manuals. The temporary revisions provide information to advise the flight crew of emergency procedures for addressing AOA sensor blockage.

We also reviewed the following service information:

- Airbus Mandatory Service Bulletin A330–34–3293, including Appendix 01, dated January 31, 2013.
- Airbus Mandatory Service Bulletin A340–34–4273, including Appendix 01, dated January 30, 2013.
- Airbus Mandatory Service Bulletin A340–34–5093, including Appendix 01, dated January 30, 2013.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Difference Between the Proposed AD and the MCAI or Service Information

This proposed AD would require operators to revise the AFM within 10 days after the effective date of this AD. The MCAI recommends revising the AFM ''from the effective date of this AD.'' In developing the compliance time for this action, we considered the degree of urgency associated with addressing the subject unsafe condition and the practical aspect of revising the AFM. We have determined that 10 days represents an appropriate interval of time in which to revise the AFM for the affected fleet without adversely affecting the safety of these airplanes.

This difference has been coordinated with the EASA.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 64 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM Revision	1 work-hour × 85 per hour = 85	0	85	5,440
Modification	7 work-hours × 85 per hour = 595	0	595	38,080

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

3. Will not affect intrastate aviation in Alaska; and

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2013–0363; Directorate Identifier 2013–NM–031–AD.

(a) Comments Due Date

We must receive comments by June 17, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the Airbus airplanes, certificated in any category, as identified in paragraphs (c)(1) and (c)(2) of this AD.

(1) Model A330–201, –202, –203, –223, 223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes, all manufacturer serial numbers.

(2) Model A340–211, –212, –213, –311, –312, –313, –541 and –642 airplanes, all manufacturer serial numbers.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 34: Navigation.

(e) Reason

This AD was prompted by a report that an airplane equipped with Angle of Attack (AOA) sensors installed with conic plates recently experienced blockage of all sensors during climb, leading to autopilot disconnection and activation of the alpha protection (Alpha Prot) when Mach number was increased. We are issuing this AD to prevent reduced control 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) Airplane Flight Manual Revision

For airplanes identified in paragraphs (g)(1) and (g)(2) of this AD, except as provided by paragraph (i) of this AD: Within 10 days after the effective date of this AD, revise the Emergency Procedures of the Airbus A330 and A340 Airplane Flight Manuals (AFMs), as applicable, by incorporating Airbus A330 Temporary Revision TR293, Issue 1.0, dated December 4, 2012; or Airbus A340 Temporary Revision TR294, Issue 1.0, dated December 4, 2012; as applicable; to advise the flight crew of emergency procedures for addressing AOA sensor blockage. This can be done by inserting the Airbus A330 Temporary Revision TR293, Issue 1.0, dated December 4, 2012; or Airbus A340 Temporary Revision TR294, Issue 1.0, dated December 4, 2012; into the applicable AFM. When the information in Airbus A330 Temporary Revision TR293, Issue 1.0, dated December 4, 2012; and Airbus A340 Temporary Revision TR294, Issue 1.0, dated December 4, 2012; is included in the general revisions of the applicable AFM, the general revisions may be incorporated into the AFM, and the temporary revisions may be removed.

(1) Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes, all manufacturer serial numbers, on which Airbus modification 201609 or 201610 has been embodied in production; or on which Airbus Service Bulletin A330–34–3255 has been embodied in service.

(2) Model A340–211, –212, –213, –311, –312, –313, –541, and –642 airplanes, all manufacturer serial numbers, on which Airbus modification 201609 or 201610 has been embodied in production; or on which Airbus Service Bulletin A340–34–4250 or A340–34–5081, as applicable, has been embodied in service.

(h) Terminating Replacement

Within 5 months after the effective date of this AD: Replace all AOA sensor conic plates having part number (P/N) F3411060200000 or P/N F3411060900000, with an applicable AOA sensor flat plate identified in paragraph (h)(1) or (h)(2) of this AD. Performing this replacement constitutes terminating action for the AFM revision required by paragraph (g) of this AD; and Airbus A330 Temporary Revision TR293, Issue 1.0, dated December 4, 2012, and Airbus A340 Temporary Revision TR294, Issue 1.0, dated December 4, 2012, to the Airbus A330 and A340 AFMs, as applicable; must be removed from the AFMs before further flight after doing the replacement.

(1) Replace with a flat plate having P/N F3411007920200 or P/N F3411007920300, as applicable, in accordance with the applicable service information specified in paragraph (h)(1)(i), (h)(1)(ii), or (h)(1)(iii) of this AD.

(i) Airbus Mandatory Service Bulletin A330–34–3293, including Appendix 01, dated January 31, 2013.

(ii) Airbus Mandatory Service Bulletin A340–34–4273, including Appendix 01, dated January 30, 2013.

(iii) Airbus Mandatory Service Bulletin A340–34–5093, including Appendix 01, dated January 30, 2013.

(2) Replace with a flat plate having P/N F3411007920000 or P/N F3411007920100, in accordance with a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) or its delegated agent.

(i) Exception to Paragraphs (g) and (h) of This AD

For airplanes on which Airbus Modification 203285 (improve AOA flat plate protection treatment) has been embodied in production: The actions specified in paragraphs (g) and (h) of this AD are not required, provided that, since first flight, no AOA probe conic plate having P/N F3411060200000 or P/N F3411060900000 has been installed.

(j) Parts Installation Prohibition

As of the effective date of this AD, no person may install, on any airplane, an AOA sensor conic plate having P/N F3411060200000 or P/N F3411060900000 or an AOA protection cover having P/N 98D34203003000.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(l) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information EASA Airworthiness Directive 2013–0023, dated February 1, 2013, and the service information specified in paragraphs (l)(1)(i), (l)(1)(ii), (l)(1)(iii), (l)(1)(iv) and (l)(1)(v) of this AD for related service information:

(i) Airbus A330 Temporary Revision TR293, Issue 1.0, dated December 4, 2012.

(ii) Airbus A340 Temporary Revision TR294, Issue 1.0, dated December 4, 2012.

(iii) Airbus Mandatory Service Bulletin A330–34–3293, including Appendix 01, dated January 31, 2013.

(iv) Airbus Mandatory Service Bulletin A340–34–4273, including Appendix 01, dated January 30, 2013.

(v) Airbus Mandatory Service Bulletin A340–34–5093, including Appendix 01, dated January 30, 2013.

(2) For service information identified in this proposed AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330–A340@airbus.com;* Internet *http://www.airbus.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.

Issued in Renton, Washington, on April 23, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–10486 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0362; Directorate Identifier 2013–NM–030–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 727 airplanes. This proposed AD was prompted by an evaluation by the design approval holder (DAH) indicating that the frame-to-floor beam attachment is subject to widespread fatigue damage (WFD). This proposed AD would require repetitive high frequency eddy current inspections for any crack of the frames at body station (STA) 188 through STA 344, and repair if necessary. We are proposing this AD to detect and correct fatigue cracking at the frame-to-floor beam attachment, on both the left- and right-sides, which could result in reduced structural integrity of the airplane, and decompression of the cabin.

DATES: We must receive comments on this proposed AD by June 17, 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 proposed 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, Washington 98057–3356. 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 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: Chandra Ramdoss, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: (562) 627–5239; fax: (562) 627–5210; email: *chandraduth.ramdoss@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about

this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0362; Directorate Identifier 2013–NM–030–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

Structural fatigue damage is progressive. It begins as minute cracks, and those cracks grow under the action of repeated stresses. This can happen because of normal operational conditions and design attributes, or because of isolated situations or incidents such as material defects, poor fabrication quality, or corrosion pits, dings, or scratches. Fatigue damage can occur locally, in small areas or structural design details, or globally. Global fatigue damage is general degradation of large areas of structure with similar structural details and stress levels. Multiple-site damage is global damage that occurs in a large structural element such as a single rivet line of a lap splice joining two large skin panels. Global damage can also occur in multiple elements such as adjacent frames or stringers. Multiple-site-damage and multiple-element-damage cracks are typically too small initially to be reliably detected with normal inspection methods. Without intervention, these cracks will grow, and eventually compromise the structural integrity of the airplane, in a condition known as widespread fatigue damage (WFD). As an airplane ages, WFD will likely occur, and will certainly occur if the airplane is operated long enough without any intervention.

The FAA's WFD final rule (75 FR 69746, November 15, 2010) became effective on January 14, 2011. The WFD rule requires certain actions to prevent structural failure due to WFD throughout the operational life of certain existing transport category airplanes and all of these airplanes that will be certificated in the future. For existing and future airplanes subject to the WFD rule, the rule requires that DAHs establish a limit of validity (LOV) of the engineering data that support the structural maintenance program. Operators affected by the WFD rule may not fly an airplane beyond its LOV, unless an extended LOV is approved.

The WFD rule (75 FR 69746, November 15, 2010) does not require identifying and developing maintenance actions if the DAHs can show that such actions are not necessary to prevent WFD before the airplane reaches the LOV. Many LOVs, however, do depend on accomplishment of future maintenance actions. As stated in the WFD rule, any maintenance actions necessary to reach the LOV will be mandated by airworthiness directives through separate rulemaking actions.

In the context of WFD, this action is necessary to enable DAHs to propose LOVs that allow operators the longest operational lives for their airplanes, and still ensure that WFD will not occur. This approach allows for an implementation strategy that provides flexibility to DAHs in determining the timing of service information development (with FAA approval), while providing operators with certainty regarding the LOV applicable to their airplanes.

Cracks were discovered in the frame web common to the floor beam attachment during a Model 727 extended pressure test. Using the extended pressure test results, a WFD assessment was performed for fuselage frames common to the floor beam attachments. The result of the assessment is a recommendation for an inspection program for the section 41 frame fastener holes in the area of the floor beam attachments. Frame cracking could adversely affect the integrity of the airplane structure. Extended frame cracking could lead to complete fracture of the frame, which may result in damage to the skin and cause a possible decompression.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 727–53–0234, dated January 17, 2013. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2013–0362.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

This proposed AD would require that requests for approval of alternative methods of compliance (AMOCs) be directed to the Seattle Aircraft Certification Office.

Differences Between the Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 727–53–0234, dated January 17, 2013, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 106 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	118 work-hours × $85 per hour = $10,030 per inspection cycle.	$0	$10,030 per inspection cycle.	$1,063,180 per inspection cycle

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2013–0362; Directorate Identifier 2013–NM–030–AD.

(a) Comments Due Date

We must receive comments by June 17, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 727, 727C, 727–100, 727–100C, 727–200, and 727–200F series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 727–53–0234, dated January 17, 2013.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Unsafe Condition

This AD was prompted by an evaluation by the design approval holder (DAH) indicating that the frame-to-floor beam attachment is subject to widespread fatigue damage (WFD). We are issuing this AD to detect and correct fatigue cracking at the frame-to-floor beam attachment, on both the left- and right-sides, which could result in reduced structural integrity of the airplane, and decompression of the cabin.

(f) Compliance

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

(g) Inspection and Repair

Before the accumulation of 61,000 total flight cycles, or within 24 months after the effective date of this AD, whichever occurs later, do a high frequency eddy current inspection for cracking of the frames (for certain stations), in the area of the floor beam attachments on both the left- and right-sides of the airplane, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 727–53–0234, dated January 17, 2013. Repeat this inspection thereafter at intervals not to exceed 20,000 flight cycles. If any crack is found during any inspection required by this AD, before further flight, repair the crack using a method approved in accordance with the procedures specified in paragraph (h) of this AD.

(h) 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 paragraph (i)(2) of 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 Aircraft Certification Office (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.

(i) Related Information

(1) For more information about this AD, contact Chandra Ramdoss, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: (562) 627–5239; fax: (562) 627–5210; email: *chandraduth.ramdoss@faa.gov.*

(2) For information about AMOCs, contact Berhane Alazar, Aerospace Engineer, Seattle ACO, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6577; fax: 425–917–6590; email: *berhane.alazar@faa.gov.*

(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.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98057–3356. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on April 23, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–10487 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 435

RIN 3084–AB07

Mail or Telephone Order Merchandise Rule; Staff Report

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Staff report; notice of availability.

SUMMARY: The FTC announces the publication of the Staff Report on the Mail or Telephone Order Merchandise Rule (''MTOR'' or ''Rule''). The Staff Report sets forth the staff's recommendations to the Commission on the various proposed amendments to the MTOR.

DATES: Comments on the Staff Report must be received on or before July 15, 2013.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''16 CFR Part 435—Mail or Telephone Order Merchandise'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/mtorstaffreport* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex N), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Jock Chung, (202) 326–2984, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room M–8102B, 600 Pennsylvania Ave. NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The MTOR prohibits sellers from soliciting mail or telephone order sales unless sellers have a reasonable basis to expect that they will be able to ship, after receipt of a properly completed order, the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days. The MTOR further requires a seller to seek the buyer's consent to the delayed shipment when the seller learns that it cannot ship within the time stated or, if no time is stated, within 30 days. If the buyer does not consent, the seller must promptly refund all money paid for the unshipped merchandise.

On September 11, 2007, as part of its rule review process,[1] the Commission published a request for public comment,[2] which also served as an Advance Notice of Proposed Rulemaking.[3] It then published a Notice of Proposed Rulemaking (ANPRM'') in 2011.[4]

Pursuant to the Commission's Rules of Practice, and the rulemaking procedures specified earlier in the NPRM, the Commission now announces the availability of the Staff Report on the MTOR. The Staff Report summarizes the rulemaking record to date, and sets forth the staff's recommendation that the Commission revise the Rule to respond to new methods of accessing the Internet and making payments and refunds. The Staff Report has not been endorsed or adopted by the Commission.

The Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule for the Mail or Telephone Order Merchandise Rule is available at the FTC's Web site at *http://www.ftc.gov/ftc/regreview/index.shtml.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

The Commission invites interested parties to submit written data, views, and arguments on the recommendations announced by the Staff Report by following the instructions in the **ADDRESSES** section of this notice. Comments previously submitted in the ongoing rulemaking procedures are already part of the rulemaking record and need not be repeated.

I. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before July 15, 2013. Write ''16 CFR Part 435—Mail or Telephone Order Merchandise'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, such as anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment doesn't include any sensitive health information, such as medical records or other individually identifiable health information. In addition, don't include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, don't include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[5] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/mtorstaffreport* by following the instruction on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''16 CFR Part 435—Mail or Telephone Order Merchandise'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the

[1] The Commission reviews all its rules and guides periodically to ensure that they remain relevant. These periodic reviews seek information about the costs and benefits of the Commission's rules and guides as well as their economic and regulatory impact. The information obtained assists the Commission in identifying rules and guides that warrant modification or rescission.

[2] 72 FR 51728 (Sept. 11, 2007).

[3] 15 U.S.C. 57a(b)(2)(A).

[4] 76 FR 60765 (Sept. 30, 2011).

[5] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Secretary, Room H–113 (Annex N), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before July 15, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Upon completion of the comment period, the staff will make final recommendations to the Commission about the Rule. If the Commission adopts the proposed revised Rule as recommended by the staff, or alternatively determines to make changes to the proposed revised Rule, it will publish in a future **Federal Register** notice the final text of the Rule, statement of Basis and Purpose on the Rule, and an announcement of when the revised Rule will become effective.

II. Communications to Commissioners and Commissioner Advisors by Outside Parties

Pursuant to Commission Rule 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the end of the comment period on the Staff Report. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of ''Sunshine'' Meetings.[6]

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2013–10405 Filed 5–2–13; 8:45 am]

BILLING CODE 6750–01–P

[6] *See* 15 U.S.C. 57a(i)(2)(A), 45 FR 50814 (1980), 45 FR 78626 (1980).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–125398–12]

RIN 1545–BL43

Minimum Value of Eligible Employer-Sponsored Plans and Other Rules Regarding the Health Insurance Premium Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the health insurance premium tax credit enacted by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, as amended by the Medicare and Medicaid Extenders Act of 2010, the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, and the Department of Defense and Full-Year Continuing Appropriations Act, 2011. These proposed regulations affect individuals who enroll in qualified health plans through Affordable Insurance Exchanges (Exchanges) and claim the premium tax credit, and Exchanges that make qualified health plans available to individuals and employers. These proposed regulations also provide guidance on determining whether health coverage under an eligible employer-sponsored plan provides minimum value and affect employers that offer health coverage and their employees.

DATES: Written (including electronic) comments and requests for a public hearing must be received by July 2, 2013.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–125398–12), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–125398–12), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–125398–12).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Andrew S. Braden, (202) 622–4960; concerning the submission of comments and/or requests for a public hearing, Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free calls).

SUPPLEMENTARY INFORMATION:

Background

Beginning in 2014, under the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)), and the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)) (collectively, the Affordable Care Act), eligible individuals who purchase coverage under a qualified health plan through an Affordable Insurance Exchange may receive a premium tax credit under section 36B of the Internal Revenue Code (Code). Section 36B was subsequently amended by the Medicare and Medicaid Extenders Act of 2010, Public Law 111–309 (124 Stat. 3285 (2010)); the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, Public Law 112–9 (125 Stat. 36 (2011)); and the Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112–10 (125 Stat. 38 (2011)).

Notice 2012–31 (2012–20 IRB 910) requested comments on methods for determining whether health coverage under an eligible employer-sponsored plan provides minimum value (MV). Final regulations under section 36B (TD 9590) were published on May 23, 2012 (77 FR 30377). The final regulations requested comments on issues to be addressed in further guidance. The comments have been considered in developing these proposed regulations.

Minimum Value

Individuals generally may not receive a premium tax credit if they are eligible for affordable coverage under an eligible employer-sponsored plan that provides MV. An applicable large employer (as defined in section 4980H(c)(2)) may be liable for an assessable payment under section 4980H if a full-time employee receives a premium tax credit.

Under section 36B(c)(2)(C)(ii), a plan fails to provide MV if the plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of the costs. Section 1302(d)(2)(C) of the Affordable Care Act provides that, in determining the percentage of the total allowed costs of benefits provided under a group health plan, the regulations promulgated by the Secretary of Health and Human Services (HHS) under section 1302(d)(2) apply.

HHS published final regulations under section 1302(d)(2) on February 25, 2013 (78 FR 12834). The HHS regulations at 45 CFR 156.20 define the percentage of the total allowed costs of

benefits provided under a group health plan as (1) The anticipated covered medical spending for essential health benefits (EHB) coverage (as defined in 45 CFR 156.110(a)) paid by a health plan for a standard population, (2) computed in accordance with the plan's cost-sharing, and (3) divided by the total anticipated allowed charges for EHB coverage provided to a standard population. In addition, 45 CFR 156.145(c) provides that the standard population used to compute this percentage for MV (as developed by HHS for this purpose) reflects the population covered by typical self-insured group health plans.

The HHS regulations describe several options for determining MV. Under 45 CFR 156.145(a)(1), plans may use the MV Calculator (available at *http://cciio.cms.gov/resources/regulations/index.html*). Alternatively, 45 CFR 156.145(a)(2) provides that a plan may determine MV through a safe harbor established by HHS and IRS. For plans with nonstandard features that are incompatible with the MV Calculator or a safe harbor, 45 CFR 156.145(a)(3) provides that the plan may determine MV through an actuarial certification from a member of the American Academy of Actuaries after performing an analysis in accordance with generally accepted actuarial principles and methodologies. Finally, 45 CFR 156.145(a)(4) provides that a plan in the small group market satisfies MV if it meets the requirements for any of the levels of metal coverage defined at 45 CFR 156.140(b) (bronze, silver, gold, or platinum).

Miscellaneous Provisions Under Section 36B

To be eligible for a premium tax credit, an individual must be an applicable taxpayer. Under section 36B(c)(1), an applicable taxpayer is a taxpayer whose household income for the taxable year is between 100 percent and 400 percent of the federal poverty line (FPL) for the taxpayer's family size.

Section 36B(b)(1) provides that the premium assistance credit amount is the sum of the premium assistance amounts for all coverage months in the taxable year for individuals in the taxpayer's family. The premium assistance amount for a coverage month is the lesser of (1) the premiums for the month for one or more qualified health plans that cover a taxpayer or family member, or (2) the excess of the adjusted monthly premium for the second lowest cost silver plan (as described in section 1302(d)(1)(B) of the Affordable Care Act (42 U.S.C. 18022(d)(1)(B)) (the benchmark plan) that applies to the taxpayer over 1/12 of the product of the taxpayer's household income and the applicable percentage for the taxable year. The adjusted monthly premium, in general, is the premium an insurer would charge for the plan adjusted only for the ages of the covered individuals.

Under section 36B(c)(2)(A), a coverage month is any month for which the taxpayer or a family member is covered by a qualified health plan enrolled in through an Exchange and the premium is paid by the taxpayer or through an advance credit payment. Section 36B(c)(2) provides that a month is not a coverage month for an individual who is eligible for other minimum essential coverage. If the other coverage is eligible employer-sponsored coverage, however, it is treated as minimum essential coverage only if it is affordable and provides MV. Eligible employer-sponsored coverage is affordable for an employee and related individuals if the portion of the annual premium the employee must pay for self-only coverage does not exceed the required contribution percentage (9.5 percent for taxable years beginning before January 1, 2015) of the taxpayer's household income. The MV requirement is discussed in the Explanation of Provisions.

Any arrangement under which employees are required, as a condition of employment or otherwise, to be enrolled in an employer-sponsored plan that does not provide minimum value or is unaffordable, and that does not give the employees an effective opportunity to terminate or decline the coverage, raises a variety of issues. Proposed regulations under section 4980H indicate that if an employer maintains such an arrangement it would not be treated as having made an offer of coverage. As a result, an applicable large employer could be subject to an assessable payment under that section. See Proposed § 54.4980H–4(b), 78 FR 250 (January 2, 2013). Such an arrangement would also raise additional concerns. For example, it is questionable whether the law permits interference with an individual's ability to apply for a section 36B premium tax credit by seeking to involuntarily impose coverage that does not provide minimum value. (See, for example, the Fair Labor Standards Act, as amended by section 1558 of the Affordable Care Act, 29 U.S.C. 218c(a).) If an employer sought to involuntarily impose on its employees coverage that did not provide minimum value or was unaffordable, the IRS and Treasury, as well as other relevant departments, may treat such arrangements as impermissible interference with an employee's ability to access premium tax credits, as contemplated by the Affordable Care Act.

Explanation of Provisions and Summary of Comments

1. Minimum Value

a. In General

The proposed regulations refer to the proportion of the total allowed costs of benefits provided to an employee that are paid by the plan as the plan's MV percentage. The MV percentage is determined by dividing the cost of certain benefits (described in paragraph b.) the plan would pay for a standard population by the total cost of certain benefits for the standard population, including amounts the plan pays and amounts the employee pays through cost-sharing, and then converting the result to a percentage.

b. Health Benefits Measured in Determining MV

Commentators sought clarification of the health benefits considered in determining the share of benefit costs paid by a plan. Some commentators maintained that MV should be based on the plan's share of the cost of coverage for all EHBs, including those a plan does not offer. Other commentators suggested that the MV percentage should be based on the plan's share of the costs of only those categories of EHBs the plan covers.

The proposed regulations do not require employer-sponsored self-insured and insured large group plans to cover every EHB category or conform their plans to an EHB benchmark that applies to qualified health plans. The preamble to the HHS regulations (see 78 FR 12833) notes that employer-sponsored group health plans are not required to offer EHBs unless they are health plans offered in the small group market subject to section 2707(a) of the Public Health Service Act. The preamble also states that, under section 1302(d)(2) of the Affordable Care Act, MV is measured based on the provision of EHBs to a standard population and plans may account for any benefits covered by the employer that also are covered in any one of the EHB-benchmark plans. See 45 CFR 156.145(b)(2).

Consistent with 45 CFR 156.145(a)-(c) and the assumptions described in Notice 2012–31, these proposed regulations provide that MV is based on the anticipated spending for a standard population. The plan's anticipated spending for benefits provided under any particular EHB-benchmark plan for any State counts towards MV.

c. Health reimbursement arrangements, health savings accounts, and wellness program incentives

i. Arrangements That Reduce Cost-Sharing

Some commentators suggested that current year health savings account (HSA) contributions and amounts newly made available under a health reimbursement arrangement (HRA) should be fully counted toward the plan's share of costs included in calculating MV. Some commentators suggested that only HRA contributions that may be used to pay for cost sharing and not HRAs restricted to other uses should be counted in the MV calculation.

Consistent with 45 CFR 156.135(c), the proposed regulations provide that all amounts contributed by an employer for the current plan year to an HSA are taken into account in determining the plan's share of costs for purposes of MV and are treated as amounts available for first dollar coverage. Amounts newly made available under an HRA that is integrated with an eligible employer-sponsored plan for the current plan year count for purposes of MV in the same manner if the amounts may be used only for cost-sharing and may not be used to pay insurance premiums. It is anticipated that regulations will provide that whether an HRA is integrated with an eligible employer-sponsored plan is determined under rules that apply for purposes of section 2711 of the Public Health Service Act (42 U.S.C. 300gg-11). Commentators offered differing opinions about how nondiscriminatory wellness program incentives that may affect an employee's cost sharing should be taken into account for purposes of the MV calculation. Some commentators noted that the rules governing wellness incentives require that they be available to all similarly situated individuals. These commentators suggested that because eligible individuals have the opportunity to reduce their cost-sharing if they choose, a plan's share of costs should be based on the costs paid by individuals who satisfy the terms of the wellness program. Other commentators expressed concern that, despite the safeguards of the regulations governing wellness incentives, certain individuals inevitably will face barriers to participation and fail to qualify for rewards. These commentators suggested that a plan's share of costs should be determined without assuming that individuals would qualify for the reduced cost-sharing available under a wellness program.

The proposed regulations provide that a plan's share of costs for MV purposes is determined without regard to reduced cost-sharing available under a nondiscriminatory wellness program. However, for nondiscriminatory wellness programs designed to prevent or reduce tobacco use, MV may be calculated assuming that every eligible individual satisfies the terms of the program relating to prevention or reduction of tobacco use. This exception is consistent with other Affordable Care Act provisions (such as the ability to charge higher premiums based on tobacco use) reflecting a policy about individual responsibility regarding tobacco use.

ii. Arrangements That Reduce Premiums

Section 36B(c)(2)(C)(i)(II) and the final regulations provide that eligible employer-sponsored coverage is affordable only if an employee's required contribution for self-only coverage does not exceed 9.5 percent of household income. The preamble to the final regulations indicated that rules for determining how HRAs and wellness program incentives are counted in determining the affordability of eligible employer-sponsored coverage would be provided in later guidance.

Some commentators asserted that an employer's entire annual contribution to an HRA plus prior year contributions should be taken into account in determining affordability. The proposed regulations provide that amounts newly made available under an HRA that is integrated with an eligible employer-sponsored plan for the current plan year are taken into account only in determining affordability if the employee may use the amounts only for premiums or may choose to use the amounts for either premiums or cost-sharing. Treating amounts that may be used either for premiums or cost-sharing only towards affordability prevents double counting the HRA amounts when assessing MV and affordability of eligible employer-sponsored coverage.

It is anticipated that regulations under section 5000A will provide that amounts newly made available under an HRA that is integrated with an eligible employer-sponsored plan for the current plan year are also taken into account for purposes of the affordability exemption under section 5000A(e)(1) if the employee may use the amounts only for premiums or for either premiums or cost-sharing.

The final regulations requested specific comments on the nature of wellness incentives and how they should be treated for determining affordability. Commentators expressed similar views about the treatment of wellness incentives that affect the cost of premiums as about the treatment of wellness incentives that affect cost-sharing.

Like the rule for determining MV, the proposed regulations provide that the affordability of an employer-sponsored plan is determined by assuming that each employee fails to satisfy the requirements of a wellness program, except the requirements of a nondiscriminatory wellness program related to tobacco use. Thus, the affordability of a plan that charges a higher initial premium for tobacco users will be determined based on the premium that is charged to non-tobacco users, or tobacco users who complete the related wellness program, such as attending smoking cessation classes.

In many circumstances these rules relating to the effect of premium-related wellness program rewards on affordability will have no practical consequences. They matter only when the employer sets the level of the employee's required contribution to self-only premium, and establishes a wellness program that provides for a level of premium discount, in such a manner that the employee's required contribution to premium would exceed 9.5 percent of household income (or wages, under an affordability safe harbor under the section 4980H proposed regulations) but for the potential premium discount under the wellness program. If, for example, the employee's household income was at least $25,000, and the employee's required contribution for self-only coverage did not exceed $2,375 (9.5 percent of $25,000), the coverage would be affordable whether or not a wellness premium discount was taken into account to reduce the $2,375 required contribution.

It is anticipated that regulations under section 5000A will provide that nondiscriminatory wellness programs that affect premiums will be treated for purposes of the affordability exemption under section 5000A(e)(1) in the same manner as they are treated for purposes of determining affordability under section 36B.

Solely for purposes of applying section 4980H and solely for plan years of an employer's group health plan beginning before January 1, 2015, with respect to an employee described in the next sentence, an employer will not be subject to an assessable payment under section 4980H(b) with respect to an employee who received a premium tax credit because the offer of coverage was not affordable or did not satisfy MV, if the offer of coverage to the employee under the employer's group health plan would have been affordable or would

have satisfied MV based on the total required employee premium and cost-sharing for that group health plan that would have applied to the employee if the employee satisfied the requirements of any wellness program described in the next sentence, including a wellness program with requirements unrelated to tobacco use. The rule in the preceding sentence applies only (1) To the extent of the reward as of May 3, 2013, expressed as either a dollar amount or a fraction of the total required employee contribution to the premium (or the employee cost-sharing, as applicable), (2) under the terms of a wellness program as in effect on May 3, 2013, and (3) with respect to an employee who is in a category of employees eligible under the terms of the wellness program as in effect on May 3, 2013 (regardless of whether the employee was hired before or after that date). Any required employee contribution to premium determined based upon assumed satisfaction of the requirements of a wellness program available under this transition relief may be applied to the use of an affordability safe harbor provided in the proposed regulations under section 4980H.

d. Standard Population and Utilization

Consistent with 45 CFR 156.145(c), the proposed regulations provide that the standard population used to determine MV reflects the population covered by self-insured group health plans. HHS has developed the MV standard population and described it through summary statistics (for example, continuance tables). MV continuance tables and an explanation of the MV Calculator methodology and the health claims data HHS has used to develop the continuance tables are available at *http://cciio.cms.gov/resources/regulations/index.html.*

e. Methods for Determining Minimum Value

Notice 2012–31 and 45 CFR 156.145(a) describe several methods for determining MV: the MV Calculator, a safe harbor, actuarial certification, and, for small group market plans, a metal level. Some commentators requested that plans be allowed to choose one of the four methods in determining MV. Other commentators favored requiring employers to use the most precise method for plans that may be close to the 60 percent threshold.

The proposed regulations provide that taxpayers may determine whether a plan provides MV by using the MV Calculator made available by HHS and the IRS. Taxpayers must use the MV Calculator to measure standard plan features (unless a safe harbor applies), but the percentage may be adjusted based on an actuarial analysis of plan features that are outside the parameters of the calculator.

Certain safe harbor plan designs that satisfy MV will be specified in additional guidance under section 36B or 4980H, see § 601.601(d). It is anticipated that the guidance will provide that the safe harbors are examples of plan designs that clearly would satisfy the 60 percent threshold if measured using the MV Calculator. The safe harbors are intended to provide an easy way for sponsors of typical employer-sponsored group health plans to determine whether a plan meets the MV threshold without having to use the MV Calculator.

Plan designs meeting the following specifications are proposed as safe harbors for determining MV if the plans cover all of the benefits included in the MV Calculator: (1) A plan with a $3,500 integrated medical and drug deductible, 80 percent plan cost-sharing, and a $6,000 maximum out-of-pocket limit for employee cost-sharing; (2) a plan with a $4,500 integrated medical and drug deductible, 70 percent plan cost-sharing, a $6,400 maximum out-of-pocket limit, and a $500 employer contribution to an HSA; and (3) a plan with a $3,500 medical deductible, $0 drug deductible, 60 percent plan medical expense cost-sharing, 75 percent plan drug cost-sharing, a $6,400 maximum out-of-pocket limit, and drug co-pays of $10/$20/$50 for the first, second and third prescription drug tiers, with 75 percent coinsurance for specialty drugs. Comments are requested on these and other common plan designs that would satisfy MV and should be designated as safe harbors.

Consistent with 45 CFR 156.145(a), the proposed regulations require plans with nonstandard features that cannot determine MV using the MV Calculator or a safe harbor to use the actuarial certification method. The actuary must be a member of the American Academy of Actuaries and must perform the analysis in accordance with generally accepted actuarial principles and methodologies and any additional standards that subsequent guidance requires.

f. Other Issues

Commentators suggested a de minimis exception to the MV 60 percent level of coverage, noting that similar de minimis variations are permitted in determining actuarial value for qualified health plans. However, as other commentators noted, permitting a de minimis exception would have the effect of lowering the minimum level of coverage to a percentage below 60 percent. Under section 36B(c)(2)(C)(ii), coverage below 60 percent does not provide MV. Accordingly, the proposed regulations do not provide for a de minimis exception.

2. Miscellaneous Issues Under Section 36B

a. Definition of Modified Adjusted Gross Income

Section 36B(d)(2) provides that the term *household income* means the modified adjusted gross income of the taxpayer plus the modified adjusted gross income of all members of the taxpayer's family required to file a tax return under section 1 for the taxable year. The final regulations provide that the determination of whether a family member is required to file a return is made without regard to section 1(g)(7). Under section 1(g)(7), a parent may, if certain requirements are met, elect to include in the parent's gross income, the gross income of his or her child. If the parent makes the election, the child is treated as having no gross income for the taxable year.

The proposed regulations remove ''without regard to section 1(g)(7)'' from the final regulations because that language implies that the child's gross income is included in both the parent's adjusted gross income and the child's adjusted gross income in determining household income. Thus, the proposed regulations clarify that if a parent makes an election under section 1(g)(7), household income includes the child's gross income included on the parent's return and the child is treated as having no gross income.

b. Rating Area

Section 36B(b)(3)(B) determines the applicable benchmark plan by reference to the rating area where a taxpayer resides. The final regulations reserved the definition of *rating area.* The proposed regulations provide that the term *rating area* has the same meaning as used in section 2701(a)(2) of the Public Health Service Act (42 U.S.C. 300gg) and 45 CFR 156.255.

c. Retiree Coverage

The section 36B final regulations provide that an individual who may enroll in continuation coverage required under Federal law or a State law that provides comparable continuation coverage is eligible for minimum essential coverage only for months that the individual is enrolled in the coverage. These proposed regulations apply this rule to former employees

only. Active employees eligible for continuation coverage as a result of reduced hours should be subject to the same rules for eligibility of affordable employer-sponsored coverage offering MV as other active employees. The proposed regulations add a comparable rule for health coverage offered to retired employees (retiree coverage). Accordingly, an individual who may enroll in retiree coverage is eligible for minimum essential coverage under the coverage only for the months the individual is enrolled in the coverage.

d Coverage Month for Newborns and New Adoptees

Under section 36B(c)(2)(A)(i) and the final regulations, a month is a coverage month for an individual only if, as of the first day of the month, the individual is enrolled in a qualified health plan through an Exchange. A child born or adopted during the month is not enrolled in coverage on the first day and therefore would not be eligible for the premium tax credit or cost-sharing reductions for that month. Accordingly, the proposed regulations provide that a child enrolled in a qualified health plan in the month of the child's birth, adoption, or placement with the taxpayer for adoption or in foster care, is treated as enrolled as of the first day of the month.

e. Adjusted Monthly Premium for Family Members Enrolled for Less Than a Full Month

Under section 36B(c), the premium assistance amount for a coverage month is computed by reference to the adjusted monthly premium for an applicable benchmark plan. The final regulations provide that the applicable benchmark plan is the plan that applies to a taxpayer's coverage family. The final regulations do not address whether changes to a coverage family, for example as the result of the birth and enrollment of a child or the disenrollment of another family member, that occur during the month affect the premium assistance amount. The proposed regulations provide that the adjusted monthly premium is determined as if all members of the coverage family for that month were enrolled in a qualified health plan for the entire month.

f. Premium Assistance Amount for Partial Months of Coverage

The final regulations do not address the computation of the premium assistance amount if coverage under a qualified health plan is terminated during the month. The proposed regulations provide that when coverage under a qualified health plan is terminated before the last day of a month and, as a result, the issuer reduces or refunds a portion of the monthly premium the premium assistance amount for the month is prorated based on the number of days of coverage in the month.

g. Family Members Residing at Different Locations

The final regulations reserved rules on determining the premium for the applicable benchmark plan if family members are geographically separated and enroll in separate qualified health plans. The proposed regulations provide that the premium for the applicable benchmark plan in this situation is the sum of the premiums for the applicable benchmark plans for each group of family members residing in a different State.

h. Correction to Applicable Percentage Table

The applicable percentage table in the final regulations erroneously states that the 9.5 percentage applies only to taxpayers whose household income is less than 400 percent of the FPL. The proposed regulations clarify that the 9.5 percentage applies to taxpayers whose household income is not more than 400 percent of the FPL.

i. Additional Benefits and Applicable Benchmark Plan

Under section 36B(b)(3)(D) and the final regulations, only the portion of the premium for a qualified health plan properly allocable to EHBs determines a taxpayer's premium assistance amount. Premiums allocable to benefits other than EHBs (additional benefits) are disregarded. The final regulations do not address, however, whether a taxpayer's benchmark plan is determined before or after premiums have been allocated to additional benefits. The proposed regulations provide that premiums are allocated to additional benefits before determining the applicable benchmark plan. Thus, only essential health benefits are considered in determining the applicable benchmark plan, consistent with the requirement in section 36B(b)(3)(D) that only essential health benefits are considered in determining the premium assistance amount. In addition, allocating premium to benefits that exceed EHBs before determining the applicable benchmark plan results in a more accurate determination of the premium assistance amount.

j. Requirement To File a Return To Reconcile Advance Credit Payments

The final regulations provided that a taxpayer who receives advance credit payments must file an income tax return for that taxable year on or before the fifteenth day of the fourth month following the close of the taxable year. Under the proposed regulations, a taxpayer who receives advance credit payments must file an income tax return on or before the due date for the return (including extensions).

Effective/Applicability Date

These regulations are proposed to apply for taxable years ending after December 31, 2013. Taxpayers may apply the proposed regulations for taxable years ending before January 1, 2015.

Special Analyses

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 regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the ''Addresses'' heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are Andrew S. Braden, Frank W. Dunham III, and

Stephen J. Toomey of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in the development of the regulations.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.36B–0 is amended by:
■ 1. Revising the introductory text.
■ 2. Adding new entries for §§ 1.36B–2(c)(3)(iv) and (c)(3)(v)(A)(*5*) and 1.36B–3(c)(2) and (3), and (d)(1), (2), and (3).
■ 3. Revising the entries for §§ 1.36B–2(c)(3)(v)(A)(*4*) and 1.36B–3(c)(4).
■ 4. Adding new entries for § 1.36B–6.

The revisions and additions read as follows.

§ 1.36B–0 Table of contents.

This section lists the captions contained in §§ 1.36B–1 through 1.36B–6.

* * * * *

§ 1.36B–2 Eligibility for premium tax credit.

* * * * *

(c) * * *
(3) * * *
(iv) Post-employment coverage.
(v) * * *
(A) * * *
(*4*) Wellness incentives.
(*5*) Employer contributions to health reimbursement arrangements.

* * * * *

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

* * * * *

(c) * * *
(2) Child born or adopted during a month.
(3) Premiums paid for a taxpayer.
(4) Examples.
(d) * * *
(1) In general.
(2) Mid-month termination of coverage.
(3) Example.

* * * * *

§ 1.36B–6 Minimum value.

(a) In general.
(b) MV standard population.
(c) MV percentage.
(1) In general.
(2) Wellness incentives.
(i) In general.
(ii) Example.
(3) Health savings accounts.
(4) Health reimbursement arrangements.
(5) Expected spending adjustments for health savings accounts and health reimbursement arrangements.
(d) Methods for determining MV.
(e) Scope of essential health benefits and adjustment for benefits not included in MV Calculator.
(f) Actuarial certification.
(1) In general.
(2) Membership in American Academy of Actuaries.
(3) Actuarial analysis.
(4) Use of MV Calculator.
(g) Effective/applicability date.

■ **Par. 3.** Section 1.36B–1 is amended by revising paragraph (e)(1)(ii)(B) and adding paragraph (n) to read as follows:

§ 1.36B–1 Premium tax credit definitions.

* * * * *

(e) * * *
(1) * * *
(ii) * * *
(B) Are required to file a return of tax imposed by section 1 for the taxable year.

* * * * *

(n) *Rating area.* The term *rating area* has the same meaning as used in section 2701(a)(2) of the Public Health Service Act (42 U.S.C. 300gg(a)(2)) and 45 CFR 156.255.

* * * * *

■ **Par. 4.** Section 1.36B–2 is amended by:
■ 1. Revising paragraphs (c)(3)(iv), (c)(3)(v)(A)(*4*), and (c)(3)(vi).
■ 2. Adding paragraphs (c)(3)(v)(A)(*5*) and (c)(3)(v)(D), Example 9.

The revisions and additions read as follows:

§ 1.36B–2 Eligibility for premium tax credit.

* * * * *

(c) * * *
(3) * * *
(iv) *Post-employment coverage.* A former employee who may enroll in continuation coverage required under Federal law or a State law that provides comparable continuation coverage, and an individual who may enroll in retiree coverage under an eligible employer-sponsored plan, are eligible for minimum essential coverage under this coverage only for months that the individual is enrolled in the coverage.

* * * * *

(v) * * *
(A) * * *
(*4*) *Wellness incentives.* Nondiscriminatory wellness program incentives offered by an eligible employer-sponsored plan that affect premiums are treated as earned in determining an employee's required contribution for purposes of affordability of an eligible employer-sponsored plan to the extent the incentives relate to tobacco use. Wellness program incentives that do not relate to tobacco use are treated as not earned for this purpose.
(*5*) *Employer contributions to health reimbursement arrangements.* Amounts newly made available for the current plan year under a health reimbursement arrangement that is integrated with an eligible employer-sponsored plan and that an employee may use to pay premiums are counted toward the employee's required contribution.

* * * * *

(D) * * *

Example 9. Wellness incentives. (i) Employer X offers an eligible employer-sponsored plan with a nondiscriminatory wellness program that reduces premiums by $300 for employees who do not use tobacco products or who complete a smoking cessation course. Premiums are reduced by $200 if an employee completes cholesterol screening within the first six months of the plan year. Employee B does not use tobacco and the cost of his premiums is $3,700. Employee C uses tobacco and the cost of her premiums is $4,000.

(ii) Under paragraph (c)(3)(v)(A)(*4*) of this section, only the incentives related to tobacco use are counted toward the premium amount used to determine the affordability of X's plan. C is treated as having earned the $300 incentive for attending a smoking cessation course. Thus, the employee's required contribution to premium for determining affordability for both Employees B and C is $3,700. The $200 incentive for completing cholesterol screening is disregarded.

(vi) *Minimum value.* See § 1.36B–6 for rules for determining whether an eligible employer-sponsored plan provides minimum value.

* * * * *

■ **Par. 5.** Section 1.36B–3 is amended by:
■ 1. Redesignating paragraphs (c)(2) and (c)(3) as paragraphs (c)(3) and (c)(4) and adding a new paragraph (c)(2).
■ 2. Revising paragraphs (d), (g)(2), (j)(1), and (j)(3).
■ 3. Adding a sentence to the end of paragraph (e).
■ 4. Adding paragraph (f)(4).

The revisions and additions read as follows:

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

* * * * *

(c) * * *
(2) *Child born or adopted during a month.* A child enrolled in a qualified

health plan in the month of the child's birth, adoption, or placement with the taxpayer for adoption or in foster care, is treated as enrolled as of the first day of the month for purposes of this paragraph (c).

* * * * *

(d) *Premium assistance amount*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, the premium assistance amount for a coverage month is the lesser of—

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

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

(2) *Mid-month termination of coverage.* If a qualified health plan is terminated before the last day of a month and, as a result, the issuer reduces or refunds a portion of the monthly premium, the premium assistance amount for the coverage month is the amount that would apply under paragraph (d)(1) of this section for the entire month multiplied by a fraction, the numerator of which is the number of days of enrollment in the month and the denominator of which is the number of days in the month.

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

Example. (i) Taxpayer R is single and has no dependents. R enrolls in a qualified health plan for 2014 with a monthly premium of $450. The adjusted monthly premium for R's applicable benchmark plan is $490 and 1/12 of the product of R's household income and applicable percentage for 2014 (R's contribution amount) is $190. R takes a new job in September of 2014, enrolls in the employer-sponsored plan, and terminates his enrollment in the qualified health plan, effective on September 10, 2014. The issuer of R's qualified health plan refunds ⅔ of the September premium for R's coverage.

(ii) Under paragraph (d)(1) of this section, R's premium assistance amount for the months January–August of 2014 is $300, the lesser of $450 (the monthly premium for the plan in which R enrolls) and $300 (the excess of the adjusted monthly premium for R's applicable benchmark plan ($490) over R's contribution amount ($190)). Under paragraph (d)(2) of this section, R's premium assistance amount for September is $100, the premium assistance amount for September had R been enrolled for the full month ($300), times 10/30 (the number of days R is enrolled in September, over the number of days in September).

(e) * * * The adjusted monthly premium is determined as if all members of the coverage family for that month were enrolled in the qualified health plan for the entire month.

(f) * * *

(4) *Family members residing at different locations.* The premium for the applicable benchmark plan determined under paragraphs (f)(1) and (f)(2) of this section for family members who live in different States and enroll in separate qualified health plans is the sum of the premiums for the applicable benchmark plans for each group of family members living in the same State.

* * * * *

(g) * * *

(2) *Applicable percentage table.*

Household income percentage of Federal poverty line	Initial percentage	Final percentage
Less than 133%	2.0	2.0
At least 133% but less than 150%	3.0	4.0
At least 150% but less than 200%	4.0	6.3
At least 200% but less than 250%	6.3	8.05
At least 250% but less than 300%	8.05	9.5
At least 300% but not more than 400%	9.5	9.5

* * * * *

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

* * * * *

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

Example 1. (i) Taxpayer B enrolls in a qualified health plan that provides benefits in addition to essential health benefits (additional benefits). The monthly premium for the plan in which B enrolls is $370, of which $35 is allocable to additional benefits. The premium for B's applicable benchmark plan (determined after allocating premiums to additional benefits for all silver level plans) is $440, of which $40 is allocable to additional benefits. B's contribution amount, which is the product of B's household income and the applicable percentage, is $60.

(ii) Under this paragraph (j), the premium for the qualified health plan in which B enrolls and the applicable benchmark premium are reduced by the portion of the premium that is allocable to the additional benefits provided under that plan. Therefore, the premium for the qualified health plan in which B enrolls is reduced to $335 ($370 − $35) and the premium for B's applicable benchmark plan is reduced to $400 ($440 − $40). B's premium assistance amount for a coverage month is $335, the lesser of $335 (the premium for the qualified health plan in which B enrolls, reduced by the portion of the premium allocable to additional benefits) and $340 (the premium for B's applicable benchmark plan, reduced by the portion of the premium allocable to additional benefits ($400), minus B's $60 contribution amount).

Example 2. The facts are the same as in *Example 1,* except that the plan in which B enrolls provides no benefits in addition to the essential health benefits required to be provided by the plan. Thus, under paragraph (j) of this section, the premium for B's applicable benchmark plan ($440) is reduced by the portion of the premium allocable to additional benefits provided under that plan ($40). The premium for the plan in which B's enrolls ($370) is not reduced under this paragraph (j). B's premium assistance amount for a coverage month is $340, the lesser of $370 (the premium for the qualified health plan in which B enrolls) and $340 (the premium for B's applicable benchmark plan, reduced by the portion of the premium allocable to additional benefits ($400), minus B's $60 contribution amount).

* * * * *

■ **Par. 6.** Section 1.36B–6 is added to read as follows:

§ 1.36B–6 Minimum value.

(a) *In general.* An eligible employer-sponsored plan provides minimum value (MV) only if the plan's share of the total allowed costs of benefits provided to an employee (the MV percentage) is at least 60 percent.

(b) *MV standard population.* The MV standard population is a standard population developed and described through summary statistics by the Department of Health and Human Services (HHS). The MV standard population is based on the population

covered by typical self-insured group health plans.

(c) *MV percentage*—(1) *In general.* An eligible employer-sponsored plan's MV percentage is—

(i) The plan's anticipated covered medical spending for benefits provided under a particular essential health benefits (EHB) benchmark plan described in 45 CFR 156.110 (EHB coverage) for the MV standard population based on the plan's cost-sharing provisions;

(ii) Divided by the total anticipated allowed charges for EHB coverage provided to the MV standard population; and

(iii) Expressed as a percentage.

(2) *Wellness incentives*—(i) *In general.* Nondiscriminatory wellness program incentives offered by an eligible employer-sponsored plan that affect deductibles, copayments, or other cost-sharing are treated as earned in determining the plan's MV percentage to the extent the incentives relate to tobacco use. These wellness program incentives that do not relate to tobacco use are treated as not earned.

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

Example. (i) Employer X offers an eligible employer-sponsored plan that reduces the deductible by $300 for employees who do not use tobacco products or who complete a smoking cessation course. The deductible is reduced by $200 if an employee completes cholesterol screening within the first six months of the plan year. Employee B does not use tobacco and his deductible is $3,700. Employee C uses tobacco and her deductible is $4,000.

(ii) Under paragraph (c)(2)(i) of this section, only the incentives related to tobacco use are considered in determining the plan's MV percentage. C is treated as having earned the $300 incentive for attending a smoking cessation course. Thus, the deductible for determining for the MV percentage for both Employees B and C is $3,700. The $200 incentive for completing cholesterol screening is disregarded.

(3) *Health savings accounts.* Employer contributions for the current plan year to health savings accounts that are offered with an eligible employer-sponsored plan are taken into account for that plan year towards the plan's MV percentage.

(4) *Health reimbursement arrangements.* Amounts newly made available for the current plan year under a health reimbursement arrangement that is integrated with an eligible employer-sponsored plan are taken into account for that plan year towards the plan's MV percentage if the amounts may be used only to reduce cost-sharing for covered medical expenses.

(5) *Expected spending adjustments for health savings accounts and health reimbursement arrangements.* The amount taken into account under paragraph (c)(3) or (c)(4) of this section is the amount of expected spending for health care costs in a benefit year.

(d) *Methods for determining MV.* An eligible employer-sponsored plan may use one of the following methods to determine whether the plan provides MV—

(1) The MV Calculator made available by HHS and IRS, with adjustments permitted by paragraph (e) of this section;

(2) One of the safe harbors established by HHS and IRS and described in published guidance, see § 601.601(d) of this chapter;

(3) Actuarial certification, as described in paragraph (f) of this section, if an eligible employer-sponsored plan has nonstandard features that are not compatible with the MV Calculator and may materially affect the MV percentage; or

(4) For plans in the small group market, conformance with the requirements for a level of metal coverage defined at 45 CFR 156.140(b) (bronze, silver, gold, or platinum).

(e) *Scope of essential health benefits and adjustment for benefits not included in MV Calculator.* An eligible employer-sponsored plan may include in calculating its MV percentage all benefits included in any EHB benchmark (as defined in 45 CFR part 156). An MV percentage that is calculated using the MV Calculator may be adjusted based on an actuarial analysis that complies with the requirements of paragraph (f) of this section to the extent of the value of these benefits that are outside the parameters of the MV Calculator.

(f) *Actuarial certification*—(1) *In general.* An actuarial certification under paragraph (d)(3) of this section must satisfy the requirements of this paragraph (f).

(2) *Membership in American Academy of Actuaries.* The actuary must be a member of the American Academy of Actuaries.

(3) *Actuarial analysis.* The actuary's analysis must be performed in accordance with generally accepted actuarial principles and methodologies and specific standards that may be provided in published guidance, see § 601.601(d) of this chapter.

(4) *Use of MV Calculator.* The actuary must use the MV Calculator to determine the plan's MV percentage for coverage the plan provides that is measurable by the MV Calculator. The actuary may perform an actuarial analysis of the plan's EHB coverage for the MV standard population for benefits not measured by the MV Calculator to determine the effect of nonstandard features that are not compatible with the MV Calculator. The actuary may certify the plan's MV percentage based on the MV percentage that results from use of the MV Calculator and the actuarial analysis of the plan's coverage that is not measured by the MV calculator.

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

■ **Par. 7.** Section 1.6011–8 is amended by revising paragraph (a) to read as follows:

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

(a) *Requirement of return.* A taxpayer who receives advance payments of the premium tax credit under section 36B must file an income tax return for that taxable year on or before the due date for the return (including extensions of time for filing).

* * * * *

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2013–10463 Filed 4–30–13; 4:15 pm]

BILLING CODE 4830–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 2, 15 and 68

[ET Docket No. 13–44; FCC 13–19]

Authorization of Radiofrequency Equipment

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes certain changes to the Commission's equipment authorization processes to ensure that they continue to operate efficiently and effectively. In particular, it addresses the role of TCBs in certifying RF equipment and post-market surveillance, as well as the Commission's role in assessing TCB performance. It also addresses the role of test laboratories in the RF equipment approval process, including accreditation of test labs and the Commission's recognition of laboratory accreditation bodies, and measurement procedures used to determine RF equipment compliance. The Commission believes that the changes proposed will enable new and

innovative products to be brought to market as quickly as possible, thus promoting competition in the provision of RF equipment, while at the same time protecting against interference among radio services and devices using the RF spectrum.

DATES: Comments must be filed on or before June 17, 2013, and reply comments must be filed on or before July 17, 2013.

FOR FURTHER INFORMATION CONTACT: Hugh Van Tuyl, Office of Engineering and Technology, (202) 418–7506, email: *Hugh.VanTuyl@fcc.gov*, TTY (202) 418–2989.

ADDRESSES: You may submit comments, identified by ET Docket No. 13–44 and RM–11652, by any of the following methods:

- *Federal Communications Commission's Web site: http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- *Mail:* Hugh Van Tuyl, Office of Engineering and Technology, Room 7–A162, Federal Communications Commission, 445 12th SW., Washington, DC 20554.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making,* ET Docket No. 13–44, FCC 13–19, adopted February 12, 2013, and released February 15, 2013. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov*.

Pursuant to sections 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 the Commission's Electronic Comment Filing System (ECFS). *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/*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy 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 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 and boxes 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.
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Summary of Notice of Proposed Rulemaking

1. The Commission is responsible for an equipment authorization program for radiofrequency (RF) devices under part 2 of its rules. This program is one of the primary means that the Commission uses to ensure that the multitude of RF devices used in the United States operate effectively without causing harmful interference and otherwise comply with the Commission rules. All RF devices subject to equipment authorization must comply with the Commission's technical requirement before they can be imported or marketed. The Commission or a Telecommunication Certification Body (TCB) must approve some of these devices before they can be imported or marketed, while others do not require such approval. The Commission last comprehensively reviewed its equipment authorization program more than ten years ago. The rapid innovation in equipment design since that time has led to ever-accelerating growth in the number of parties applying for equipment approval. The Commission therefore believes that the time is now right for us to comprehensively review our equipment authorization processes to ensure that they continue to enable this growth and innovation in the wireless equipment market. In May of 2012, the Commission began this reform process by issuing an Order to increase the supply of available grantee codes. With this Notice of Proposed Rulemaking (NPRM), the Commission continues its work to review and reform the equipment authorization processes and rules.

2. The NPRM proposes certain changes to the Commission's part 2 equipment authorization processes to ensure that they continue to operate efficiently and effectively. In particular, it addresses the role of TCBs in certifying RF equipment and post-market surveillance, as well as the Commission's role in assessing TCB performance. The NPRM also addressed the role of test laboratories in the RF equipment approval process, including accreditation of test labs and the Commission's recognition of laboratory accreditation bodies, and measurement procedures used to determine RF equipment compliance. Finally, it proposes certain modifications to the rules regarding TCBs that approve terminal equipment under part 68 of the rules that are consistent with our proposed modifications to the rules for TCBs that approve RF equipment. Specifically the Commission proposes to recognize the National Institute for Standards and Technology (NIST) as the organization that designates TCBs in the United States and to modify the rules to reference the current International Organization for Standardization and International Electrotechnical Commission (ISO/IEC) guides used to accredit TCBs.

3. The current RF equipment authorization procedures have evolved over the course of more than 35 years. The last complete review of the equipment authorization procedures was conducted more than 10 years ago. In the *Equipment Authorization Procedures Order* of 1998, 63 FR 36591, July 7, 1998, the Commission reduced and consolidated the equipment approval processes for RF equipment to

three types—certification, Declaration of Conformity (DoC), and verification; relaxed the equipment authorization requirement from certification to Declaration of Conformity for certain part 15 unintentional radiators and part 18 consumer industrial, scientific, and medical (ISM) equipment; relaxed the equipment authorization requirement from notification to verification for certain transmitters operated in licensed services; and provided for electronic filing of applications for equipment authorization. These actions were designed to reduce the burden of the equipment authorization program on manufacturers.

4. Subsequently, in the *Streamlining II Order,* the Commission amended its equipment authorization rules to further streamline the equipment authorization process by allowing accredited independent certification bodies, called Telecommunication Certification Bodies (TCBs), to approve most types of equipment that require certification. The Commission took this action pursuant to its authority under Section 302(e) of the Communications Act, which permits it to delegate equipment testing and certification to private organizations. It established the TCB program to provide manufacturers with an alternative to obtaining certification from the Commission, and to facilitate the more rapid introduction of RF equipment in the market. TCBs approve equipment under the certification procedure based on an application that provides all of the information specified in part 2. The TCB processes the application to determine whether the product meets the Commission's requirements and issues a grant of equipment authorization through the Commission's Equipment Authorization System (EAS). The grant identifies the approving TCB and the Commission as the issuing authority. While the Commission continues to process most types of certification applications, TCBs now issue the vast majority of grants of certification. In order to ensure that the TCBs' evaluations are properly performed, the Commission holds mandatory monthly conference calls and semi-annual workshops with all TCBs to discuss recent interpretations, policy changes and any other issues or concerns related to the TCB program. The Commission also performs audits on TCB approvals to ensure that TCBs operate in accordance with our rules. If such audits reveal concerns about a particular TCB's performance, the Commission may initiate action to verify the TCB's technical competence and may revoke the recognition of a TCB that does not operate in accordance with the rules.

5. TCBs, which may be located in the United States or in certain foreign countries, all have the same responsibilities regardless of their location. However, their location dictates the method by which they are designated. TCBs within the United States are designated by the Commission after demonstrating that they are accredited to meet the applicable requirements by NIST or its designated accrediting organization. Certification bodies located outside of the United States can be recognized as a TCB only under the terms of a Mutual Recognition Agreement (MRA) between a foreign country and the United States government. Each MRA specifies an authority, typically a government entity that designates TCBs in the country or countries covered by the MRA. The Commission then recognizes the designated TCBs. No TCBs are designated in countries that do not have an MRA with the United States. Manufacturers in such countries have to obtain product certification at a designated TCB in another country.

6. The specific provisions of the three current RF equipment authorization procedures are described below.

Certification is an equipment authorization issued by the Commission or by a designated TCB based on an application and test data submitted by the responsible party (*e.g.,* the manufacturer or importer). The Commission or a TCB may re-test a sample of a device to verify that it complies with the rules before granting approval for the equipment to be marketed. The certification procedure is typically applied to RF equipment that has a greater risk of non-compliance, such as equipment employing new technology for which the testing methodology is not well defined, or that poses a higher risk of interference. Examples of devices subject to certification include, but are not limited to, mobile phones; wireless local area networking equipment, remote control transmitters; land mobile radio transmitters; wireless medical telemetry transmitters; cordless telephones; and walkie-talkies. All certified equipment is listed in a Commission database, regardless of whether it is approved by the Commission or a TCB.

Declaration of Conformity (DoC) is a procedure that requires the party responsible for compliance to follow certain measurement requirements and/or take other necessary steps to ensure that the equipment complies with the appropriate technical standards. A compliance information statement must be supplied with the product, identifying the product and a responsible party within the United States, and containing the statement specified in § 15.19(a)(3). The responsible party is not required to file an equipment authorization application with the Commission or a TCB, or to submit a sample unit or test data unless specifically requested. However, the responsible party must submit to the Commission upon request records of the original design drawings and specifications, the procedures used for production inspection and testing, a report of RF emission measurements, the compliance information statement, and a sample of the device. The DoC authorization procedure is typically required for types of RF equipment that have a good record of compliance, where the testing methodology is clearly defined and recognized by the Commission, and there is a low risk of interference. Examples of devices subject to a DoC include personal computers and peripherals, consumer ISM equipment such as microwave ovens and RF light bulbs, radio receivers and TV interface devices. Equipment authorized under the DoC procedure is not listed in a Commission database.

Verification is a procedure under which the party responsible for compliance relies on measurements that it or another party makes to ensure that the equipment complies with the appropriate technical standards. Under the verification procedure, the responsible party is not required to file an application with the Commission. Submission of a sample unit or representative data to the Commission demonstrating compliance is not required unless specifically requested by the Commission. The responsible party must submit to the Commission upon request records of the original design drawings and specifications, the procedures used for production inspection and testing, a report of RF emission measurements, and a sample of the device. Verification, which is the least burdensome equipment authorization procedure, is applied to types of RF equipment that have an excellent record of compliance, the testing methodology is well known and understood, and there is low risk of interference. Examples of devices subject to verification include non-consumer ISM equipment; TV and FM receivers; and business computer equipment. Devices subject to verification must be uniquely identified in a format which cannot be confused with the FCC identifier required on

certified equipment. Equipment authorized under the verification procedure is not listed in a Commission database.

7. RF equipment subject to any of the equipment authorization procedures described must generally be tested for compliance with the Commission's technical rules. The Commission has general requirements on the qualifications of laboratories that perform compliance testing, and certain specific requirements on laboratories that test equipment under particular rule parts or authorization procedures. For example, equipment authorized under the DoC procedure must be tested by a laboratory that is accredited as meeting the requirements of ISO/IEC Standard 17025, *General Requirements for the Competence of Calibration and Testing Laboratories,* by a Commission-recognized accreditation organization. Laboratories that test equipment subject to certification under parts 15 and 18 of the rules are not required to be accredited, but must be on a list maintained by the Commission. Equipment authorized pursuant to certification under rule parts other than parts 15 or 18, or any equipment authorized under verification, may be tested by the manufacturer or by an independent testing laboratory that is not required to be accredited or listed with the Commission. The Commission may conduct post-market testing of equipment authorized under any of the three procedures to ensure that equipment on the market complies with the Commission's technical requirements. Additionally, TCBs are required to perform post-market surveillance on a certain percentage of products they have certified.

Given the changes in RF devices, technologies, and manufacturing methods that have occurred since the Commission last comprehensively reviewed its equipment authorization procedures, we believe that it is time to revisit the equipment authorization procedures to ensure that they are appropriate for the types of equipment being marketed today and for the increasingly intensive use of the airwaves. We are initiating this proceeding to explore improvements that can be made to our RF equipment authorization processes to efficiently achieve the goals of preventing interference to communications services without hindering the rapid introduction of new and innovative products to the market.

8. In particular, the Commission proposed that it will no longer conduct evaluations for initially approving RF equipment requiring certification under the procedures in part 2 of the rules, and that TCBs will approve all such equipment in the first instance, including equipment on the ''exclusion list'' that only the Commission may currently approve. The Commission also proposed to clarify and modify the rules on TCB responsibilities. Specifically, it proposed to codify the ''permit-but-ask'' procedure that TCBs must use when certifying new technologies when testing protocols have not been established, clarify the responsibility of TCBs to perform post-market surveillance of products they have approved, and specify steps that can be taken if a TCB's performance were found to be deficient. The Commission also proposed to require accreditation of all laboratories that test equipment subject to the part 2 certification procedure, and to codify the existing procedure through which the Commission can recognize new laboratory accreditation bodies. In addition, it proposed to incorporate the latest versions of the industry standards for measuring equipment into the rules and address how to update these standards more quickly in the future. Finally, the Commission proposed to modify the rules to reference the current ISO/IEC standards used to accredit TCBs that approve RF equipment under part 2 of the Commission's rules and terminal equipment under part 68 of the Commission's rules. The specific issues and proposals on which it seeks comments are discussed in detail in the *NPRM.* The Commission believes that the changes proposed will enable new and innovative products to be brought to market as quickly as possible, thus promoting competition in the provision of RF equipment, while at the same time protecting against interference among radio services and devices using the RF spectrum.

9. Many of the changes proposed herein are administrative in nature and the Commission believes that there would be minimal or no costs associated with them. It recognizes that certain proposed changes, such as requiring laboratories to become accredited, would result in some increased costs. The Commission expects that the benefits of the proposed changes would be greater than the additional costs that would be incurred. The Commission seeks comment on the costs and benefits of the rule changes proposed, along with data supporting commenters' assessments.

A. TCB Program

1. Certification of RF Equipment

10. One goal of the Commission in allowing TCBs to perform equipment approvals was to enable it to discontinue processing routine applications when TCBs were available to perform the work. The Commission, however, did not commit to ending its role in issuing equipment authorizations altogether. The Commission concluded at that time that it was unnecessary for it to continue approving certification applications for personal computers and peripherals, since that equipment could be authorized through the DoC procedure. It found that processing these voluntarily filed applications was not an efficient use of its resources, and stated that once domestic TCBs were available to process applications for personal computer equipment for those applicants who chose to use the certification process rather than DoC, the Commission would stop accepting these applications. The Commission issued a public notice in September 2000 announcing that it would no longer accept applications for personal computer equipment. However, the Commission has continued to accept applications for all other types of equipment during the implementation of the TCB program. This practice has provided a smooth transition to TCB certification of equipment authorization applications, and ensured that at least one entity is available to certify all types of equipment.

11. Under the current rules, a TCB is not permitted to certify equipment for which Commission rules or requirements do not exist or for which the application of the rules or requirements are unclear. In some rulemaking proceedings, the Commission has identified specific categories of equipment that TCBs are not allowed to certify, such as TV bands devices and split modular transmitters. OET maintains an up-to-date list of the types of equipment that a TCB is not allowed to certify and publishes this ''exclusion list'' on the Commission's Knowledge DataBase (KDB) system. To enable TCBs to certify more types of devices, OET has established a ''permit-but-ask'' procedure that allows TCBs to review applications for certification of equipment that would otherwise be excluded from approval by a TCB. These procedures allow the prospective applicant and TCB to seek guidance prior to filing the application for certification. Based on information submitted from the initiating party in a permit-but-ask request, the Commission provides guidance on test methods and

the applicability of the Commission's technical requirements specific to the device for which authorization is to be requested. This is an electronic inquiry/response process that is linked to the electronic equipment authorization system. The TCB then reviews the application for certification based on the guidance received from the Commission. Once a TCB has completed a review of equipment covered by the permit-but-ask procedure, it confirms with OET that appropriate measures have been taken to demonstrate compliance with the guidance provided by OET prior to issuing a grant of certification. The appropriate measures include seeking guidance on proper test procedures, applying interpretations of technical rules or applying specific review procedures as provided by the Commission staff prior to the final approval.

12. The Commission maintains a database of all RF equipment certified by the Commission and TCBs. This database allows the Commission to verify that a device is approved without having to contact the TCB that approved the device to obtain the records demonstrating compliance with the FCC requirements. The database also allows the Commission to monitor the activities of TCBs to determine how many approvals are issued for each type of equipment. Further, this database provides a single publicly available source of information that parties can use to verify approvals and obtain copies of applications for and grants of certification.

13. *Proposals.* Now that the TCB program is well-established, the Commission proposes that the Commission no longer directly issue any grants of equipment authorization, and instead allow TCBs to authorize all products subject to certification. This proposal will allow the Commission staff to concentrate on enforcing the rules, providing the necessary oversight and guidance to the TCBs, performing post-market surveillance and auditing random samples of products approved by the TCBs. The Commission notes that during Fiscal Year 2011, TCBs certified approximately 98% of the products submitted for approval under the Commission's RF equipment authorization program. It also proposes to provide TCBs with specific authority to dismiss equipment authorization applications under the same circumstances that the Commission may dismiss applications. Specifically, the Commission proposes that a TCB shall dismiss an application that is not in accordance with the provisions of Subpart 2 or if requested by the applicant, and the TCB may dismiss an application if the applicant fails to provide additional information or test samples requested by the TCB. The dismissal of an application would be without prejudice to the applicant filing a new application under the same FCC identification number with additional or corrected information. An applicant could appeal a TCB's dismissal of an application to the Commission if it believed that the TCB acted in error, and the Commission could change a TCB's action that it finds erroneous. However, the Commission is not proposing to provide TCBs with authority to deny applications, which it believes is a function that should be reserved for the Commission. A TCB could recommend denial of an application to the Commission which would determine if such action is warranted. A TCB would continue to have authority to rescind a grant within 30 days as the rules currently allow for both TCBs and the Commission, but we are proposing to change the term ''rescind'' to ''set aside'' for consistency with the part 1 rules. The Commission does not expect that this proposal will have any impact on applicant's costs because TCBs already certify approximately 98% of all RF equipment. Further, the benefits are significant because applicants for equipment certification would be able to have all types of devices approved by a TCB and obtain approvals more quickly. The Commission seeks comment on these proposals.

14. The Commission proposes to eliminate the exclusion list and instead codify a procedure that TCBs will use when they require guidance from the Commission to certify a product for which the rules, requirements or measurement procedures are not clear. It proposes to call this the pre-approval guidance procedure. Under this procedure, the Commission will identify the types of devices or types of testing for which a TCB will be required to consult with the Commission before granting certification. These may include, for example, devices operating under the Dynamic Frequency Selection (DFS), Ultra Wide Band (UWB) and TV Bands Device (TVBD) rules under which the Commission is the only equipment approval body at the present time. Under our proposed procedure, the Commission would have to give its concurrence before a TCB could grant an application. The Commission also would advise a TCB if additional information or equipment testing is required or if the equipment cannot be approved because it does not comply with the Commission's rules. In this manner, although ultimately the authorization is granted by a TCB, the Commission will continue to exercise the necessary control and oversight of particular areas of the rules until such time that it determines these areas can be considered routine and these additional oversight procedures will not be needed. The Commission expects that having TCBs process applications for equipment currently on the exclusion list under the proposed pre-approval guidance procedure will speed processing because TCBs will perform all of the routine application review, while OET will need to review only those portions of an application that require additional oversight. We seek comment on this proposal.

15. The current permit-but-ask process does not fully integrate the inquiry/response function in the KDB with the application processing function in the Equipment Authorization System (EAS). This process requires a TCB to first send a request through the KDB for Commission guidance on processing an application on the permit-but-ask list. The TCB then uploads files for Commission review using the EAS, which is a separate system from the KDB. Any further communications between the Commission and a TCB are made using the KDB. Therefore, both the Commission and TCBs must cross reference application files and related communications that are stored on different electronic systems. As a result, the process has sometimes been time consuming for applicants and TCBs. The Commission intends to fully integrate the pre-approval guidance procedure with the EAS, thereby improving Commission response time while continuing to provide necessary guidance for new equipment representing new technologies.

16. Under the present process, the Commission may test a sample of certain types of equipment before it gives a TCB permission to issue a grant of certification. For example, for equipment subject to the Dynamic Frequency Selection (DFS) requirements in part 15, subpart E, the Commission requires a sample of the equipment being considered for certification be tested at the Commission's Laboratory prior to the grant of certification being issued. The Commission proposes to provide that the pre-approval guidance procedure include the option for the Commission to conduct pre-grant sample testing to ensure that the Commission is able to request samples of devices to verify their compliance with the rules. The Commission seeks comment on this proposal.

17. In summary, the proposed pre-approval guidance procedure would function as follows:

1. The Commission will issue a KDB publication identifying the categories of equipment or types of testing that come under the pre-approval guidance procedure. This list will include devices currently on the exclusion and permit-but-ask lists.

2. The TCB will perform an initial review of the application and determine the issues on which it needs to obtain guidance from the Commission. It will then contact the Commission to obtain guidance on those issues by electronically submitting relevant exhibits.

3. The TCB will review the application in accordance with the Commission's guidance to determine whether the equipment complies with the Commission's rules.

4. The Commission may request and test a sample before the application can be granted.

5. The TCB will electronically submit all exhibits to the Commission along with a recommendation to grant or dismiss the application.

6. The Commission will give its concurrence for the TCB to grant the application if it determines that the equipment complies with the rules. The Commission will advise the TCB if additional information or equipment testing is required, or if the equipment cannot be approved because it does not comply with the Commission's rules.

The Commission seeks comment on this proposed procedure and on any additions or modifications that may be required.

18. Under the current rules, an application for certification of RF equipment is made by filing FCC Form 731 and the supporting information required by the rules, including a measurement report, instruction manuals, and equipment photographs and diagrams. For equipment certified by the Commission, the application form and supporting information must be filed electronically with the EAS at the URL specified in the rules. For equipment certified by TCBs, the applicant files the information required by Form 731 and all required exhibits directly with a TCB. The Commission's rules also require that applicants, to be eligible for any instrument of authorization from the Commission, must certify that they comply with the Implementation of the Anti-Drug Abuse Act of 1988 and are responsible for ensuring that statements made in an application for authorization are true and correct to the best of their knowledge and belief. Signatures required on the application may be in electronic format.

19. The Commission proposes to modify its rules to clarify the responsibilities of applicants for equipment authorization and of the TCBs that will process these applications through the Commission's electronic systems. It proposes to modify § 2.911 to state that applicants shall send a written, signed request for equipment authorization to a TCB. The Commission would continue to permit signatures in electronic format. It also proposes to modify the rule to make explicit that applicants provide the TCB with the information required by Form 731 in writing or electronic format, including all exhibits that the TCB requires to process the application and to complete Form 731 in the Commission electronic system. For example, applicants would have to provide the TCB with an FCC Registration Number (FRN) and a grantee code if these have already been assigned to the applicant by the Commission. The Commission further proposes that an applicant must provide the TCB with signed written certifications stating that it complies with Implementation of the Anti-Drug Abuse Act of 1988 and that all statements made in the application are correct to the best of its knowledge and belief. Additionally, the Commission proposes that the TCB must submit the applicant's certifications as exhibits when it uploads Form 731 applications to the Commission. The Commission is also proposing to incorporate into § 2.911 the requirement from § 2.913 that applications must be accompanied by the appropriate fees since new applicants for certification must submit a fee to obtain a grantee code, and this function could be handled by a TCB if an applicant authorizes a TCB to do so. However, because that is the only equipment authorization fee listed in § 1.1103 of the rules that a TCB or an applicant might need to submit to the Commission, the Commission proposes to modify § 1.1103 to eliminate equipment authorization fees that would no longer be collected by the Commission if TCBs approve all equipment subject to certification. The Commission does not expect that these proposals will be burdensome because TCBs should already be obtaining the required certifications and any other information that they need from applicants to complete their Form 731. The Commission seeks comment on these proposals.

20. The rules currently require that a TCB supply the Commission with electronic copies of FCC Form 731 and the grant of equipment authorization for each RF device certified by the TCB. The rules do not require TCBs to submit other supporting information from the certification application, but they specify that the Commission can request the complete application and exhibits from a TCB if it needs additional information about a particular device. In order for the Commission to effectively perform its program oversight and enforcement role, it is necessary to have the TCB submit a complete copy of the certification application to the database, including all the photographs, user manuals and test reports. The Commission therefore routinely request that TCBs submit complete information for each certification application that they approve.

21. The Commission proposes to amend § 2.926(g)(1) of the rules to require that TCBs provide the Commission with a complete copy of each certification application that they process, including all exhibits required by the Commission's rules, prior to issuance of a grant of certification or dismissal of the application. The TCB would grant or dismiss equipment authorization applications through the Commission's electronic EAS. The Commission also proposes to move to this section the language concerning the confidentiality of application exhibits from § 2.962(g)(4) and remove the remainder of § 2.962(g)(4) as unnecessary since it refers to full applications being sent to the Commission upon request. These proposed changes will codify the current Commission practice of obtaining complete information for all equipment certified by TCBs prior to the issuance of a grant, and will provide notice to the Commission and other TCBs concerning which applications were dismissed. The changes would not result in any significantly increased burden for TCBs because they already supply the complete application and all exhibits to the Commission for equipment that they approve, and the Commission expects that the number of dismissed applications that they would have to submit to the Commission will be small in comparison to those they grant. The Commission seeks comment on these proposals.

22. The Commission also proposes to make a number of minor revisions to the part 2 rules to reflect the fact that TCBs would approve all RF equipment subject to the part 2 certification requirement. In particular, the Commission notes that the following sections refer to certification applications being processed by the Commission and

propose to modify the language in these sections to reflect the Commission's proposals that TCBs will process all certification applications: 2.901 (Basis and purpose), 2.907 (Certification), 2.909 (Responsible party), 2.915 (Grant of application), 2.917 (Dismissal of application), 2.919 (Denial of application), 2.921 (Hearing on application), 2.924 (Marketing of electrically identical equipment * * *), 2.925 (Identification of equipment), 2.926 (FCC identifier), 2.927 (Limitations on grants), 2.929 (Changes in name, address, ownership or control of grantee), 2.932 (Modification of equipment), 2.933 (Change in identification of equipment), 2.947 (Measurement procedure), and 2.1043 (Changes in certificated equipment). The Commission seeks comment on this proposal and whether there are any other sections in part 2 or other rule parts that need to be modified if TCBs approve all RF equipment requiring certification.

2. Post Market Surveillance

23. TCBs must be accredited to demonstrate that they comply with the Commission's TCB qualification criteria based on ISO/IEC Guide 65, *General requirements for bodies operating product certification systems.* Section 2.962(g)(2) states that, in accordance with ISO/IEC Guide 65, a TCB is required to conduct appropriate post-market surveillance activities on equipment that it certifies. This rule section requires that these activities be based on ''type testing'' (*i.e.,* sample testing) of samples of the product types that the TCB has certified. Other types of surveillance activities of a product that has been certified are permitted provided they are no more onerous than type testing. This rule section also states that the Commission may at any time request a list of products certified by a certification body and request copies of product evaluation reports. In addition, the Commission may request that a TCB perform post-market surveillance of a specific product it has certified. The Commission has authority to require grantees of certification to submit samples for testing at the FCC Laboratory, but there is no rule that specifically states that a TCB may request samples directly from the grantee of certification.

24. OET has delegated authority under the Commission's rules to develop the procedures that TCBs will use for performing post-market surveillance. OET has provided information to TCBs on performing post-market surveillance in KDB Publication No. 610077. This publication requires TCBs to develop a sample test plan and describes the criteria TCBs must use in selecting samples. TCBs must perform post-market surveillance testing on at least five percent of the products that they certify each year. This publication also describes how TCBs should obtain and evaluate samples and requires that they submit a report on their findings to OET.

25. Proposals. The Commission proposes to modify the rules on post-market surveillance to more clearly define the responsibilities of TCBs. Specifically, it proposes to modify § 2.962 to indicate that OET publishes a KDB on TCB post-market surveillance requirements, and that this document provides specific information such as the number and types of samples that a TCB must test. The Commission also proposes to provide TCBs with clear authority to request samples of equipment that they have certified directly from the grantee of certification. In this regard, the Commission notes that there are currently six different sections in part 2 of the rules that address the submission of equipment samples for testing, so it is proposing to merge these and create a single rule section that addresses equipment sample requests.

26. OET may want TCBs to perform post-market surveillance on specific devices or categories of equipment due to concerns about interference or equipment non-compliance. In such cases, the Commission proposes that OET would send a sample request directly to the grantee of certification and request that the grantee submit the sample directly to the TCB that performed the original certification for evaluation. OET will also notify the TCB that it has requested that the grantee submit a sample, and that the TCB must test the device. Any equipment samples requested by the Commission for testing by a TCB would be included in the minimum required post-market surveillance testing by the TCB. The Commission also proposes that failure of a grantee to submit a sample to a TCB within 21 days may be cause for the Commission to take actions such as suspending action on other applications for equipment authorization submitted by that grantee or issuing monetary forfeitures pursuant to § 1.80 of this chapter. The Commission may consider extensions of time upon submission of a showing of good cause.

27. The Commission proposes that, if the TCB determines that the equipment does not comply with the Commission's requirements for such devices, the TCB shall immediately notify the grantee and the Commission in writing. The Commission also proposes that the grantee must provide the TCB with information on the corrective action that it has taken to bring the equipment into compliance and that the TCB will have 30 days to submit a report on these actions to the Commission. It further proposes to require that TCBs submit periodic reports of their post-market surveillance activities and findings by a date determined by OET, but the Commission is are not proposing to specify the date in the rules to provide OET with the flexibility to modify it if necessary. The Commission does not expect that these proposals will impose any new costs on TCBs or grantees of certification because TCBs must already perform post-market surveillance testing on at least 5% of the devices they approve, and grantees are already required to supply a test sample upon request.

28. The Commission seeks comment on these proposals. It also seeks comment on how we would coordinate sample requests to ensure that the Commission and TCBs do not send duplicate requests for the same device or requests for more samples than the TCB is required to test. The Commission further seek comment on whether there should be cross-checking among TCBs, so that a TCB would test some equipment that another TCB approved. If so, how would it determine which sampled equipment is to be tested by which TCB? If a TCB is required to test a sample device approved by a different TCB, who should bear the cost of testing and reporting? The Commission we also seeks comment on ways that the Commission could obtain samples from the retail market that are part of the oversight process. For example, could the grantee provide a voucher that the Commission could use to obtain a sample from a retail outlet of its choosing, or could the grantee arrange for the Commission to pick a sample at random from a distributor? The Commission notes that in some cases, it may need special test software so that it can verify a device's compliance with the rules. The Commission seeks comment on how it should obtain any special test software for use with unmodified production devices that it obtains from the market. The Commission further seeks comment on whether its proposals would impose any new costs on TCBs or grantees, and if so, whether the benefits of the proposals outweigh the costs.

3. Assessing TCB Performance

29. Because the Commission is proposing to allow TCBs to approve all

RF equipment that is subject to certification, it will become increasingly important to ensure that recognized TCBs continue to meet all relevant Commission requirements and that we minimize the possibility that equipment could be certified without fully complying with our technical rules. For an organization to be recognized as a TCB, the Commission requires that it be accredited to demonstrate compliance with ISO/IEC Guide 65 for operating a certification body. The rules currently provide that TCBs within the United States may be designated by the Commission after demonstrating that they are accredited in accordance with this guide by NIST or its recognized accrediting organization. NIST recognizes ANSI and A2LA to accredit prospective TCBs. TCBs outside the United States must be accredited and designated by an authority recognized under the terms of an MRA, and their designation must be recognized by the Commission. In addition, a TCB must demonstrate expert knowledge of the regulations for each product type for which it seeks recognition; recognize when interpretations of the rules or test procedures are necessary and demonstrate knowledge of how to obtain current and correct interpretations; and participate in consultative activities identified by the Commission to establish a common understanding and interpretation of the regulations. A prospective TCB must demonstrate its knowledge and expertise to the organization that performs the accreditation for compliance with ISO/IEC Guide 65. The Commission has prepared a checklist of the subject areas that accreditors must assess.

30. If the Commission has concerns regarding the performance of a TCB, it may initiate action to verify the TCB's current technical competence and conformity with the designation and recognition requirements. In particular, the rules state that the Commission will withdraw designation of a domestic TCB if the TCB's accreditation is withdrawn, if the Commission determines there is just cause for withdrawing the designation, or if the TCB no longer wants the designation. The rules state that the Commission will provide a domestic TCB with a 30-day notice of its intention to withdraw the TCB's designation and provide it with an opportunity to respond. In the case of TCBs recognized pursuant to an MRA, each MRA describes a procedure for the Commission to follow to challenge a TCB's technical competence with the specified designating authority. The Commission's rules state that it will provide a TCB recognized under an MRA at least 30 days to respond in cases of disputes with respect to its designation or recognition and that it will consult with the United States Trade Representative (USTR) as necessary. The Commission's Enforcement Bureau may also investigate cases involving possible misconduct by TCBs and will take appropriate actions as required.

31. At present, the rules describe procedures only for the withdrawal of the designation or recognition of a TCB and do not specify any less severe actions that the Commission could take if it has concerns about the performance of a particular TCB. If an organization wishes to reapply to be a TCB following withdrawal of its designation or recognition, it must complete a new evaluation and accreditation process to determine if it meets the designation criteria, which can be a lengthy and complex process. Based on the Commission's experience with the TCB program, it has found cases where it has had concerns about a TCB's performance, but did not believe that revoking its authority to certify equipment would be an appropriate remedy. For example, such cases could result when a TCB misinterpreted the rules or measurement procedures, failed to familiarize itself with the latest Commission guidance documents, or did not realize when it needed to obtain additional guidance from the Commission. The Commission may discover concerns about TCB performance when auditing granted applications and discovering that applications are missing required exhibits or that the Commission can not determine whether the equipment complies with all requirements in the rules. The Commission believes that cases such as these could be appropriately addressed in some instances by simply having the TCB take corrective action, such as additional consultation with the Commission and better staff training.

32. *Proposals.* As an initial matter, the Commission proposes to modify the rules to clarify the role of NIST in designating domestic TCBs. By way of background, there are three steps that an entity must follow to become a TCB. First, a prospective TCB must obtain accreditation from a Commission-recognized organization to demonstrate that it complies with the requirements of ISO/IEC Standard 17025 and Guide 65. Second, a prospective TCB must apply to the government agency that has the authority to designate TCBs (''designating authority'') in the country where the TCB is located and demonstrate that it complies with all of the Commission's requirements to become a TCB. Third, the designation of the prospective TCB must be recognized by the Commission, which places the names of TCBs acceptable for performing equipment certification on a publicly available list. Under the current rules, NIST is the accreditor for TCBs in the United States, and the Commission is the designating authority. NIST may also allow other qualified organizations to accredit TCBs.

33. The current practice for designating TCBs in the United States is for prospective TCBs to apply directly to NIST after being accredited to ISO/IEC Standard 17025 and Guide 65 by a recognized accreditor. NIST evaluates the qualifications of prospective TCBs to ensure that they comply with all of the Commission's TCB requirements. NIST then forwards to the Commission information about the TCBs it found compliant with the Commission's requirements. Therefore, NIST effectively operates as the designating authority for TCBs within the United States. Consistent with this practice, the Commission proposes to modify §§ 2.960(b) and 68.160(b) of the rules to recognize NIST as the designating authority for TCBs within the United States. NIST would continue to have authority to designate other organizations to accredit TCBs as it does now. To ensure effective oversight of the TCB program, the Commission proposes that an organization designated by NIST as a TCB would have to be recognized by the Commission before it could function as a TCB, and that the Commission could withdraw its recognition of a TCB designated by NIST that does not operate in accordance with the rules. This change would make the designation and recognition requirements for domestic and foreign TCBs more consistent, in that in both cases the Commission would rely on other organizations to accredit and designate TCBs, but the Commission would have to recognize the designated TCBs before they could operate, and the Commission could withdraw its recognition of a TCB that exhibits serious performance problems. The Commission does not expect that these proposals would result in any additional costs on TCBs or other parties since the proposals would merely codify the existing practices that have evolved over time. The Commission seeks comment on these proposals.

34. The Commission also proposes to amend the rules to provide additional measures that the Commission could

take to address TCB performance issues that are less severe than the complete withdrawal of a TCB's designation or recognition. These proposed measures are designed to address performance issues that can be resolved through relatively simple corrective measures by a TCB, and are not intended to limit the Commission's ability to act quickly if serious misconduct by a TCB were to occur. Specifically, the Commission proposes that it will first notify a TCB in writing when it has evidence that the TCB is not approving equipment in accordance with the Commission's rules and policies and request that it correct any apparent deficiencies. The Commission may monitor all grants by a TCB during the time it provides for it to respond to us, and the Commission would set aside any grants found to be in error within the 30 day time period provided in the rules. If a TCB does not demonstrate that it has satisfactorily resolved the performance issues identified by the Commission, it is proposes that the Commission may temporarily require that all certification applications filed with that TCB be processed using the pre-approval guidance procedure for a period of at least 30 days. This would provide the Commission an opportunity to review all of that TCB's applications prior to grant to ascertain whether it has corrected the identified performance deficiencies. The Commission further proposes that it will provide a TCB with a 30-day notice of its intent to require that applications be processed under the pre-approval guidance procedure unless the Commission finds good cause to require a more immediate implementation of this protective measure. A shorter time frame may be appropriate, for example, in cases where the Commission discovers that a TCB has a pattern of approving equipment that is non-compliant with the rules, particularly equipment that has a high potential for causing harmful interference. The Commission also proposed that when a TCB demonstrates to the Commission that it is processing equipment approval applications in accordance with the rules, it would no longer be required to use the pre-approval guidance procedure for all equipment, just the equipment on the pre-approval guidance list. The Commission further proposed that these procedures would apply equally to both domestic and foreign TCBs.

35. In cases where a TCB continues to exhibit performance deficiencies after the Commission requests that it take corrective action, it has been proposed that the Commission may request that the designating authority and accreditation body investigate and take appropriate steps as needed. This could include, for example, limiting the scope of the TCB's accreditation, or withdrawing the accreditation. The Commission proposes that in such cases it would limit the scope of equipment that a TCB could approve if the accrediting body limited the scope of a TCB's accreditation, and that the Commission would no longer recognize a TCB if its accreditation is withdrawn. The Commission further proposes that it would no longer recognize the designation of a TCB, either foreign or domestic, if good cause exists, *e.g.,* a TCB shows a pattern of approving equipment that is clearly not in compliance with the rules. It is also proposed that the Commission would provide a TCB with at least 60 days notice of its intention to withdraw or limit the scope of its recognition and provide the TCB with an opportunity to respond. During that time, the Commission would monitor all grants issued by the TCB and would set aside any grants within 30 days that were issued in error. In the case of a TCB recognized pursuant to the terms of an MRA, the Commission would provide more than 60 days notice if required by the MRA and consult with the Office of the United States Trade Representative (USTR) as necessary concerning any trade issues that arise. In addition, the Commission proposed that if a TCB's status is revoked, any equipment certifications previously approved by the TCB would continue to be valid unless specifically set aside or revoked by the Commission. However, a TCB would not be permitted to act on any certification applications that it was processing but had not yet approved at the time its operating status was revoked.

36. The Commission also proposed certain other modifications to clarify the part 2 rules for TCBs. Specifically, it proposed to modify § 2.962(e)(1) to specify the recognition requirements for both foreign and domestic TCBs. This section currently specifies the recognition requirements for only domestic TCBs. The Commission also proposed to move the text in § 2.962(h) concerning disputes over the recognition of foreign TCBs to § 2.962(e) because it more appropriately fits in that paragraph which addresses the recognition of TCBs.

37. The Commission seeks comment on these proposals. In particular, it seeks comment on whether the steps being proposed are appropriate, and whether there are other measures the Commission could take to ensure that TCBs operate in accordance with the rules. For example, should the Commission instead prohibit a TCB from approving any equipment for a limited time period when performance issues arise? If the Commission were to prohibit a TCB from approving equipment for a certain time, it seeks comment on how it could determine when the TCB has corrected its performance problems. The Commission also seeks comment on whether it needs to more clearly define the circumstances under which it would take actions such as requiring all of a TCB's applications to be processed under the pre-approval guidance procedure. If so, what should those circumstances be?

4. TCB Accreditation

38. The Commission's rules require that TCBs that approve either RF equipment under part 2 or terminal equipment under part 68 of the Commission's rules meet the accreditation standards in specific ISO/IEC standards. An entity recognized as a TCB must be accredited as meeting all appropriate specifications in ISO/IEC Guide 65, *General requirements for bodies operating product certification systems,* for the scope of equipment that it will certify. An organization accrediting a prospective TCB to Guide 65 must be capable of meeting the requirements and conditions of ISO/IEC Guide 61, *General requirements for assessment and accreditation of certification/registration bodies.* TCBs also must be accredited as meeting the requirements of ISO/IEC Standard 17025, *General Requirements for the Competence of Calibration and Testing Laboratories.* The organization accrediting a TCB or testing laboratory to ISO/IEC 17025 must be approved by OET to perform such accreditation based on ISO/IEC Guide 58, *Calibration and testing laboratory accreditation systems—General requirements for operation and recognition.* A TCB that approves RF equipment under part 2 must be reassessed for continuing accreditation at intervals not to exceed two years.

39. Subsequent to the adoption of the rules specifying these requirements, several ISO/IEC guides were updated. Specifically, ISO/IEC Guides 58 and 61 were updated and combined into a single new standard, ISO/IEC 17011, *Conformity assessment—General requirements for accreditation bodies accrediting conformity assessment bodies.* ISO/IEC 17011 was prepared by the ISO Committee on conformity assessment (CASCO) because the work performed by accreditation bodies accrediting testing laboratories and

certification bodies is quite similar, and the two separate standards had two sets of largely repetitious but slightly differing requirements for evaluating laboratory and certification body functions. In addition, ISO/IEC Guide 65 was replaced with a revised version designated ISO/IEC 17065, *Conformity assessment—Requirements for bodies certifying products, processes and services.*

40. *Proposal.* The Commission proposes to modify the rules in parts 2 and 68 to replace the references to Guide 58 and Guide 61 with references to ISO/IEC 17011, and to replace the references to Guide 65 with references to ISO/IEC 17065. Consistent with the revised ISO/IEC 17065, the Commission also proposed to change the term ''sub-contractors'' with ''external resources'' in the parts 2 and 68 rules. The Commission believes that these changes will not have any significant impact on accrediting organizations or TCBs because the revised guides are substantially similar to the ISO/IEC guides currently specified in the rules. The Commission also proposed to update § 68.162 to correct the outdated references to ISO/IEC Guide 25 which is now designated ISO/IEC 17025. The Commission is not, however, proposing to change the requirement that TCBs that approve RF equipment must be reassessed every two years. The Commission seeks comment on these proposals. The Commission is also proposing to give OET delegated authority to update references to measurement procedures and other industry standards in parts 2, 5, 15 and 18 of the rules in the future.

B. Test Laboratories

1. Accreditation of Test Laboratories

41. Equipment subject to certification under parts 15 and 18 of the rules–*i.e.* unlicensed devices and industrial, scientific and medical equipment—must be tested at a laboratory that meets one of two criteria: the laboratory must have either (a) filed a description of its facilities with the Commission in accordance with the requirements of § 2.948 of the rules, or (b) been accredited under ISO/IEC 17025 and recognized by the Commission. The § 2.948 filing process requires a party to submit a description of its facilities to the Commission that includes the location of the test site, a physical description of the site that includes drawings and photographs, a description of the structures that support the device being measured and test instrumentation, the measuring equipment used and information on its calibration, a statement as to whether the site is available to do measurements for the public for a fee, and site attenuation data taken in accordance with ANSI C63.4–2001. The § 2.948 listing is based solely on a Commission review of the documentation submitted.

42. In contrast to the § 2.948 filing process, laboratory accreditation involves an extensive review of documentation and onsite visits by representative(s) of the accrediting body. Laboratory accreditation bodies assess a variety of aspects of a laboratory, including the technical competence of staff; the validity and appropriateness of test methods; traceability of measurements and calibration to national standards; suitability, calibration and maintenance of the testing environment; sampling, handling and transportation of test items; and quality assurance of test and calibration data. The accreditation of a laboratory outside the United States is considered acceptable only if it is located in a country that has an MRA with the United States or is accredited by an organization that has entered into an arrangement between accrediting organizations that is recognized by the Commission. The Commission maintains a list of laboratories that includes those that have filed a description under § 2.948 and those laboratories accredited under ISO/IEC 17025 for which the accrediting organization has submitted information to the Commission. An accredited test laboratory must be reassessed at intervals not to exceed two years.

43. Unlike parts 15 and 18 equipment rules, the Commission's rules do not require that equipment authorized to operate in licensed services be tested at either a § 2.948 listed laboratory or at an accredited and recognized laboratory. However, because many of the testing laboratories that perform measurements on equipment operating under the licensed radio service requirements also test equipment subject to parts 15 and 18, their test facilities are already accredited.

44. *Proposal.* The Commission proposed to end the listing program for laboratories that test equipment certified under parts 15 and 18 of the rules. Instead, it proposed to require that all laboratories that test equipment subject to certification and DoC under any rule part be accredited to ISO/IEC 17025. This would be a change from the current rules under which only devices subject to DoC must be tested at an accredited laboratory. The Commission believes that this change is appropriate for several reasons. First, because it is proposing to cease Commission certification of RF devices and rely on TCBs to approve all such equipment, the Commission believes that it should at the same time take measures to continue to ensure the quality of the TCB program. Requiring laboratories that perform certification testing to be accredited will provide a higher degree of confidence for both the Commission and TCBs that testing was done in accordance with the applicable standards than the current listing procedure provides. As noted, laboratory accreditation is based on a rigorous third party review of laboratory functions and capabilities, including the technical competence of its staff and quality assurance methods, and includes onsite inspections by the accrediting organization. In contrast, the § 2.948 listing program is based solely on a desk review of certain laboratory characteristics. The Commission expects that requiring all laboratories that perform certification testing to be accredited will improve both the quality and consistency of test results. The Commission therefore believes that requiring laboratory accreditation is part of a balanced approach in allowing TCBs to certify all RF equipment while ensuring the quality of the results.

45. The Commission is proposing to retain the requirement in § 2.948 that test laboratories compile a description of their measurement facilities, and propose to require that they supply this information to a laboratory accreditation body or to the Commission upon request. This description will assist a laboratory accreditation body in evaluating the suitability of a laboratory's facilities for performing measurements. It will also help the Commission determine whether a laboratory that tests equipment subject to verification, and which is not required to be accredited, has suitable measurement facilities. The Commission also proposed to retain the requirement that accredited laboratories must be reassessed at least every two years to ensure continued compliance with the accreditation requirements.

46. It is also proposed that the Commission will maintain a list of accredited laboratories that are acceptable for testing equipment subject to our certification and DoC procedures. Under this proposal, laboratories will be accredited to test certain scopes of equipment, such as low power transmitters, unintentional radiators and transmitters used in various licensed services. The Commission believes that a list of accredited laboratories and the types of equipment they can test will assist us in our oversight of TCBs and will assist manufacturers in selecting an

appropriate testing facility. The Commission proposed to include accredited laboratories outside the United States on the list only if it recognizes their accreditation under the terms of an MRA or other agreement. The Commission is aware that some test laboratories are located in countries that do not have an MRA with the United States. In this regard, it proposes to modify § 2.948(e)(2) to provide that if a laboratory is located in a country that does not have an MRA with the United States, then it must be accredited by an organization recognized by the Commission for performing accreditations in the country where the laboratory is located. The Commission describes proposals for Commission recognition of additional laboratory accreditation bodies in the following information.

47. The Commission seeks comment on these proposals. In particular, it seeks comment on whether it is appropriate and necessary to require accreditation of laboratories that perform certification testing and whether such a requirement would be unduly burdensome. The Commission also seeks comment on whether it should allow an accredited laboratory to subcontract part of its work to another laboratory. If so, is there any reason why it should not also require the subcontractor to be accredited? The Commission also seeks comment on whether it should eliminate the § 2.948 test site listing process. The Commission further seeks comment on the information that should be included in the list of accredited laboratories if it requires accreditation of laboratories that perform certification testing. In addition, the Commission seeks comment on steps it could take to recognize the accreditation of test laboratories outside of the United States in countries that do not have an MRA with the United States. For example, should the Commission recognize accreditations made through an organization such as the International Laboratory Accreditation Cooperation (ILAC) for laboratories in countries without an MRA with the United States?

48. The Commission recognizes that there is a cost in terms of time and money for a laboratory to become accredited, but it believes the benefits of increased certainty that equipment tested by an accredited laboratory will comply with the Commission's technical requirements outweigh this burden. As noted, many laboratories that perform certification testing of part 15 and part 18 equipment as well as many laboratories that test equipment used in licensed services are already accredited. Thus, our proposal will not impact those laboratories. However, the Commission seeks comment on the costs that its proposals would impose on currently unaccredited laboratories, and whether the benefits of our proposals outweigh the costs. The Commission furthers seek comment on the impact of this proposal on laboratories outside the United States, particularly those in countries without an MRA with the United States.

2. Selection of New Laboratory Accreditation Bodies

49. Under § 2.948(d) of the rules, any entity seeking recognition from the Commission as an accreditation body for test laboratories must obtain the approval of OET. OET considers recognition of entities as accreditation bodies based on requirements established by ISO and IEC. The rules currently refer to requirements in ISO/IEC Guide 58 for laboratory accreditation, but as discussed, the Commission is proposing modify the rules to reference ISO/IEC Guide 17011 that superseded Guide 58. Under Guide 17011, the accrediting entity must be competent to (1) assess a test laboratory's compliance with applicable ISO/IEC standards for operating a testing laboratory and conducting tests; and (2) assess the laboratory's ability to perform testing in support of the applicable technical regulations. The accreditation body is required to (1) Review the qualifications of a test laboratory's test personnel, management systems, recordkeeping and reporting practices; (2) send recognized experts to observe testing at the laboratory; and (3) verify the testing laboratory's competence to perform tests in accordance with Commission-related measurement procedures.

50. On August 12, 2010 OET issued a public notice providing guidance on the type of information that an applicant that desires to be recognized by the Commission as a laboratory accreditation body should provide in support of its application. Specifically, OET stated that an applicant must submit to the Chief of OET a letter requesting such recognition and that the letter must include information on the applicant's qualifications; OET further indicated that it will make a determination based on the information provided in support of the letter of request. It stated that the following types of information would provide the ''best evidence'' of an applicant's credentials and qualifications to perform accreditation of laboratories that test equipment to Commission requirements, consistent with the requirements of § 2.948(d) of the Commission's rules for accreditation bodies and for test laboratories:

1. Successful completion of a ISO/IEC 17011 peer review, such as being a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement or other equivalent laboratory accreditation agreement;

2. Experience with the accreditation of electromagnetic compatibility (EMC), radio and telecom testing laboratories to ISO/IEC 17025. This can be demonstrated by having OET staff participate in a witness audit of the accreditation body performing an assessment of an EMC/Radio/Telecom testing laboratory; or by having OET staff review the report generated by the NIST laboratory accreditation evaluation program conducted to support the Asia Pacific Economic Cooperation (APEC) Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment. An applicant that offers other evidence has the burden of demonstrating that the information would enable OET to evaluate its experience with the accreditation of EMC, radio and telecom testing laboratories to ISO/IEC 17025.

3. Accreditation personnel/assessors with specific technical experience in the Commission equipment authorization rules and requirements; and

4. Procedures and policies developed for the accreditation of testing laboratories for FCC equipment authorization programs.

51. *Proposal.* The Commission proposes to codify the criteria from the August 12, 2010 public notice into the rules as the method that OET will use to determine the acceptability of new laboratory accreditation bodies. OET developed these criteria during the process of selecting a new laboratory accreditation body, and we believe they represent an appropriate method for determining the acceptability of new accreditation bodies. The Commission seeks comment on this proposal.

3. Test Site Validation

52. A measurement facility that is used for measuring radiated emissions from equipment subject to parts 15 and 18 of the rules must meet the site validation requirements in ANSI C63.4–2001. Radiated emission measurements above 1 GHz are required for many devices subject to parts 15 and 18. However, ANSI C63.4–2001 does not have specific site validation criteria for test facilities used for making radiated emissions above 1 GHz. Rather, it states that facilities determined to be suitable

for performing measurements in the frequency range 30 MHz to 1 GHz are considered suitable for performing measurements in the frequency range 1 GHz to 40 GHz.

53. ANSI C63.4–2009, *American National Standard for Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz,* provides two options for test site validation for facilities used to make radiated emission measurements above 1 GHz. Specifically, it states that facilities suitable for measurements in the frequency range 30 MHz to 1 GHz are considered suitable for measurements in the frequency range 1 GHz to 40 GHz when used with RF absorbing material covering the ground plane such that either: (1) The site validation criterion called out in CISPR 16–1–4:2007 (CISPR 16) is met; or (2) a minimum area of the ground plane is covered, *i.e.,* 2.4 m by 2.4 m (for a 3 m test distance), between the antenna and the Equipment Under Test (EUT) using RF absorbing material with a minimum-rated attenuation of 20 dB (for normal incidence) up to 18 GHz.

54. *Proposal.* The Commission proposed to require that test facilities used to make radiated emission measurements on equipment authorized under any rule part meet the site validation requirements in sections 5.4.4 through 5.5 of ANSI C63.4–2009. The Commission also proposed that if the measurement site will be used for measuring radiated emissions in the range of 1 GHz to 40 GHz, the site must meet the first alternative specified in § 5.5 of this procedure which states that RF absorbing material must cover the ground plane such that the site validation criterion called out in CISPR 16 is met. The Commission believes that requiring a site to meet the CISPR 16 site validation criteria at frequencies above 1 GHz will provide better accuracy and repeatability of measurements than simply covering a minimum area of its ground plane. Consistent with § 5.4.4.2 of ANSI C63.4–2009 and § 2.948(a)(2), the Commission proposed that compliance with the site validation criterion shall be confirmed no less than once every three years. The Commission believes that these proposals will ensure that a test site is suitable for performing accurate, repeatable measurements at all frequencies for which measurements are required. The Commission seeks comment on these proposals. It also seeks comment on how many laboratories would need to modify their sites to comply with the ANSI C63.4–2009 and CISPR 16 site validation criteria that we are proposing, and the costs of implementing this change.

C. Measurement Procedures

1. Part 15 Devices

55. The Commission requires that most devices subject to the part 15 technical requirements be tested to demonstrate compliance with these requirements before they can be imported into or marketed within the United States. Section 15.31(a) of the rules specifies the measurement procedures that the Commission uses to determine equipment compliance with the part 15 technical requirements. This section states that the Commission will measure emissions from most intentional and unintentional radiators using the standard published by the American National Standards Institute, Inc. Accredited Standards Committee C63 (ANSI ASC 63), titled ANSI C63.4–2003, *American National Standard for Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 KHz to 40 GHz* (ANSI C63.4 standard).

56. The Commission has issued a number of public notices, interpretations and advisories on measurement standards for intentional radiators to supplement the test procedures given in the ANSI C63.4 standard. This additional guidance has been necessitated by the growing number of intentional radiators being developed and the resulting number of questions from test laboratories seeking guidance on how to properly measure these devices for FCC compliance. To assist manufacturers in complying with the Commission's rules, the Commission staff worked with ANSI ASC C63 and its members, including manufacturers, the Telecommunication Certification Body Council (TCBC), telecommunication industry representatives and test laboratory staff, to develop a new standard, ANSI C63.10–2009, *American National Standard for Testing Unlicensed Wireless Devices* (ANSI C63.10–2009), for use in the measurement of intentional radiators in a wide range of frequency bands. This new standard consolidates the various measurement procedures that the Commission staff has already allowed for intentional radiators without substantive modification and does not add any new requirements for compliance testing.

57. ANSI ASC C63 also released a revised version of the ANSI C63.4 standard, ANSI C63.4–2009, *American National Standard for Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 KHz to 40 GHz.* Because ANSI ASC C63 developed a separate document that contains the measurement procedures for intentional radiators (ANSI C63.10–2009 as discussed above), the new ANSI C63.4–2009 addresses only unintentional radiators, rather than both intentional and unintentional radiators as did the previous version. The other changes to this standard from the 2003 version are discussed in more detail. OET issued a public notice on November 25, 2009, indicating that it would accept applications for certification of equipment tested either to the ANSI C63.4–2003 procedure currently specified in the rules or to the revised ANSI C63.4–2009 and new ANSI C63.10–2009 procedures.

58. On September 27, 2011, ANSI ASC C63 filed a petition for rule making requesting that the Commission modify §§ 15.31(a)(3) and 15.38(b)(6) of the rules to remove the references to C63.4–2003 and replace them with references to C63.4–2009 and C63.10–2009. It argues that continued use of the C63.4–2003 standard will lead to confusion, inconsistency and a lack of repeatability in product testing. It states that its reasons for developing the 2009 version of the standard were to remove ambiguities, clarify the text in response to requests for interpretations, and to add new material concerning the calibration of test equipment and testing new types of devices. ANSI ASC C63 states that the following changes are incorporated into the new version:

- Specifying a single method of antenna calibration, rather than the two different methods specified in the 2003 version. Because the method specified in the 2009 version is different than either of the previous two methods, test laboratories may need to recalibrate their antennas if the Commission requires use of the new version.
- Clarifying the requirements that receivers and spectrum analyzers must meet and providing more detailed information on the proper use of spectrum analyzers.
- Requiring test laboratories to document any special software used to exercise the equipment under test.
- Requiring test laboratories to determine the effect of temperature changes on measurement cable losses.
- Eliminating the requirement for minimum measuring equipment sensitivity.
- Providing more guidance on testing wall-mounted and ceiling-mounted devices.

• Moving the test site validation procedure from the body of the document to an appendix.

• Specifying criteria for determining measuring site validity at frequencies above 1 GHz.

• Updating the requirement for the information to be displayed on a video display during testing.

On January 12, 2012, the Commission released a public notice inviting comment on the ANSI ASC C63 petition. The Information Technology Industry Council (ITI) filed comments, and ANSI ASC C63 filed reply comments.

59. *Proposal.* The Commission proposes to incorporate ANSI C63.10–2009 into the rules as the procedure the Commission will use for determining the compliance of intentional radiators and ANSI C63.4–2009 as the procedure the Commission will use for determining the compliance of unintentional radiators. The Commission believes that the various clarifications and improvements from the previous version of ANSI C63.4 will advance the Commission's objective of ensuring compliance with its technical requirements as well as decreasing the burden on equipment manufacturers, thus promoting the timely introduction of innovative new products. Consistent with the Commission's previous actions with respect to ANSI C63.4, the Commission is proposing to exclude the use of the sections in C63.4–2009 that allow the use of rod antennas for electric field measurements below 30 MHz, an artificial hand for holding handheld devices, an absorber clamp for radio noise power measurements, and relaxation of the limits for transient emissions. The Commission previously found that there was insufficient evidence that rod antennas, artificial hands or absorber clamps produce accurate, repeatable measurements, and it found that short duration emissions can produce as much nuisance to radio communications as continuous emissions. The Commission seeks comment on these proposals.

60. The Commission is not proposing to incorporate CISPR 22 into the rules for measuring equipment subject to part 15 as requested by ITI. CISPR 22 addresses measurements only up to 6 GHz, whereas our rules require measurements at higher frequencies in some cases. Also, CISPR 22 is applicable only to information technology equipment (called digital devices in the Commission's rules), while C63.4–2009 is applicable to all types of unintentional radiators under part 15 of our rules, including digital devices. The Commission also believes that the C63.4–2009 measurement procedure for frequencies above 1 GHz is more appropriate than the CISPR 22 procedure. Specifically, at frequencies above 1 GHz, C63.4–2009 requires varying the receive antenna height to determine the maximum level of emissions from a device under test, whereas CISPR 22 specifies a fixed receive antenna height that may not determine the maximum emission levels. However, the Commission recognizes that ITI has raised certain specific concerns about C63.4–2009 that merit consideration and it seeks comment on these concerns. Specifically, is the 2009 version of C63.4 more burdensome than previous editions as ITI alleges, and if so, do the benefits of these increased burdens (*e.g.,* increased accuracy and/or consistency of test results) outweigh their costs? Do certain changes in the 2009 revision cause problems for manufacturers and/or test laboratories, such as a restriction on the use of hybrid antennas or the 2 dB rule? Would the references to undated standards in C63.4–2009 force parties to comply with future changes to those standards with no opportunity for comment and no transition period? Should the Commission accept the interpretations of C63.4–2009 and C63.10–2009 on ANSI's Web site? Could the Commission address ITI's concerns about C63.4–2009 and C63.10–2009 by not incorporating certain sections of these standards into the rules? If so, which particular sections should not be incorporated and why? In addition, the Commission notes that ANSI ASC C63 is currently working on revised versions to both C63.4–2009 and C63.10–2009. The Commission seeks comment on whether there are any significant differences between the 2009 versions of these standards and the latest drafts, and whether any of the changes in these drafts would address ITI's concerns.

2. Delegated Authority To Update Measurement Procedures

61. The Commission incorporates industry standards into parts 2 and 15 of the rules for various purposes. For example, § 15.38 lists the measurement procedures and other standards that are incorporated by reference into part 15 of the rules. In addition, part 2 references various ISO/IEC standards related to the accreditation of laboratories and certification bodies. Industry groups that develop standards revise them periodically. In some cases revisions could contain major changes from a previous version, while in other cases revisions of standards may contain only minor updates that pose no significant changes for evaluation of compliance with the rules. The Commission's part 0 rules delegate authority to the Chief of OET to perform certain functions, but require that orders making non-editorial revisions to the rules be referred to the Commission for action. Updating a rule to reference a revised standard is not considered an editorial revision, so such a change requires a Commission action.

62. The Commission proposes to delegate to the Chief of OET the authority to update references to industry standards in parts 2, 5, 15 and 18 of the rules, for which OET is responsible. It further proposes that this authority be limited to updating versions of standards that are already referenced into the rules and not to incorporate a new standard into the rules, and that it be further limited to the approval of changes to the technical standards that do not raise major compliance issues. To meet the statutory requirements of the Administrative Procedure Act (APA), OET would first issue a notice that would be published in the **Federal Register** seeking comment on the proposed change to the rules. The Commission would continue to act on rule changes that incorporate a new standard into the rules or raise major compliance issues. The Commission believes that these proposals would allow us to more quickly update the rules to reflect the release of revised industry standards. The Commission seeks comment on these proposals.

3. Other Issues

63. *Test set-up information.* The Commission is proposing to amend § 2.1033 of the rules to require that applications for certification include photographs or diagrams of the test set-up for each of the required types of tests applicable to the device for which certification is requested. These tests may include, for example, radiated emissions, AC line conducted emissions, conducted power, RF safety (SAR), or compliance with the hearing aid compatibility (HAC) requirements. The rules do not currently require that a certification application include this information, while test set-up photographs or diagrams are required with the information that responsible parties must retain for equipment subject to DoC or verification. The Commission believes that photographs or diagrams of the test set-up should be required with an application for certification for consistency with our other authorization processes and to allow us to determine whether a test laboratory or TCB tested equipment in accordance with the applicable

measurement procedures. The Commission proposed that diagrams or photographs must show enough detail to confirm other information contained in the test report, and that any photographs must be focused originals without glare or dark spots and must clearly show the test configuration used. The Commission believes that the cost of this proposed requirement is negligible because it merely requires a test laboratory or TCB to take a minimal number of additional photographs during testing or draw some relatively simple diagrams and include those with the test report submitted with the application for certification. The Commission seeks comment on this proposal.

64. *Rule corrections.* The Commission is proposing to correct two minor discrepancies in part 15 concerning measurement procedures. Specifically, it is proposing to remove § 15.109(g)(4) as unnecessary because it merely references former § 15.107(e) that was deleted in 2002. The Commission is also proposing to delete as unnecessary the note in § 15.31(a)(3) that states digital devices meeting the limits in §§ 15.107(e) and 15.109(g) must be tested using the ANSI C63.4 procedure. As noted, § 15.107(e) is no longer in the rules, and § 15.109(g) already makes clear that digital devices tested for compliance with the limits in that section must be tested in accordance with the ANSI C63.4 procedure. The Commission seeks comment on these proposals.

D. Transition Period

65. Two of the proposals in this Notice would make changes to the requirements for test laboratories that the Commission believes may take some time for currently operating laboratories to meet. These proposals are that: (1) All laboratories must be accredited if they test equipment authorized through the certification procedure, and (2) laboratories that perform measurements at frequencies above 1 GHz must comply with the site validation criteria in ANSI C63.4–2009. The Commission proposes several provisions to implement these changes and to facilitate the transition for currently listed laboratories that do not meet these proposed requirements. First, it proposes that we will cease accepting applications for unaccredited laboratories under the § 2.948 listing program as of the effective date of final rules. After that date, any new laboratory that wishes to be added to our list of laboratories that can perform testing in support of certification applications must be accredited. The Commission would continue processing applications for § 2.948 listing of unaccredited laboratories that were pending as of the effective date of the rules. If such applications were approved, the laboratories would be treated in the same manner as laboratories that were already listed on the effective date of the rules. Second, the Commission proposed that unaccredited laboratories that are listed as of the effective date of the rules may continue to perform testing in support of certification applications until one year after the publication of final rules in the **Federal Register**. After that date, they must be accredited or cease performing testing in support of certification applications unless they become accredited. Third, the Commission proposes that all laboratories listed with the Commission as of the effective date of the rules, both accredited and unaccredited, must comply with the site validation criteria in ANSI C63.4–2009 no later than one year after publication of final rules in the **Federal Register**. New laboratories that wish to be listed after the effective date of the rules must comply with the ANSI C63.4–2009 site validation criteria, and must be accredited as described. The Commission seeks comment on these proposals.

Initial Regulatory Flexibility Analysis

66. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rule Making* (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided in the item. The Commission will send a copy of the *NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.[3]

A. Need for, and Objectives of, the Proposed Rules

67. The Commission operates an equipment authorization program for radiofrequency (RF) devices under part 2 of its rules. This program is one of the primary means that the Commission uses to ensure that the multitude of RF devices used in the United States operate effectively without causing harmful interference and otherwise comply with the Commission's rules. Certain radio frequency (RF) devices must be approved by the Commission or a Telecommunication Certification Body (TCB) before they can be imported or marketed, while other RF devices do not require approval by the Commission or a TCB.

68. The Commission last comprehensively reviewed its equipment authorization program over ten years ago. The rapid innovation in equipment design since that time has led to ever-accelerating growth in the number of parties applying for equipment approval. We therefore believe that the time is now right for us to review our equipment authorization processes to ensure that they continue to enable this growth and innovation in the wireless equipment market.

B. Legal Basis

69. The proposed action is taken pursuant to Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

70. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[5] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[6] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field

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

[2] *See* 5 U.S.C. 603(a).

[3] *See* 5 U.S.C. 603(a).

[4] *See* 5 U.S.C. 603(b)(3).

[5] *See* 5 U.S.C. 601(6).

[6] *See* 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[7] *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' [8] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees. According to Census Bureau data for 2007, there were a total of 939 establishments in this category that operated for part or all of the entire year. Of this total, 912 had less than 500 employees and 17 had more than 1000 employees.[9] Thus, under that size standard, the majority of firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

71. RF equipment must be authorized through one of three authorization procedures described below. The Notice does not propose to change these authorization procedures, but it does propose changes in the administrative requirements for laboratories that test equipment and TCBs that approve equipment. These changes are described in the following.

Certification is an equipment authorization issued by the Commission or by a designated TCB based on an application and test data submitted by the responsible party (*e.g.,* the manufacturer or importer).[10] The Commission or a TCB may test a sample of a device to verify that it complies with the rules before granting approval for the equipment to be marketed. Examples of devices subject to certification include, but are not limited to, mobile phones; wireless local area networking equipment, remote control transmitters; land mobile radio transmitters; wireless medical telemetry transmitters; cordless telephones; and walkie-talkies.

Declaration of Conformity (DoC) is a procedure that requires the party responsible for compliance to follow certain measurement requirements and/or take other necessary steps to ensure that the equipment complies with the appropriate technical standards.[11] A compliance information statement must be supplied with the product which identifies the product and a responsible party within the United States and which contains the statement specified in Section 15.19(a)(3).[12] The responsible party is not required to file an equipment authorization application with the Commission or a TCB, or to submit a sample unit or test data unless specifically requested.[13] Examples of devices subject to DoC include personal computers and peripherals, consumer ISM equipment such as microwave ovens and RF light bulbs, radio receivers and TV interface devices.[14]

Verification is a procedure under which the party responsible for compliance relies on measurements that it or another party makes to ensure that the equipment complies with the appropriate technical standards.[15] Under the verification procedure, the responsible party is not required to file an application with the Commission. Submittal of a sample unit or representative data to the Commission demonstrating compliance is not required unless specifically requested by the Commission.[16] Examples of devices subject to verification include non-consumer ISM equipment; TV and FM receivers; and business computer equipment.[17] Devices subject to verification must be uniquely identified in a format which cannot be confused with the FCC identifier required on certified equipment.[18]

72. RF equipment subject to any of the equipment authorization procedures described above must be tested for compliance with the Commission's technical rules. Equipment authorized under the DoC procedure must be tested by a laboratory that is accredited as meeting the requirements of the International Organization for Standardization/International Electrotechnical Commission (ISO/IEC) Standard 17025, *General Requirements for the Competence of Calibration and Testing Laboratories,* by a Commission-recognized accreditation organization.[19] Laboratories that test equipment subject to certification under Parts 15 and 18 of the rules are not required to be accredited, but must be on a list maintained by the Commission.[20] Equipment authorized pursuant to certification under rule parts other than Parts 15 or 18, or any equipment authorized under verification, may be tested by the manufacturer or by an independent testing laboratory that is not required to be accredited or listed with the Commission.[21] The Commission may conduct post-market testing of equipment authorized under any of the three procedures to ensure that equipment on the market complies with the Commission's technical requirements.[22] Additionally, TCBs are required to perform post-market surveillance on a certain percentage of products they have certified.[23]

73. The Notice proposes that the Commission will cease approving RF equipment authorized under the certification procedure and allow TCBs to perform all equipment certification. Equipment manufacturers would therefore have to obtain equipment approval through a TCB and would no longer have the option of obtaining equipment approval from the Commission. The Notice also proposes to give TCBs clear authority to request samples of equipment from the

[7] *See* 15 U.S.C. 632.

[8] The NAICS Code for this service 334220. *See* 13 CFR 121/201. *See alsohttp://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=300&-ds_name=EC0731SG2&-_lang=en.*

[9] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=4500&-ds_name=EC0731SG3&-_lang=en.*

[10] *See* 47 CFR 2.907.

[11] *See* 47 CFR 2.906. The party responsible for compliance is defined in 47 CFR 2.909.

[12] *See* 47 CFR 2.1077 and 15.19(a)(3).

[13] *See* 47 CFR 2.956.

[14] *See* 47 CFR 15.101(a) and 18.203(a). Although the Commission rules require Class B personal computers and peripherals to be authorized under either the DoC or certification procedure, the Commission does not certify such equipment. Manufacturers may only obtain certification for Class B personal computers and peripherals through a TCB. *See FCC Will No Longer Accept Equipment Authorization Applications For Class B Computers and Peripherals That Can Be Self-Approved, Public Notice,* 15 FCC Rcd. 25484 (rel. September 29, 2000).

[15] *See* 47 CFR 2.909(b) and 2.953.

[16] *See* 47 CFR 2.956.

[17] *See* 47 CFR 15.101(a) and 18.203(b).

[18] *See* 47 CFR 2.954.

[19] *See* 47 CFR 2.948(a)(3), (d). DoC-authorized devices must be tested by a test laboratory that has been accredited by the National Voluntary Laboratory Accreditation Program (NVLAP) or the American Association of Laboratory Accreditation (A2LA), or by an accredited laboratory designated by the Commission under the terms of a negotiated MRA. *See* 47 CFR 2.948(a)(3), (d), (e).

[20] *See* 47 CFR 2.948(a)(2). To become listed with the Commission, a testing laboratory must file a description of its measurement facilities with the Commission's Laboratory. An accredited laboratory may become listed by filing certain information about itself, but does not need to file a complete description of its measurement facilities.

[21] *See* 47 CFR 2.947, 2.948(a)(1).

[22] *See* 47 CFR 2.946 and 2.1076.

[23] *See* 47 CFR 2.962(g)(2).

manufacturer, so manufactures would be required to provide a sample of equipment to TCBs upon request.

74. The Notice proposes that all laboratories that test equipment that will be approved under the certification procedure must be accredited by a Commission-recognized organization. This would be a change from the current requirement under which only laboratories that test equipment under the DoC procedure must be accredited. Thus, parties wishing to obtain equipment certification would have to ensure that their equipment is tested at an accredited laboratory. The Commission plans to publish a list of accredited laboratories that may test RF equipment that will be certified.

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

75. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.'' [24]

76. The Commission proposed several modifications to the administrative requirements for test laboratories and TCBs that it believes will make the equipment authorization program more efficient and effective, thus benefiting small entities. Specifically, the Commission proposed that TCBs will approve all equipment, including equipment that TCBs may not currently approve because it incorporates new technology or requires measurements for which the procedures are not yet clearly defined. To more efficiently implement this change, it also proposes to integrate a new procedure into our equipment authorization system that will enable TCBs to obtain guidance from the Commission on testing or other certification issues. The Commission expects that these changes will reduce the time required for manufacturers to obtain equipment approval.

77. Our proposals to require accreditation of test laboratories that perform certification testing and establish additional measures to address TCB performance will ensure the continuing quality of the TCB program. This will benefit equipment manufacturers by ensuring that all TCBs operate in accordance with the Commission's rules, thus providing a clear path to market and a level playing field for all manufacturers, both large and small.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

78. None.

Ordering Clauses

79. Pursuant to Sections 1, 4(i), 7(a), 301, 303(f), 303(g), 303(r), 307(e) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 157(a), 301, 303(f), 303(g), 303(r), 307(e), and 332, this Notice of Proposed Rule Making *is adopted.*

80. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies), Reporting and recordkeeping requirements.

47 CFR Part 2

Communications equipment, Incorporation by reference, Reporting and recordkeeping requirements.

47 CFR Part 15

Communications equipment, Radio, and Reporting and recordkeeping requirements.

47 CFR Part 68

Communications equipment and Reporting and recordkeeping.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons set forth in the preamble, the Federal Communications Commission proposes to amend parts 0, 2, 15 and 68 of Title 47 of the Code of Federal Regulations as follows:

PART 0—COMMISSION ORGANIZATION

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

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

■ 2. Section 0.241 is amended by revising paragraphs (a)(1) and (f) to read as follows:

§ 0.241 Authority delegated.

(a) * * *

(1) Notices of proposed rulemaking and of inquiry and final orders in rulemaking proceedings, inquiry proceedings and non-editorial orders making changes, except that:

(i) The Chief of the Office of Engineering and Technology is delegated authority, together with the Chief of the Wireless Telecommunications Bureau, to adopt certain technical standards applicable to hearing aid compatibility under § 20.19 of this chapter, as specified in § 20.19(k) of this chapter.

(ii) The Chief of the Office of Engineering and Technology is delegated authority, by notice-and-comment rulemaking if required by statute or otherwise in the public interest, to issue an order amending parts 2, 5, 15, and 18 of this chapter that reference industry standards to specify revised versions of the standards. This delegation is limited to modifying rules to reference revisions to standards that are already in the rules and not to incorporate a new standard into the rules, and is limited to the approval of changes to the technical standards that do not raise major compliance issues.

* * * * *

(f) The Chief of the Office of Engineering and Technology is authorized to enter into agreements with the National Institute of Standards and Technology and other accreditation bodies to perform accreditation of test laboratories pursuant to § 2.948(e) of this chapter. In addition, the Chief is authorized to make determinations regarding the continued acceptability of individual accrediting organizations and accredited laboratories.

* * * * *

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

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

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 4. Section 2.906 is amended by revising paragraph (a) to read as follows:

§ 2.906 Declaration of Conformity.

(a) A Declaration of Conformity is a procedure where the responsible party, as defined in § 2.909, makes

[24] *See* 5 U.S.C. 603(c)(1)–(c)(4).

measurements or takes other necessary steps to ensure that the equipment complies with the appropriate technical standards. Submittal of a sample unit or representative data to the Commission demonstrating compliance is not required unless specifically requested pursuant to § 2.945.

* * * * *

■ 5. Section 2.910 is added to read as follows:

§ 2.910 Incorporation by reference.

(a) The materials listed in this section are incorporated by reference in this part. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any change in these materials will be published in the Federal Register. The materials are available for purchase at the corresponding addresses as noted, and all are available for inspection at the Federal Communications Commission, 445 12th St. SW., Reference Information Center, Room CY–A257, Washington, DC 20554, (202) 418–0270, and 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/code_of_federal_regulations/ibr_locations.html*.

(b) The following material is available for purchase from at least one of the following addresses: Global Engineering Documents, 15 Inverness Way East, Englewood, CO 80112, (800) 854–7179, or at *http://global.ihs.com*; or American National Standards Institute, 25 West 43rd Street, 4th Floor, New York, NY 10036, (212) 642–4900, or at *http://webstore.ansi.org/ansidocstore/default.asp*.

(1) ANSI C63.4–2009: ''Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz,'' 2009, sections 5.4.4 through 5.5 IBR approved for § 2.948.

(2) CISPR 16–1–4:2007: ''Specification for radio disturbance and immunity measuring apparatus and methods—Part 1–4: Radio disturbance and immunity measuring apparatus—Ancillary equipment—Radiated disturbances'', IBR approved for § 2.948.

(c) The International Organization for Standardization (ISO), 1, ch. De la Voie-Creuse, CP 56, CH–1211, Geneva 20, Switzerland; *www.iso.org*; Tel.: +41 22 749 01 11; Fax: +41 22 733 34 30; email: *central@iso.org*. (ISO publications can also be purchased from the American National Standards Institute (ANSI) through its NSSN operation (*www.nssn.org*), at Customer Service, American National Standards Institute, 25 West 43rd Street, New York NY 10036, telephone (212) 642–4900.)

(1) ISO/IEC 17011:2004, ''Conformity assessment—General requirements for accreditation bodies accrediting conformity assessment bodies,'' IBR approved for §§ 2.948, 2.949, and 2.960.

(2) ISO/IEC 17025:2005, ''General Requirements for the Competence of Calibration and Testing Laboratories,'' IBR approved for §§ 2.948, 2.949, and 2.962.

(3) ISO/IEC 17065:2012, ''Conformity assessment—Requirements for bodies certifying products, processes and services,'' IBR approved for §§ 2.960 and 2.962.

■ 6. Section 2.911 is revised to read as follows:

§ 2.911 Application requirements.

(a) All requests for equipment authorization shall be submitted in writing to a Telecommunication Certification Body (TCB) in a manner prescribed by the TCB.

(b) A TCB shall submit an electronic copy of each equipment authorization application to the Commission pursuant to § 2.962(f)(6) on a form prescribed by the Commission at *http://www.fcc.gov/eas*.

(c) Each application that a TCB submits to the Commission shall be accompanied by all information required by this subpart and by those parts of the rules governing operation of the equipment, the applicant's certifications required in paragraphs (d)(1) and (2) of this section, and by requisite test data, diagrams, photographs, etc., as specified in this subpart and in those sections of rules under which the equipment is to be operated.

(d) The applicant shall provide to the TCB all information that the TCB requests to process the equipment authorization request and to submit the application form prescribed by the Commission and all exhibits required with this form.

(1) The applicant shall provide a written and signed certification to the TCB that all statements it makes in its request for equipment authorization are true and correct to the best of its knowledge and belief.

(2) The applicant shall provide a written and signed certification to the TCB that the applicant complies with the requirements in § 1.2002 of this chapter concerning the Anti-Drug Abuse Act of 1988.

(3) Each request for equipment authorization submitted to a TCB, including amendments thereto, and related statements of fact and authorizations required by the Commission, shall be signed by the applicant if the applicant is an individual; by one of the partners if the applicant is a partnership; by an officer, if the applicant is a corporation; or by a member who is an officer, if the applicant is an unincorporated association: Provided, however, that the application may be signed by the applicant's authorized representative who shall indicate his title, such as plant manager, project engineer, etc.

(4) Information on the Commission's equipment authorization requirements can be obtained from the Internet at *http://www.fcc.gov/eas*.

(e) Technical test data submitted to the TCB and to the Commission shall be signed by the person who performed or supervised the tests. The person signing the test data shall attest to the accuracy of such data. The Commission may require such person to submit a statement showing that he is qualified to make or supervise the required measurements.

(f) Each application submitted by a TCB to the Commission shall be accompanied by any processing fee prescribed in subpart G of part 1 of this chapter. Unless otherwise directed, any fees required for equipment approval services pursuant to § 1.1103 of this chapter must be submitted either electronically via the Internet at *http://www.fcc.gov/eas* or by following the procedures described in § 0.401(b) of this chapter. The address for fees submitted by mail is: Federal Communications Commission, Equipment Approval Services, P.O. Box 979095, St. Louis, MO 63197–9000. If the applicant chooses to make use of an air courier/package delivery service, the following address must appear on the outside of the package/envelope: Federal Communications Commission, c/o Lockbox 979095, SL–MO–C2–GL, 1005 Convention Plaza, St. Louis, MO 63101.

(g) Signed, as used in this section, means an original handwritten signature; however, the Office of Engineering and Technology may allow signature by any symbol executed or adopted by the applicant or TCB with the intent that such symbol be a signature, including symbols formed by computer-generated electronic impulses.

§ 2.913 [Removed]

■ 7. Section 2.913 is removed.

§ 2.936 [Removed]

■ 8. Section 2.936 is removed.

§ 2.943 [Removed]

■ 9. Section 2.943 is removed.

■ 10. Section 2.945 is revised to read as follows:

§ 2.945 Submission of equipment for testing and equipment records.

(a) *Prior to equipment authorization.* (1) The Commission or a Telecommunication Certification Body (TCB) may require an applicant for certification to submit one or more sample units for measurement at the Commission's laboratory or the TCB.

(2) If the applicant fails to provide a sample of the equipment, the TCB may dismiss the application without prejudice.

(3) In the event the applicant believes that shipment of the sample to the Commission's laboratory or the TCB is impractical because of the size or weight of the equipment, or the power requirement, or for any other reason, the applicant may submit a written explanation why such shipment is impractical and should not be required.

(4) The Commission may take administrative sanctions against a grantee of certification that fails to respond within 21 days to a Commission or TCB request for an equipment sample, such as suspending action on applications for equipment authorization submitted by that party while the matter is being resolved. The Commission may consider extensions of time upon submission of a showing of good cause.

(b) *Subsequent to equipment authorization.* (1) The Commission may request that the responsible party or any other party marketing equipment subject to this chapter submit a sample of the equipment to determine the extent to which production of such equipment continues to comply with the data filed by the applicant or on file with the responsible party for equipment subject to verification or Declaration of Conformity. The Commission may request that a sample be submitted to the Commission, or in the case of equipment subject to certification, to the TCB that certified the equipment.

(2) A TCB may request samples of equipment that it has certified from the grantee of certification for the purpose of performing post-market surveillance as described in § 2.962. TCBs must document their sample requests to show the date they were sent and provide this documentation to the Commission upon request.

(3) The cost of shipping the equipment to Commission's laboratory or a TCB and back to the party submitting the equipment shall be borne by the party from which the Commission or TCB requested the equipment.

(4) In the event a party believes that shipment of the sample to the Commission's laboratory or the TCB is impractical because of the size or weight of the equipment, or the power requirement, or for any other reason, that party may submit a written explanation why such shipment is impractical and should not be required.

(5) Failure of a responsible party or other party marketing equipment subject to this chapter to comply with a request from the Commission or TCB for equipment samples within 21 days may be cause for actions such as such as suspending action on applications for equipment authorization submitted by a grantee or forfeitures pursuant to § 1.80 of this chapter. The Commission may consider extensions of time upon submission of a showing of good cause.

(c) *Submission of records.* Upon request by the Commission, each responsible party shall submit copies of the records required by §§ 2.938, 2.955, and 2.1075 to the Commission. Failure of a responsible party or other party marketing equipment subject to this chapter to comply with a request from the Commission for records within 21 days may be cause for forfeiture, pursuant to § 1.80 of this chapter. The Commission may consider extensions of time upon submission of a showing of good cause.

(d) *Inspection by the Commission.* Upon request by the Commission, each responsible party shall make its manufacturing plant and facilities available for inspection.

§ 2.946 [Removed]

■ 11. Section 2.946 is removed.

■ 12. Section 2.948 is revised to read as follows:

§ 2.948 Measurement facilities.

(a) Equipment authorized under the certification or Declaration of Conformity (DoC) procedure shall be tested at a laboratory that is accredited in accordance with paragraph (e) of this section.

(b) A laboratory that makes measurements of equipment subject to an equipment authorization under the certification, DoC or verification procedure shall compile a description of the measurement facilities employed.

(1) The description of the measurement facilities shall contain the following information:

(i) Location of the test site.

(ii) Physical description of the test site accompanied by photographs of size A4 (21 cm × 29.7 cm) or 8×10 inches (20.3 cm × 25.4 cm). Smaller photographs may be used if they clearly show the details of the test site and are mounted on full size sheets of paper.

(iii) A drawing showing the dimensions of the site, physical layout of all supporting structures, and all structures within 5 times the distance between the measuring antenna and the device being measured.

(iv) Description of structures used to support the device being measured and the test instrumentation.

(v) List of measuring equipment used.

(vi) Information concerning the calibration of the measuring equipment, i.e., the date the equipment was last calibrated and how often the equipment is calibrated.

(vii) For a measurement facility that will be used for testing radiated emissions, a plot of site attenuation data taken pursuant paragraph (d) of this section.

(2) The description of the measurement facilities shall be provided to a laboratory accreditation body upon request.

(3) The description of the measurement facilities shall be retained by the party responsible for verification of equipment and provided to the Commission upon request.

(i) The party responsible for verification of equipment may rely upon the description of the measurement facilities retained by an independent laboratory that performed the tests. In this situation, the party responsible for verification of the equipment is not required to retain a duplicate copy of the description of the measurement facilities.

(ii) No specific site calibration data is required for equipment that is verified for compliance based on measurements performed at the installation site of the equipment. The description of the measurement facilities may be retained at the site at which the measurements were performed.

(c) The Commission will maintain a list of accredited laboratories for which the accrediting organization (or designating authority in the case of foreign laboratories) submits the information listed in paragraphs (c)(1) through (8) of this section to the Commission's laboratory. The Commission will make publicly available a list of those laboratories that indicate they will perform testing on a contract basis. Inclusion of a facility on the Commission's list does not constitute Commission endorsement of that facility. The Commission will list the following information:

(1) Laboratory name, location of test site(s), mailing address and contact information;

(2) Name of accrediting organization;

(3) Scope of laboratory accreditation;

(4) Date of expiration of accreditation;

(5) Designation number;

(6) FCC Registration Number (FRN);

(7) A statement as to whether or not the laboratory performs testing on a contract basis;

(8) For laboratories outside the United States, the name of the mutual recognition agreement or arrangement under which the accreditation of the laboratory is recognized.

(d) For a measurement facility that will be used for testing radiated emissions, the site attenuation must comply with the requirements of Sections 5.4.4 through 5.5 of the following procedure: American National Standards Institute (ANSI) C63.4–2009, ''American National Standard for Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz'' (incorporated by reference, see § 2.910). This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. If the measurement site will be used for measuring radiated emissions in the range of 1 GHz to 40 GHz, the site must meet the first alternative specified in Section 5.5 of C63.4–2009 which states that RF absorbing material must cover the ground plane such that the site validation criterion called out in CISPR 16–1–4:2007 is met. Test site revalidation shall occur on an interval not to exceed three years.

(e) A laboratory that has been accredited with a scope covering the measurements required for the types of equipment that it will test shall be deemed competent to test and submit test data for equipment subject to verification, Declaration of Conformity, and certification. Such a laboratory shall be accredited by an approved accreditation organization based on the International Organization for Standardization/International Electrotechnical Commission (ISO/IEC) Standard 17025, ''*General Requirements for the Competence of Calibration and Testing Laboratories.*'' The organization accrediting the laboratory must be approved by the Commission's Office of Engineering and Technology, as indicated in § 0.241 of this chapter, to perform such accreditation based on ISO/IEC Standard 17011, ''*Conformity assessment—General requirements for accreditation bodies accrediting conformity assessment bodies.*'' The frequency for re-assessment of the test facility and the information that is required to be filed or retained by the testing party shall comply with the requirements established by the accrediting organization, but shall occur on an interval not to exceed two years.

(f) The accreditation of a laboratory located outside of the United States, or its possessions, will be acceptable only under one of the following conditions:

(1) If the accredited laboratory has been designated by a foreign designating authority and recognized by the Commission under the terms of a government-to-government Mutual Recognition Agreement/Arrangement (MRA); or

(2) If the laboratory is located in a country that does not have an MRA with the United States, then it must be accredited by an organization recognized by the Commission under the provisions of § 2.949 for performing accreditations in the country where the laboratory is located.

■ 13. Section 2.949 is added to read as follows:

§ 2.949 Selection of laboratory accreditation bodies.

(a) A party wishing to become a laboratory accreditation body recognized by OET must submit a written request to the Chief of OET requesting such recognition. OET will make a determination based on the information provided in support of the request for recognition.

(b) Applicants shall provide the following information as evidence of their credentials and qualifications to perform accreditation of laboratories that test equipment to Commission requirements, consistent with the requirements of § 2.948(e) of the Commission's rules. OET may request additional information, as needed, to determine the applicant's credentials and qualifications.

(1) Successful completion of an ISO/IEC 17011 peer review, such as being a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement or other equivalent laboratory accreditation agreement.

(2) Experience with the accreditation of electromagnetic compatibility (EMC), radio and telecom testing laboratories to ISO/IEC 17025. This can be demonstrated by having OET staff participate in a witness audit of the accreditation body performing an assessment of an EMC/Radio/Telecom testing laboratory; or by having OET staff review the report generated by the National Institute of Standards and Technology (NIST) laboratory accreditation evaluation program conducted to support the Asia Pacific Economic Cooperation (APEC) Mutual Recognition Arrangement (MRA) for Conformity Assessment of Telecommunications Equipment. An applicant that offers other evidence has the burden of demonstrating that the information would enable OET to evaluate its experience with the accreditation of electromagnetic compatibility (EMC), radio and telecom testing laboratories to ISO/IEC 17025.

(3) Accreditation personnel/assessors with specific technical experience on the Commission equipment authorization rules and requirements.

(4) Procedures and policies developed for the accreditation of testing laboratories for FCC equipment authorization programs.

■ 14. Section 2.953 is amended by revising paragraph (b) to read as follows.

§ 2.953 Responsibility for compliance.

* * * * *

(b) The importer of equipment subject to verification may upon receiving a written statement from the manufacturer that the equipment complies with the appropriate technical standards rely on the manufacturer or independent testing agency to verify compliance. The test records required by § 2.955 however should be in the English language and made available to the Commission upon a reasonable request, in accordance with § 2.945.

* * * * *

§ 2.956 [Removed]

■ 15. Section 2.956 is removed.

■ 16. Section 2.960 is amended by revising paragraphs (a), (b), and (c)(1) to read as follows:

§ 2.960 Recognition of Telecommunication Certification Bodies (TCBs).

(a) The Commission may recognize designated Telecommunication Certification Bodies (TCBs) to approve equipment for certification as required under this part. Certification of equipment by a TCB shall be based on an application with all the information specified in this part. The TCB shall process the application to determine compliance with the Commission's requirements and shall issue a written grant of equipment authorization. The grant shall identify the approving TCB and the Commission as the issuing authority.

(b) In the United States, TCBs shall be accredited and designated by the National Institute of Standards and Technology (NIST) under its National Voluntary Conformity Assessment Evaluation (NVCASE) program, or other

recognized programs based on ISO/IEC 17065, to comply with the Commission's qualification criteria for TCBs. NIST may, in accordance with its procedures, allow other appropriately qualified accrediting bodies to accredit TCBs. TCBs shall comply with the requirements in § 2.962.

(c) * * *

(1) The organization accrediting the prospective telecommunication certification body shall be capable of meeting the requirements and conditions of ISO/IEC 17011.

* * * * *

■ 17. Section 2.962 is revised to read as follows:

§ 2.962 Requirements for Telecommunication Certification Bodies.

Telecommunication certification bodies (TCBs) designated by NIST, or designated by another authority pursuant to an effective bilateral or multilateral mutual recognition agreement or arrangement to which the United States is a party, shall comply with the following requirements:

(a) *Certification methodology.* (1) The certification system shall be based on type testing as identified in ISO/IEC 17065.

(2) Certification shall normally be based on testing no more than one unmodified representative sample of each product type for which certification is sought. Additional samples may be requested if clearly warranted, such as when certain tests are likely to render a sample inoperative.

(b) *Criteria for designation.* (1) To be designated as a TCB under this section, an entity shall, by means of accreditation, meet all the appropriate specifications in ISO/IEC 17065 for the scope of equipment it will certify. The accreditation shall specify the group of equipment to be certified and the applicable regulations for product evaluation.

(2) The TCB shall demonstrate expert knowledge of the regulations for each product with respect to which the body seeks designation. Such expertise shall include familiarity with all applicable technical regulations, administrative provisions or requirements, as well as the policies and procedures used in the application thereof.

(3) The TCB shall have the technical expertise and capability to test the equipment it will certify and shall also be accredited in accordance with ISO/IEC 17025 to demonstrate it is competent to perform such tests.

(4) The TCB shall demonstrate an ability to recognize situations where interpretations of the regulations or test procedures may be necessary. The appropriate key certification and laboratory personnel shall demonstrate knowledge of how to obtain current and correct technical regulation interpretations. The competence of the TCB shall be demonstrated by assessment. The general competence, efficiency, experience, familiarity with technical regulations and products included in those technical regulations, as well as compliance with applicable parts of the ISO/IEC 17025 and ISO/IEC 17065, shall be taken into consideration.

(5) A TCB shall participate in any consultative activities, identified by the Commission or NIST, to facilitate a common understanding and interpretation of applicable regulations.

(6) The Commission will provide public notice of the specific methods that will be used to accredit TCBs, consistent with these qualification criteria.

(7) A TCB shall be reassessed for continued accreditation on intervals not exceeding two years.

(c) *External resources.* (1) In accordance with the provisions of ISO/IEC 17065, the evaluation of a product, or a portion thereof, may be performed by bodies that meet the applicable requirements of ISO/IEC 17025 and ISO/IEC 17065, in accordance with the applicable provisions of ISO/IEC 17065 for external resources (outsourcing) and other relevant standards.

(2) A recognized TCB shall not sub-contract certification decision activities.

(3) When a subcontractor is used to provide testing of equipment subject to certification, the TCB shall be responsible for the test results and shall maintain appropriate oversight of the subcontractor to ensure reliability of the test results. Such oversight shall include periodic audits of products that have been tested and other activities as required in ISO/IEC 17065 when a certification body uses external resources for evaluation.

(d) *Recognition of a TCB.* (1)(i) The Commission will recognize as a TCB any organization in the United States that meets the qualification criteria and is accredited and designated by NIST or NIST's recognized accreditor as provided in § 2.960(b).

(ii) The Commission will recognize as a TCB any organization outside the United States that meets the qualification criteria and is designated pursuant to an effective bilateral or multilateral MRA as provided in § 2.960(c).

(2) The Commission will withdraw its recognition of a TCB if the TCB's designation or accreditation is withdrawn, if the Commission determines there is just cause for withdrawing the recognition, or if the TCB requests that it no longer hold its designation or recognition. The Commission will limit the scope of equipment that can be approved by a TCB if its accreditor limits the scope of its accreditation or if the Commission determines there is good cause to do so. The Commission will notify a TCB in writing of its intention to withdraw or limit the scope of the TCB's recognition and provide at least 60 days for the TCB to respond. In the case of a TCB designated and recognized pursuant to an effective bilateral or multilateral mutual recognition agreement or arrangement (MRA), the Commission shall consult with the Office of the United States Trade Representative (USTR), as necessary, concerning any disputes arising under an MRA for compliance with the Telecommunications Trade Act of 1988 (Section 1371–1382 of the Omnibus Trade and Competitiveness Act of 1988).

(3) The Commission will notify a TCB in writing when it has evidence that the TCB is not approving equipment in accordance with the Commission's rules and policies and request that it correct any apparent deficiencies. The Commission may require that all applications for the TCB be processed under the pre-approval guidance procedure in § 2.964 for at least 30 days, and will provide a TCB with 30 day notice of its intent to do so unless good cause exists for providing shorter notice. The Commission may request that a TCB's designating authority or accreditation body investigate and take appropriate corrective actions as required, and the Commission may initiate action to limit or withdraw the recognition of the TCB as described in § 2.962(e)(2).

(4) If the Commission withdraws its recognition of a TCB, all equipment approvals issued by that TCB will remain valid unless specifically set aside or revoked by the Commission under paragraph (f)(5) of this section.

(5) A list of recognized TCBs will be published by the Commission.

(e) *Scope of responsibility.* (1) A TCB shall certify equipment in accordance with the Commission's rules and policies.

(2) A TCB shall accept test data from any Commission-recognized accredited test laboratory, subject to the requirements in ISO/IEC 17065, and shall not unnecessarily repeat tests.

(3) A TCB may establish and assess fees for processing certification applications and other Commission-required tasks.

(4) A TCB shall dismiss an application which is not in accordance with the provisions of this subpart or when the applicant requests dismissal, and may dismiss an application if the applicant does not submit additional information or test samples requested by the TCB.

(5) The Commission or TCB may set aside a grant of certification within 30 days of grant. A TCB shall notify the applicant and the Commission when a grant is set aside. After 30 days, the Commission may revoke a grant of certification through the procedures in § 2.939.

(6) A TCB shall follow the procedures in § 2.964 for equipment on the pre-approval guidance list.

(7) A TCB shall supply an electronic copy of each equipment authorization application form and all necessary exhibits to the Commission prior to grant or dismissal of the application. Where appropriate, the application must be accompanied by a request for confidentiality of any material that may qualify for confidential treatment under the Commission's rules.

(8) A TCB shall grant or dismiss each equipment authorization application through the Commission's electronic system.

(9) A TCB may not:

(i) Grant a waiver of the rules.

(ii) Take enforcement actions; or

(iii) Authorize a transfer of control of a grantee.

(10) All TCB actions are subject to Commission review.

(f) *Post-market surveillance requirements.* (1) In accordance with ISO/IEC 17065, a TCB shall conduct appropriate post-market surveillance activities. These activities shall be based on type testing a certain number of samples of the total number of product types which the certification body has certified. Other types of surveillance activities of a product that has been certified are permitted, provided they are no more onerous than type testing.

(2) The Chief of the Office of Engineering and Technology (OET) has delegated authority under § 0.241(g) of this chapter to develop procedures that TCBs will use for performing post-market surveillance. OET will publish a document on TCB post-market surveillance requirements, and this document will provide specific information such as the number and types of samples that a TCB must test.

(3) OET may request that a grantee of equipment certification submit a sample directly to the TCB that performed the original certification for evaluation. Any equipment samples requested by the Commission and tested by a TCB will be counted toward the minimum number of samples that the TCB must test.

(4) TCBs may request samples of equipment that they have certified directly from the grantee of certification in accordance with § 2.945.

(5) If during post market surveillance of a certified product, a TCB determines that a product fails to comply with the technical regulations for that product, the TCB shall immediately notify the grantee and the Commission in writing of its findings. The grantee shall provide a report to the TCB describing the actions taken to correct the situation, and the TCB shall provide a report of these actions to the Commission within thirty days.

(6) TCBs shall submit periodic reports to OET of their post-market surveillance activities and findings in the format and by the date specified by OET.

■ 18. Section 2.964 is added to read as follows:

§ 2.964 Pre-approval guidance procedure for Telecommunication Certification Bodies.

(a) The Commission will publish a ''pre-approval guidance list'' identifying the categories of equipment or types of testing for which TCBs must request guidance from the Commission before approving equipment on the list.

(b) TCBs shall use the following procedure for approving equipment on the Commission's pre-approval guidance list.

(1) A TCB shall perform an initial review of the application and determine the issues on which it needs to obtain guidance from the Commission. It shall then contact the Commission to obtain guidance on those issues by electronically submitting relevant exhibits.

(2) The TCB shall complete the review of the application in accordance with the Commission's guidance.

(3) The Commission may request and test a sample of the equipment before the application can be granted.

(4) The TCB shall electronically submit the application and all exhibits to the Commission along with a request to grant the application.

(5) The Commission will give its concurrence for the TCB to grant the application if it determines that the equipment complies with the rules. The Commission will advise the TCB if additional information or equipment testing is required, or if the equipment cannot be approved because it does not comply with the Commission's rules.

■ 19. Section 2.1033 is amended by adding paragraph (b)(13), revising paragraph (c) introductory text and adding paragraph (c)(19) to read as follows:

§ 2.1033 Application for certification.

* * * * *

(b) * * *

(13) Contain at least one drawing or photograph showing the test set-up for each of the required types of tests applicable to the device for which certification is requested. These drawings or photographs must show enough detail to confirm other information contained in the test report. Any photographs used must be focused originals without glare or dark spots and must clearly show the test configuration used.

(c) Applications for equipment other than that operating under parts 15, 11 and 18 of this chapter shall be accompanied by a technical report containing the following information:

* * * * *

(19) Contain at least one drawing or photograph showing the test set-up for each of the required types of tests applicable to the device for which certification is requested. These drawings or photographs must show enough detail to confirm other information contained in the test report. Any photographs used must be focused originals without glare or dark spots and must clearly show the test configuration used.

* * * * *

■ 20. Section 2.1073 is amended by revising paragraph (b) to read as follows:

§ 2.1073 Responsibilities.

* * * * *

(b) The responsible party, if different from the manufacturer, may upon receiving a written statement from the manufacturer that the equipment complies with the appropriate technical standards rely on the manufacturer or independent testing agency to determine compliance. However, the test records required by § 2.1075 shall be in the English language and shall be made available to the Commission upon a reasonable request in accordance with the provisions of § 2.945.

* * * * *

■ 21. Section 2.1075 is amended by revising paragraph (c) to read as follows:

§ 2.1075 Retention of records.

* * * * *

(c) The records listed in paragraphs (a) and (b) of this section shall be retained for two years after the manufacture or assembly, as appropriate, of said equipment has been permanently discontinued, or until the conclusion of an investigation or a proceeding if the responsible party is officially notified that an investigation or any other administrative proceeding

involving the equipment has been instituted. Requests for the records described in this section and for sample units also are covered under the provisions of § 2.945.

§ 2.1076 [Removed]

■ 22. Section 2.1076 is removed.

PART 15—RADIO FREQUENCY DEVICES

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

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

■ 24. Section 15.31 is amended by revising paragraph (a)(3) and adding paragraph (a)(4) to read as follows:

§ 15.31 Measurement standards.

(a) * * *

(3) Other intentional radiators are to be measured for compliance using the following procedure: ANSI C63.10–2009: ''American National Standard for Testing Unlicensed Wireless Devices'' (incorporated by reference, § 15.38). This incorporation by reference was approved by the Director of the **Federal Register** in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(4) Unintentional radiators are to be measured for compliance using the following procedure excluding sections 4.5.2, 6.2.12, 8.2.2, 9 and 14: ANSI C63.4–2009: ''Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz'' (incorporated by reference, see § 15.38). This incorporation by reference was approved by the Director of the **Federal Register** in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

* * * * *

■ 25. Section 15.38 is amended by revising paragraph (b)(1) and by adding paragraph (b)(4) to read as follows:

§ 15.38 Incorporation by reference.

* * * * *

(b) * * *

(1) ANSI C63.4–2009: ''Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz,'' 2009, IBR approved for § 15.31 except sections 4.5.2, 6.2.12, 8.2.2, 9 and 14.

* * * * *

(4) ANSI C63.10–2009, ''American National Standard for Testing Unlicensed Wireless Devices,'' 2009, IBR approved for § 15.31.

* * * * *

§ 15.109 [Amended]

■ 26. Section 15.109 is amended by removing paragraph (g)(4).

PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

■ 27. The authority citation for part 68 continues to read as follows:

Authority: Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082, (47 U.S.C. 154, 155, 303).

■ 28. Section 68.160 is amended by revising paragraphs (a), (b), and (c)(1) to read as follows:

§ 68.160 Designation of Telecommunication Certification Bodies (TCBs).

(a) The Commission may recognize designated Telecommunication Certification Bodies (TCBs) to approve equipment for certification as required under this part. Certification of equipment by a TCB shall be based on an application with all the information specified in this part. The TCB shall process the application to determine compliance with the Commission's requirements and shall issue a written grant of equipment authorization. The grant shall identify the approving TCB and the Commission as the issuing authority.

(b) In the United States, TCBs shall be accredited and designated by the National Institute of Standards and Technology (NIST) under its National Voluntary Conformity Assessment Evaluation (NVCASE) program, or other recognized programs based on ISO/IEC 17065, to comply with the Commission's qualification criteria for TCBs. NIST may, in accordance with its procedures, allow other appropriately qualified accrediting bodies to accredit TCBs. TCBs shall comply with the requirements in § 68.162.

(c) * * *

(1) The organization accrediting the prospective telecommunication certification body shall be capable of meeting the requirements and conditions of ISO/IEC 17011.

* * * * *

■ 29. Section 68.162 is amended by revising paragraphs (a), (b)(1), (c)(1), (c)(3), (c)(4), (d), (f)(2), and (g)(2) to read as follows:

§ 68.162 Requirements for Telecommunication Certification Bodies.

(a) Telecommunication certification bodies (TCBs) designated by NIST, or designated by another authority pursuant to an effective bilateral or multilateral mutual recognition agreement or arrangement to which the United States is a party, shall comply with the following requirements.

(b) *Certification methodology.* (1) The certification system shall be based on type testing as identified in ISO/IEC 17065.

* * * * *

(c) *Criteria for designation.* (1) To be designated as a TCB under this section, an entity shall, by means of accreditation, meet all the appropriate specifications in ISO/IEC 17065 for the scope of equipment it will certify. The accreditation shall specify the group of equipment to be certified and the applicable regulations for product evaluation.

* * * * *

(3) The TCB shall have the technical expertise and capability to test the equipment it will certify and shall also be accredited in accordance with ISO/IEC 17025 to demonstrate it is competent to perform such tests.

(4) The TCB shall demonstrate an ability to recognize situations where interpretations of the regulations or test procedures may be necessary. The appropriate key certification and laboratory personnel shall demonstrate knowledge of how to obtain current and correct technical regulation interpretations. The competence of the telecommunication certification body shall be demonstrated by assessment. The general competence, efficiency, experience, familiarity with technical regulations and products included in those technical regulations, as well as compliance with applicable parts of the ISO/IEC 17025 and ISO/IEC 17065, shall be taken into consideration.

* * * * *

(d) *External resources.* (1) In accordance with the provisions of ISO/IEC 17065, the evaluation of a product, or a portion thereof, may be performed by bodies that meet the applicable requirements of ISO/IEC 17025 and ISO/IEC 17065, in accordance with the applicable provisions of ISO/IEC 17065 for external resources (outsourcing) and other relevant standards.

(2) A recognized TCB shall not sub-contract certification decision activities.

(3) When a subcontractor is used to provide testing of equipment subject to certification, the TCB shall be responsible for the test results and shall maintain appropriate oversight of the subcontractor to ensure reliability of the test results. Such oversight shall include periodic audits of products that have been tested and other activities as required in ISO/IEC 17065 when a certification body uses external resources for evaluation.

* * * * *

(f) * * *

(2) A TCB shall accept test data from any source, subject to the requirements in ISO/IEC 17065, and shall not unnecessarily repeat tests.

* * * * *

(g) * * *

(2) In accordance with ISO/IEC 17065, a TCB is required to conduct appropriate surveillance activities. These activities shall be based on type testing a few samples of the total number of product types which the certification body has certified. Other types of surveillance activities of a product that has been certified are permitted, provided they are no more onerous than testing type. The Commission may at any time request a list of products certified by the certification body and may request and receive copies of product evaluation reports. The Commission may also request that a TCB perform post-market surveillance, under Commission guidelines, of a specific product it has certified.

* * * * *

[FR Doc. 2013–10315 Filed 5–2–13; 8:45 am]

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Notices

Federal Register
Vol. 78, No. 86
Friday, May 3, 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

Submission for OMB Review; Comment Request

April 30, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by June 3, 2013 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725–17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Farm Service Agency

Title: Highly Erodible Land Conservation and Wetland Conservation (7 CFR Part 12)

OMB Control Number: 0560–0185.

Summary of Collection: The Food Security Act of 1985 as amended by the Federal Agriculture Conservation and Trade Act of 1990 and the Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Act), and the Agricultural Assistance Act of 2003 (the 2003 Act) provides that any person who produces an agricultural commodity on a field which is highly erodible land (HEL) is predominate, or designate land on which HEL is predominated to be set aside, diverted, devoted to conservation uses, or otherwise not cultivated under a program administered by the Secretary to reduce production of an agricultural commodity, shall be ineligible for benefits under certain programs administered by USDA, unless the production of an agricultural commodity on HEL is in compliance with an approved conservation plan or system or an exempt applies. These provisions are an attempt to preserve the nation's wetland and to reduce the rate at which soil is lost from highly erodible land. In order to ensure that persons who request benefits subject to the conservation restrictions get technical assistance needed and are informed regarding the compliance requirements on their land, the Farm Service Agency (FSA) collects information using several forms from producers with regard to their financial activities on their land that could affect their eligibility for requested USDA benefits.

Need and Use of the Information: Information must be collected from producers to certify that they intend to comply with the conservation requirements on their land to maintain their eligibility. Additional information may be collected if producers request that certain activities be exempt from provisions of the statute in order to evaluate whether the exempted conditions will be met. The collection of information allows the FSA county employees to perform the necessary compliance checks and fulfill USDA's objectives towards preserving wetlands and reducing erosion.

Description of Respondents: Individuals or households; Business or other for-profit; Not-for-profit institutions; Federal Government; State, Local or Tribal Government.

Number of Respondents: 259,288.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 261,471.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–10553 Filed 5–2–13; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

April 30, 2013.

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Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal & Plant Health Inspection Service

Title: Certification Program for Imported Articles to Prevent Introduction of Potato Brown Rot.

OMB Control Number: 0579–0221.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry or movement of plants and plant pest to prevent the introduction of plant pest into the United States. The regulations in 7 CFR part 319 include a certification program for articles of Pelargonium spp. and Solanum spp. imported from countries where the bacterium Ralstonia solanacearum race 3 biovar 2 is known to occur. This bacterial strain causes potato brown rot, which causes potatoes to rot through, making them inedible and seriously affecting potato yields.

Need and Use of the Information: The Animal Plant and Health Inspection Service (APHIS) require the collection of information through a phytosanitary certificate (foreign), trust funds, and compliance agreement and production site registration. If the information is not collected, potato fields could become infected with the strain of *R. solanacearum* and this could drastically reduce or eliminate potato fields.

Description of Respondents: Business or other for-profit; Federal Government.

Number of Respondents: 27.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,032.

Title: Importation of Fruit from Thailand.

OMB Control Number: 0579–0308.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701 *et seq*), the Secretary of Agriculture is authorized to carry out operations or measures to detect, eradicate, suppress, control., prevent, or retard the spread of plant pests new to the United States or not known to be widely distributed throughout the United States. The Animal and Plant Health Inspection Service (APHIS) amended the fruit and vegetables regulations to allow the importation into the United State of litchi, longan, mango, mangosteen, pineapple, and rambutan from Thailand. The fruit would have to be accompanied by a phytosanitary certificate with an additional declaration stating that the fruit had been tested with irradiation in Thailand and in the case of litchi, that the fruit had been inspected and found to be free of *Peronophythora litchi,* a fungal pest of litchi.

Need and Use of the Information: APHIS will use the information on the certificate to determine the pest condition of the shipment at the time of inspection in the foreign country. This information is used as a guide to the intensity of the inspection APHIS conduct when the shipment arrives. Without this information, all shipments would need to be inspected very thoroughly, thereby requiring considerably more time. This would slow the clearance of international shipments.

Description of Respondents: Federal Government (Foreign).

Number of Respondents: 10.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 78.

Title: Permanent, Privately Owned Horse Quarantine Facilities.

OMB Control Number: 0579–0313.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The AHPA is contained in Title X, Subtitle E, Section 10401–19 of Public Law 107–171, May 13, 2002, the Farm Security and Rural Investment Act of 2002. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Animal and Plant Health Inspection Service (APHIS) regulations in subpart C of part 93, on the importation of horses include requirements for the approval and establishment of permanent, privately owned horse quarantine facilities that are operated under APHIS supervision. These regulations necessitate the use of several information collection activities when applicants apply for approval to establish and operate permanent, privately owned quarantine facilities for horses.

Need and Use of the Information: APHIS will collect the following information: (1) Environment Certification, (2) Application for Facility Approval, (3) Service Agreements, (4) Letter Challenging Withdrawal for Facility Approval, (5) Letter Notifying APHIS of Facility Closure, (6) Compliance Agreement, (7) Security Instructions, (8) Alarm Notification, (9) Security Breach, (10) List of Personnel, (11) Signed Statements, (12) Daily Log, and (13) Request for Variance.

Without the information APHIS would be unable to approve permanent, privately owned horse quarantine facilities.

Description of Respondents: Business or other for-profit; State, Local or Tribal Government .

Number of Respondents: 6.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 17.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–10548 Filed 5–2–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

April 30, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC, *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Business-Cooperative Service

Title: Rural Micro-Entrepreneur Assistance Program.

OMB Control Number: 0570–0062.

Summary of Collection: Section 6022 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) authorizes the Rural Micro-entrepreneur Assistance Program (RMAP). The Secretary makes direct loans to rural microenterprise development organizations (MDOs) that are participating in the program (who are referred to as ''micro-lenders'') for the purpose of capitalizing microloan revolving funds to provide fixed interest rate business loans of $50,000 or less to micro-entrepreneurs, as defined in the 2008 Farm Bill.

Need and Use of the Information: The program provides rural micro-entrepreneurs with the skills necessary to establish new rural microenterprises; to provide continuing technical and financial assistance related to the successful operation of rural microenterprises; and to assist with the cost of providing other activities and services related to the successful operation of MDOs and rural microenterprises. Micro-lenders seeking loans and/or grants will have to submit applications that include specified information, certifications, and agreements to the Agency. This information will be used to determine applicant eligibility and to ensure that funds are used for authorized purposes.

Description of Respondents: Business or other for-profit;

Number of Respondents: 73.

Frequency of Responses: Reporting: Quarterly, Annually.

Total Burden Hours: 3,327.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–10547 Filed 5–2–13; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0033]

Stine Seed Farm, Inc.; Extension of a Determination of Nonregulated Status of Corn Genetically Engineered for Herbicide Resistance

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service is extending to maize line HCEM485, which has been genetically engineered to be resistant to the herbicide glyphosate, our determination of nonregulated status of Roundup Ready® corn line GA21. Therefore, APHIS no longer considers maize line HCEM485 to be a regulated article under Agency regulations governing the introduction of certain genetically engineered organisms. Our decision is based on our evaluation of data submitted by Stine Seed Farm, Inc., in its request for an extension of a determination of nonregulated status, an analysis of other scientific data, and comments received from the public in response to a previous notice announcing our preliminary determination. This notice also announces the availability of our written determination, final environmental assessment, plant pest risk assessment, and our finding of no significant impact.

DATES: *Effective Date:* May 3, 2013.

ADDRESSES: Supporting documents, comments we received on our previous notice announcing our preliminary determination, and our responses to those comments may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0033* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming. Supporting documents are also available on the APHIS Web site at *http://www.aphis.usda.gov/biotechnology/petitions_table_pending.shtml* under APHIS Petition Number 09–063–01p Extension of 97–099–01p.

FOR FURTHER INFORMATION CONTACT: Dr. Rebecca Stankiewicz Gabel, Chief, Biotechnology Environmental Analysis Branch, Environmental Risk Analysis Programs, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 851–3927, email: *rebecca.l.stankiewicz-gabel@aphis.usda.gov.* To obtain copies of the supporting documents, contact Ms. Cindy Eck at (301) 851–3885, email: *cynthia.a.eck@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the authority of the plant pest provisions of the Plant Protection Act (PPA) (7 U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered (GE) organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Further, the regulations in § 340.6(e)(2) provide that a person may request that APHIS extend a determination of nonregulated status to other organisms. Such a request must include information to establish the similarity of the antecedent organism and the regulated article in question.

In a notice published in the **Federal Register** on December 5, 1997 (62 FR 64350–64351, Docket No. 97–052–2), APHIS announced our determination of nonregulated status of Roundup Ready® corn line GA21. APHIS received a request for an extension of a determination of nonregulated status (APHIS Number 09–063–01p) of Roundup Ready® corn line GA21 to maize line HCEM485 [1] from Stine Seed Farm, Inc., (Stine Seed) of Research Triangle Park, NC. In its request, Stine Seed stated that this corn is similar to Roundup Ready® corn line GA21 and, based on the similarity to the antecedent organism, is unlikely to pose a plant pest risk and, therefore, should not be

[1] The terms ''corn'' and ''maize'' both refer to *Zea mays.* In this notice, we refer to ''maize line HCEM485'' as this is the name used by Stine Seed in its extension request to identify its GE corn. Otherwise, we use the more common term ''corn'' when referring to *Zea mays.*

a regulated article under APHIS' regulations in 7 CFR part 340.

On February 27, 2013, APHIS published a notice [2] in the **Federal Register** (78 FR 13303–13304, Docket No. APHIS–2012–0033) announcing the availability of a draft environmental assessment (EA) and plant pest risk assessment (PPRA) for public comment for the Stine Seed extension request. The extension request and APHIS' preliminary decision were also published with that notice. APHIS received three comments on the subject EA and PPRA during the designated 30-day public comment period, which ended March 29, 2013. Issues raised during the comment period included effects of glyphosate, pollen drift, crop diversity, and human health concerns. APHIS has addressed the issues raised during the comment period and has provided responses to these comments as an attachment to the finding of no significant impact (FONSI).

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the determination of nonregulated status of maize line HCEM485, an EA has been prepared. The EA was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on our EA, the response to public comments, and other pertinent scientific data, APHIS has reached a FONSI with regard to the preferred alternative identified in the EA.

Determination

Based on APHIS' analysis of field and laboratory data submitted by Stine Seed, references provided in the extension request, peer-reviewed publications, information analyzed in the EA, the similarity of maize line HCEM485 to the antecedent organism, Roundup Ready® corn line GA21, comments provided by the public, and information provided in APHIS' response to those public comments, APHIS has determined that maize line HCEM485 is unlikely to pose a plant pest risk. We are therefore extending the determination of nonregulated status of Roundup Ready® corn line GA21 to maize line HCEM485, whereby maize line HCEM485 is no longer subject to our regulations governing the introduction of certain genetically engineered organisms.

Copies of the signed determination document, as well as copies of the extension request, PPRA, EA, and FONSI and response to comments, are available as indicated in the **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** sections of this notice.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 29th day of April 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–10510 Filed 5–2–13; 8:45 am]

BILLING CODE 3410–34–P

[2] To view the notice, petition, draft EA, the PPRA, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS–2012–0033.*

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0067]

J.R. Simplot Co.; Availability of Petition for Determination of Nonregulated Status of Potato Genetically Engineered for Low Acrylamide Potential and Reduced Black Spot Bruise

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service (APHIS) has received a petition from the J.R. Simplot Company (Simplot) seeking a determination of nonregulated status of potatoes designated as Innate™ potatoes (events E12, E24, F10, F37, J3, J55, J78, G11, H37, and H50), which have been genetically engineered for low acrylamide potential (acrylamide is a human neurotoxicant and potential carcinogen that may form in potatoes and other starchy foods under certain cooking conditions) and reduced black spot bruise. The petition has been submitted in accordance with our regulations concerning the introduction of certain genetically engineered organisms and products. We are making the Simplot petition available for review and comment to help us identify potential environmental and interrelated economic issues and impacts that APHIS may determine should be considered in our evaluation of the petition.

DATES: We will consider all comments that we receive on or before July 2, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0067-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0067, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0067* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

The petition is also available on the APHIS Web site at *http://www.aphis.usda.gov/brs/aphisdocs/13_02201p.pdf.*

FOR FURTHER INFORMATION CONTACT: Dr. Rebecca Stankiewicz Gabel, Chief, Biotechnology Environmental Analysis Branch, Environmental Risk Analysis Programs, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 851–3927, email: *rebecca.l.stankiewicz-gabel@aphis.usda.gov.* To obtain copies of the petition, contact Ms. Cindy Eck at (301) 851–3892, email: *cynthia.a.eck@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the authority of the plant pest provisions of the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered (GE) organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition

to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

APHIS has received a petition (APHIS Petition Number 13–022–01p) from the J.R. Simplot Company (Simplot) of Boise, ID, seeking a determination of nonregulated status of potatoes (*Solanum tuberosum*) designated as Innate™ potatoes (events E12, E24, F10, F37, J3, J55, J78, G11, H37, and H50), which have been genetically engineered for low acrylamide potential and reduced black spot bruise. Acrylamide is a human neurotoxicant and potential carcinogen that may form in potatoes and other starchy foods under certain cooking conditions. The petition states that these potatoes are unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

As described in the petition, Innate™ potatoes have been genetically engineered through the insertion of genetic elements from potato or wild potato (a group of related plant species that are sexually compatible with potato) using Simplot's Innate™ technologies. Simplot's Innate™ technologies allow researchers to isolate genetic elements from any plant genome, rearrange them, or link them together in desired permutations, and introduce them back into the genome, without incorporating anything other than plant DNA. Innate™ potatoes are currently regulated under 7 CFR part 340. Interstate movements and field tests of Innate™ potatoes have been conducted under notifications acknowledged by APHIS.

Field tests conducted under APHIS oversight allowed for evaluation in a natural agricultural setting while imposing measures to minimize the risk of persistence in the environment after completion of the tests. Data are gathered on multiple parameters and used by the applicant to evaluate agronomic characteristics and product performance. These and other data are used by APHIS to determine if the new variety poses a plant pest risk.

Paragraph (d) of § 340.6 provides that APHIS will publish a notice in the **Federal Register** providing 60 days for public comment for petitions for a determination of nonregulated status. On March 6, 2012, we published in the **Federal Register** (77 FR 13258–13260, Docket No. APHIS–2011–0129) a notice [1] describing our process for soliciting public comment when considering petitions for determinations of nonregulated status for GE organisms. In that notice we indicated that APHIS would accept written comments regarding a petition once APHIS deemed it complete.

In accordance with § 340.6(d) of the regulations and our process for soliciting public input when considering petitions for determinations of nonregulated status for GE organisms, we are publishing this notice to inform the public that APHIS will accept written comments regarding the petition for a determination of nonregulated status from interested or affected persons for a period of 60 days from the date of this notice. The petition is available for public review, and copies are available as indicated under **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** above. We are interested in receiving comments regarding potential environmental and interrelated economic issues and impacts that APHIS may determine should be considered in our evaluation of the petition. We are particularly interested in receiving information regarding the extent of true potato seed use for planting in the United States as compared to the use of asexually propagated fragments of potato tubers. We are also interested in receiving comments regarding biological, cultural, or ecological issues, and we encourage the submission of scientific data, studies, or research to support your comments. We also request that, when possible, commenters provide relevant information regarding specific localities or regions as potato growth, crop management, and crop utilization may vary considerably by geographic region.

After the comment period closes, APHIS will review all written comments received during the comment period and any other relevant information. Any substantive issues identified by APHIS based on our review of the petition and our evaluation and analysis of comments will be considered in the development of our decisionmaking documents.

As part of our decisionmaking process regarding a GE organism's regulatory status, APHIS prepares a plant pest risk assessment to assess its plant pest risk and the appropriate environmental documentation—either an environmental assessment (EA) or an environmental impact statement (EIS)—in accordance with the National Environmental Policy Act (NEPA), to provide the Agency with a review and analysis of any potential environmental impacts associated with the petition request. For petitions for which APHIS prepares an EA, APHIS will follow our published process for soliciting public comment (see footnote 1) and publish a separate notice in the **Federal Register** announcing the availability of APHIS' EA and plant pest risk assessment. Should APHIS determine that an EIS is necessary, APHIS will complete the NEPA EIS process in accordance with Council on Environmental Quality regulations (40 CFR part 1500–1508) and APHIS' NEPA implementing regulations (7 CFR part 372).

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 29th day of April 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–10504 Filed 5–2–13; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice, go to *http://www.regulations.gov/#!docketDetail;D=APHIS–2011-0129.*

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0023]

Changes to Scrapie Flock Certification Program

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: We are giving notice of changes to the Scrapie Flock Certification Program (SFCP), a voluntary program for sheep and goat flock owners who wish to reduce and/or eliminate the risk of introducing classical scrapie into their flocks. In order to refocus the program's risk reduction strategy on animal sampling, we plan to eliminate the Complete Monitored category of the SFCP. This will affect all ''Complete Monitored'' and ''Certified'' flocks. Flock owners who are currently enrolled in the Complete Monitored or Certified category who wish to remain in the SFCP will be allowed to enroll in either the Select category or the Export category. This change will allow us to apply limited agency resources to areas that most effectively contribute to scrapie eradication, such as nationwide surveillance activities for the disease in sheep and goats.

DATES: We will consider all comments that we receive on or before June 3, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0023-0001*.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0023, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0023* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Alan Huddleston, Associate National Scrapie Program Coordinator, National Center for Animal Health Programs, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; (301) 851–3497.

SUPPLEMENTARY INFORMATION: Scrapie is a degenerative and ultimately fatal disease affecting the central nervous systems of sheep and goats. It belongs to a group of diseases called transmissible spongiform encephalopathies. The Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), administers a National Scrapie Eradication Program (NSEP) to eliminate classical scrapie from the United States. The Scrapie Flock Certification Program (SFCP), described in regulations at 9 CFR part 54, is a voluntary program within the broader NSEP. Producers who elect to join the SFCP agree to follow a set of requirements outlined in the ''Scrapie Flock Certification Program Standards'' (program standards). We plan to revise the program standards for the SFCP. The SFCP program standards may be viewed on the APHIS Web site at *http://www.aphis.usda.gov/animal_health/animal_diseases/scrapie/*. Printed copies may be obtained from the person listed above under **FOR FURTHER INFORMATION CONTACT**.

Since APHIS established the SFCP as part of the NSEP, SFCP participants have received tangible benefits from the program, including a reduced risk of introducing scrapie into the flock and an increased marketability of participating animals. However, APHIS has evaluated the effects of the SFCP on scrapie eradication and concluded that the SFCP does not support national scrapie eradication as effectively as other surveillance activities, such as the Regulatory Scrapie Slaughter Surveillance (RSSS) program, distribution of free eartags to sheep and goat producers, and disease investigations and flock clean ups. Due to budget reductions in fiscal year (FY) 2012 and anticipated reductions in upcoming fiscal years, the NSEP needs to focus resources on its most effective components. APHIS has therefore decided to revise the SFCP to focus resources on other surveillance activities. The revisions to the SFCP are expected to both increase the program's contributions toward surveillance by approximately 50 percent and to cut the cost of the voluntary program roughly in half, saving about $500,000 annually for surveillance activities. The revised SFCP will assist APHIS in continuing to move efficiently toward scrapie eradication.

Effects of the SFCP on Scrapie Eradication

Our analysis of the effects of the SFCP on scrapie eradication found:

- Participation in the SFCP is voluntary, and participating flocks represent only 1 percent of the total number of U.S. sheep flocks and goat herds
- Participation in the SFCP has declined by about 25 percent since 2007
- More owners are using genotyping to reduce a sheep flock's risk of infection than the voluntary flock certification program
- The Complete Monitored category of the SFCP does not efficiently detect scrapie cases

Surveillance and disease response activities are the most effective components of the scrapie program with regard to eradication. The ability to detect clinically healthy but infected animals and successfully trace them back to their infected and source flocks has decreased scrapie prevalence by 85 percent, from 0.2 percent in 2002–2003 to less than 0.03 percent at the end of FY 2011. The most effective activities include:

- The RSSS program
- The distribution of free official eartags to sheep and goat producers
- Compliance enforcement at animal concentration points
- Disease investigations

Decreased funding for these elements means that many of the remaining scrapie-infected animals in the United States may go undetected. This could cost the sheep and goat industries approximately $10 million to $20 million each year scrapie continues to be present in our national sheep and goat population.

The SFCP is a voluntary State-Federal-industry cooperative effort established and maintained to monitor flocks and certify the scrapie status of the animals enrolled in the program. Any sheep or goat owner or manager may apply to participate in the SFCP. There are three categories of enrollment. The Selective Monitored category has the lowest level of monitoring, and flocks participating in this category cannot become certified. The Complete Monitored category has a higher level of monitoring, and flocks can achieve Certified status after 5 years. The Export Monitored category has the highest level of monitoring, and flocks can become Export Certified after 7 years. Approximately 94 percent of all participating flocks are in the Complete Monitored category. The most significant cost of the SFCP is the annual inspection, which is currently required for every flock participating in the program.

The revised SFCP will eliminate the Complete Monitored category. Participants in this category will have the following options: (1) Join a revised Selective Monitored category; (2) join the Export Monitored category; or (3) withdraw from the program. The Selective Monitored category will be renamed Select Monitored, to be consistent with the common category reference used by the sheep and goat industry. The revised Select Monitored category will no longer be subject to the annual inspection of all animals conducted by an APHIS or State representative under the former Selective Monitored category. We expect that 40 percent to 60 percent of current Complete Monitored category participants will either join the Select category or withdraw from the program, and the remaining 40 to 60 percent will join the Export Monitored category. Because the revised Select Monitored category would no longer require an annual inspection, the cost of the SFCP will be cut roughly in half, saving about $500,000 annually for surveillance activities. Additionally, the Select Monitored category will have a new sampling requirement; flocks that join the Select Monitored and Export Monitored categories will therefore contribute a greater number of animals for scrapie testing than in the current

program. The reduced cost of the SFCP and the increased surveillance achieved through the revised program will allow APHIS to continue to move efficiently toward full scrapie eradication.

If a participant with a flock currently in the Complete Monitored category chooses to join the Export Monitored category instead of the Select Monitored category, the flock will become an Export Monitored flock with the same status date that it held on its conversion date. If it is a Certified flock, it will become an Export Monitored flock with 5 years of time in status. APHIS will list the flock as both an Export Monitored flock and a Certified flock on its Web site for 3 years or until it achieves Export Certified status. After 3 years, flocks that have not achieved Export Certified status would be listed only as Export Monitored. Most former Certified flocks that join should be able to achieve Export Certified status within 2 years, since Certified status required 5 years of successful monitoring and Export Certified status requires 7 years.

We welcome public comment on this notice and the proposed revisions to the SFCP program standards. If no substantive changes to the revised SFCP are deemed necessary by the APHIS Administrator, the revised SFCP program will come into effect 7 days after the close of the comment period for this notice. If substantive changes are deemed necessary, we will publish an additional document in the **Federal Register** to discuss them; otherwise, the final version of the revised SFCP program standards will be announced and made available on the APHIS Web site at *http://www.aphis.usda.gov/animal_health/animal_diseases/scrapie/.*

Done in Washington, DC, this 29th day of April 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–10543 Filed 5–2–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–891]

Hand Trucks and Certain Parts Thereof From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Ruling Pursuant to Court Decision

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

SUMMARY: On April 24, 2013, the United States Court of International Trade (CIT) sustained the Department of Commerce's (the Department's) final results of remand determination, regarding the scope of the *Hand Trucks Order*[1] excluding the WelCom Products MCK Magna Cart pursuant to the CIT's remand order in *WelCom Products, Inc.* v. *United States, Court No. 11–00370,* Slip Op. 12–124 (September 27, 2012) (*WelCom*). *See* Results of Redetermination Pursuant to Court Order, Court No. 11–00370, dated December 20, 2012 (WelCom MCK Magna Cart Remand Results). Consistent with the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*), as clarified by *Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final scope ruling and is amending its final scope ruling on WelCom Products' MCK Magna Cart. *See* the memorandum entitled ''Hand Trucks and Certain Parts Thereof from the People's Republic of China (PRC): Final Scope Ruling—WelCom Products MC2 Magna Cart, MCI Magna Cart, and MCK Magna Cart,'' dated September 6, 2011 (Final Scope Ruling).

DATES: *Effective Date:* May 4, 2013.

FOR FURTHER INFORMATION CONTACT: Steve Bezirganian or Robert James, AD/CVD Operations, Office 7, Import Administration—International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC, 20230; telephone (202) 482–1131 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 12, 2010, WelCom Products (WelCom) submitted a request inquiring whether three of its products, the MC2 Magna Cart, MCI Magna Cart, and MCK Magna Cart, are outside of the scope of the *Hand Trucks Order.* In the Final Scope Ruling, the Department found the MC2 Magna Cart and the MCI Magna Cart are not within the scope of the hand trucks order, but the MCK Magna Cart is within the scope of the *Hand Trucks Order.* WelCom challenged the Department's final determination with respect to the MCK Magna Cart, and U.S. producer Gleason Industries challenged the Department's final determination with respect to the MC2 Magna Cart and the MCI Magna Cart. The Court sustained the Department's ruling with respect to the latter two products, but found the Department's decision regarding the MCK Magna Cart to be unreasonable. With respect to the MCK Magna Cart, the Court found the Department had not justified its conclusion in light of the Department's prior scope rulings, and, therefore, the ruling must be set aside and reconsidered. The Court ordered the Department to reconsider its conclusion that the entire telescoping portion of the frame must be less than 5/8″ in diameter in order for a product to meet scope exclusion language in the order, and to further consider the record developed in the ITC injury determination. *See WelCom* at 14. Pursuant to the Court's order in *WelCom,* in WelCom MCK Magna Cart Remand Results we determined that the MCK Magna Cart is outside the scope of the *Hand Trucks Order.*[2] The CIT sustained the Department's remand redetermination on April 24, 2013. *See WelCom Products, Inc.* v. *United States,* Court Number 11–0370, Slip Op. 1354, April 24, 2013.

Timken Notice

In its decision in *Timken,* 893 F.2d at 341, as clarified by *Diamond Sawblades,* the Federal Circuit has held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's April 24, 2013, judgment sustaining the Department's remand redetermination construing the scope of

[1] *See Notice of Antidumping Duty Order: Hand Trucks and Certain Parts Thereof From the People's Republic of China,* 69 FR 70122 (December 2, 2004) (*Hand Trucks Order*).

[2] The Department noted that it was conducting the remand respectfully under protest. *See* WelCom MCK Magna Cart Remand Results at 2. *See also Viraj Group, Ltd.* v. *United States,* 343 F.3d 1371 (Fed. Cir. 2003).

the *Hand Trucks Order* as not covering WelCom's MCK Magna Cart constitutes a final decision of that court that is not in harmony with the Department's Final Scope Ruling. This notice is published in fulfillment of the publication requirements of *Timken.* Accordingly, the Department will continue the suspension of liquidation of WelCom's MCK Magna Cart from the PRC pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision. The cash deposit rate on WelCom's MCK Magna Cart will be zero percent.

Amended Final Scope Ruling

Because there is now a final court decision with respect to WelCom's MCK Magna Cart, the Department amends its final scope ruling and now finds that the scope of the *Hand Trucks Order* does not cover WelCom's MCK Magna Cart. The Department will instruct U.S. Customs and Border Protection (CBP) that the cash deposit rate on WelCom's MCK Magna Cart will be zero percent. In the event the CIT's ruling is not appealed or, if appealed, upheld by the Federal Circuit, the Department will instruct CBP to liquidate entries of WelCom's MCK Magna Cart without regard to antidumping duties, and to lift suspension of liquidation of such entries.

This notice is issued and published in accordance with section 516A(c)(1) of the Act.

Dated: April 29, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–986]

Hardwood and Decorative Plywood From the People's Republic of China: Antidumping Duty Investigation

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

DATES: *Effective Date:* May 3, 2013.

SUMMARY: The Department of Commerce (''Department'') preliminarily determines that hardwood and decorative plywood (''plywood'') from the People's Republic of China (''PRC'') is being, or is likely to be, sold in the United States at less than fair value (''LTFV''), as provided in section 733 of the Tariff Act of 1930, as amended (''the Act''). The period of investigation (''POI'') is January 1, 2012, through June 30, 2012. The estimated margins of sales at LTFV are shown in the ''Preliminary Determination'' section of this notice. The final determination will be issued 75 days after publication of this preliminary determination in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Katie Marksberry or Kabir Archuletta, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–7906 or (202) 482–2593, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The merchandise subject to this investigation is hardwood and decorative plywood. Hardwood and decorative plywood is a flat panel composed of an assembly of two or more layers or plies of wood veneers in combination with a core. The veneers, along with the core, are glued or otherwise bonded together to form a finished product. A hardwood and decorative plywood panel must have face and back veneers which are composed of one or more species of hardwoods, softwoods, or bamboo. Hardwood and decorative plywood may include products that meet the American National Standard for Hardwood and Decorative Plywood, ANSI/HPVA HP–1–2009.

All hardwood and decorative plywood is included within the scope of this investigation, without regard to dimension (overall thickness, thickness of face veneer, thickness of back veneer, thickness of core, thickness of inner veneers, width, or length). However, the most common panel sizes of hardwood and decorative plywood are 1219 × 1829 mm (48 × 72 inches), 1219 × 2438 mm (48 × 96 inches), and 1219 × 3048 mm (48 × 120 inches).

A ''veneer'' is a thin slice of wood which is rotary cut, sliced or sawed from a log, bolt or flitch. The face veneer is the exposed veneer of a hardwood and decorative plywood product which is of a superior grade than that of the back veneer, which is the other exposed veneer of the product (*i.e.,* as opposed to the inner veneers). When the two exposed veneers are of equal grade, either one can be considered the face or back veneer. For products that are entirely composed of veneer, such as Veneer Core Platforms, the exposed veneers are to be considered the face and back veneers, in accordance with the descriptions above.

The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a range of materials, including but not limited to veneers, particleboard, and medium-density fiberboard (''MDF'').

All hardwood and decorative plywood is included within the scope of this investigation regardless of whether or not the face and/or back veneers are surface coated, unless the surface coating obscures the grain, texture or markings of the wood. Examples of surface coatings which may not obscure the grain, texture or markings of the wood include, but are not limited to, ultra-violet light cured polyurethanes, oil or oil-modified or water based polyurethanes, wax, epoxy-ester finishes, and moisture-cured urethanes. Hardwood and decorative plywood that has face and/or back veneers which have an opaque surface coating which obscures the grain, texture or markings of the wood, are not included within the scope of this investigation. Examples of surface coatings which may obscure the grain, texture or markings of wood include, but are not limited to, paper, aluminum, high pressure laminate (''HPL''), MDF, medium density overlay (''MDO''), and phenolic film). Additionally, the face veneer of hardwood and decorative plywood may be sanded, smoothed or given a ''distressed'' appearance through such methods as hand-scraping or wire brushing. The face veneer may be stained.

The scope of the investigation excludes the following items: (1) Structural plywood (also known as ''industrial plywood'' or ''industrial panels'') that is manufactured and stamped to meet U.S. Products Standard PS 1–09 for Structural Plywood (including any revisions to that standard or any substantially equivalent international standard intended for structural plywood), including but not limited to the ''bond performance'' requirements set forth at paragraph 5.8.6.4 of that Standard and the performance criteria detailed at Table 4 through 10 of that Standard; (2) products which have a face and back veneer of cork; (3) multilayered wood flooring, as described in the antidumping duty and countervailing duty orders on Multilayered Wood Flooring from the People's Republic of China, Import Administration, International Trade Administration, U.S. Department of Commerce Investigation Nos. A–570–970 and C–

570–971 (published December 8, 2011); (4) plywood which has a shape or design other than a flat panel.

Imports of the subject merchandise are provided for under the following subheadings of the Harmonized Tariff Schedule of the United States (''HTSUS''): 4412.10.0500; 4412.31.0520; 4412.31.0540; 4412.31.0560; 4412.31.2510; 4412.31.2520; 4412.31.4040; 4412.31.4050; 4412.31.4060; 4412.31.4070; 4412.31.5135; 4412.31.5155; 4412.31.5165; 4412.31.5175; 4412.31.6000; 4412.31.9100; 4412.32.0520; 4412.32.0540; 4412.32.0560; 4412.32.2510; 4412.32.2520; 4412.32.3135; 4412.32.3155; 4412.32.3165; 4412.32.3175; 4412.32.3185; 4412.32.5600; 4412.39.1000; 4412.39.3000; 4412.39.4011; 4412.39.4012; 4412.39.4019; 4412.39.4031; 4412.39.4032; 4412.39.4039; 4412.39.4051; 4412.39.4052; 4412.39.4059; 4412.39.4061; 4412.39.4062; 4412.39.4069; 4412.39.5010; 4412.39.5030; 4412.39.5050; 4412.94.1030; 4412.94.1050; 4412.94.3111; 4412.94.3121; 4412.94.3131; 4412.94.3141; 4412.94.3160; 4412.94.3171; 4412.94.4100; 4412.94.6000; 4412.94.7000; 4412.94.8000; 4412.94.9000; 4412.99.0600; 4412.99.1020; 4412.99.1030; 4412.99.1040; 4412.99.3110; 4412.99.3120; 4412.99.3130; 4412.99.3140; 4412.99.3150; 4412.99.3160; 4412.99.3170; 4412.99.4100; 4412.99.5710; 4412.99.6000; 4412.99.7000; 4412.99.8000; 4412.99.9000; 4412.10.9000; 4412.31.4080; 4412.32.0570; 4412.32.2530; 4412.94.5100; 4412.94.9500; 4412.99.5115; and 4412.99.9500.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the subject merchandise as set forth herein is dispositive.

Methodology

The Department has conducted this investigation in accordance with section 731 of the Act. Export prices have been calculated in accordance with section 772 of the Act. Because the PRC is a non-market economy within the meaning of section 771(18) of the Act, normal value (''NV'') has been calculated in accordance with section 773(c). Specifically, the Department preliminarily selected the Philippines as the surrogate country, which is economically comparable to the PRC and is a significant producer of comparable merchandise. Thus, we calculated NV using Philippine prices, when available, to value the respondents' factors of production (''FOPs'').

For a full description of the methodology underlying our conclusions, *see* ''Decision Memorandum for Preliminary Determination for the Antidumping Duty Investigation of Hardwood and Decorative Plywood from the People's Republic of China,'' (''Preliminary Decision Memorandum'') from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with this determination and hereby adopted by this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *https://iaaccess.trade.gov* and in the Department's Central Records Unit, located in room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be found on the Internet at *http://www.trade.gov/ia/*. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Determination

The preliminary weighted-average antidumping duty (''AD'') margin percentages are as follows:

Exporter	Producer	Percent margin
Linyi San Fortune Wood Co., Ltd	Linyi San Fortune Wood Co., Ltd	0.62
Jiangyang Group[1]	Jiangyang Group	1.83
Anhui Tiansen Trading Co., Ltd	Linyi City Fei County Jianxin Boards Factory	22.14
Anhui Tiansen Trading Co., Ltd	Xuzhou Dayuan Wooden Industry Co., Ltd	22.14
Anhui Tiansen Trading Co., Ltd	Linyi Yiming Wooden Industry Co., Ltd	22.14
Anhui Tiansen Trading Co., Ltd	Linyi Xicheng Wooden Industry Co., Ltd	22.14
Anhui Tiansen Trading Co., Ltd	Linyi Dazhong Wooden Industry Co., Ltd	22.14
Anhui Wanmu Wood Co., Ltd	Anhui Wanmu Wood Co., Ltd	22.14
Anhui Xinyuanda Wood Co., Ltd	Anhui Xinyuanda Wood Co., Ltd	22.14
Anji Hefeng Bamboo & Wood Industry Co., Ltd	Anji Hefeng Bamboo & Wood Industry Co., Ltd	22.14
Anji Qichen Bamboo Industry Co., Ltd	Anji Qichen Bamboo Industry Co., Ltd	22.14
Celtic Co., Ltd	Linyi Celtic Wood Co., Ltd	22.14
Dehua Tb Industry & Trade Company Limited	Zhejiang Jufeng Wood Co., Ltd	22.14
Dehua Tb Industry & Trade Company Limited	Dehua Tb New Decoration Material Co., Ltd	22.14
Dehua Tb Industry & Trade Company Limited	Zhangjiagang Jiuli Wood Co., Ltd	22.14
Zhejiang Dehua Tb Import & Export Co., Ltd	Zhejiang Jufeng Wood Co., Ltd	22.14
Zhejiang Dehua Tb Import & Export Co., Ltd	Dehua Tb New Decoration Material Co., Ltd	22.14
Zhejiang Dehua Tb Import & Export Co., Ltd	Zhangjiagang Jiuli Wood Co., Ltd	22.14
Deqing Dajiang Import and Export Co., Ltd	Fengxian Fangyuan Wood Industry Co., Ltd	22.14
Deqing Dajiang Import and Export Co., Ltd	Linyi Rui Tong Wood Co., Ltd	22.14
Deqing Dajiang Import and Export Co., Ltd	Linyi Tongxin Wood Industry Co., Ltd	22.14
Deqing Dajiang Import and Export Co., Ltd	Zhucheng Huifeng Wood Industry Co., Ltd	22.14
Deqing Dajiang Import and Export Co., Ltd	Linyi Jiatai Wood Industry Co., Ltd	22.14
Deqing Dajiang Import and Export Co., Ltd	Linyi City Lanshan District Qifeng Wood Factory	22.14
Linyi City Dongfang Jinxin Economic & Trade Co., Ltd	Linyi City Dongfang Jinxin Economic & Trade Co., Ltd	22.14

[1] Jiangyang Group consists of Xuzhou Jiangyang Wood Industries Co., Ltd. and Xuzhou Jiangheng Wood Products Co., Ltd.

Exporter	Producer	Percent margin
Fengxian Fangyuan Wood Co., Ltd	Fengxian Fangyuan Wood Co., Ltd	22.14
Guangxi Guixun Panel Co	Guangxi Guixun Panel Co	22.14
Highland Industries Inc	Linyi Lanshan District Linyu Wood Board Plant	22.14
Highland Industries Inc	Feixian Jinhao Wood Board Plant	22.14
Highland Industries Inc	Feixian Tanyi Youcheng Jiafu Wood Factory	22.14
Highland Industries Inc	Feixn Tanyi Xinhengda Multilayer Wood Plant	22.14
Highland Industries Inc	Hanlin Timber Products Company Ltd	22.14
Highland Industries Inc	Jiangsu Suyuan Wood Company Ltd	22.14
Highland Industries Inc	Linyi Feihong Wood Co., Ltd	22.14
Highland Industries Inc	Linyi Hongde Wood Co., Ltd	22.14
Highland Industries Inc	Linyi Huasheng Yongbin Wood Co., Ltd	22.14
Highland Industries Inc	Linyi Jinghua Wood Ltd	22.14
Highland Industries Inc	Linyi Maoling Wood Board Plant	22.14
Highland Industries Inc	Linyi Quanjin Wood Co., Ltd	22.14
Highland Industries Inc	Linyi Yongguo Wood Board Plant	22.14
Highland Industries Inc	Linyi Zhangcheng Wood Co., Ltd	22.14
Highland Industries Inc	Pingyi Futian Wood Board Plant	22.14
Highland Industries Inc	Qiangsheng Wood Co., Ltd	22.14
Highland Industries Inc	Shandong Union Wood	22.14
Highland Industries Inc	Shenghe Wood Company Ltd	22.14
Highland Industries Inc	Yishui Jinpeng Wood Co., Ltd	22.14
Huainan Mengping Import and Export Co., Ltd	Linyi Qianfeng Panel Factory Co., Ltd	22.14
Huainan Mengping Import and Export Co., Ltd	Linyi Dazhong Wood Co., Ltd	22.14
Lingyi Huasheng Yongbin Wood Co., Ltd	Lingyi Huasheng Yongbin Wood Co., Ltd	22.14
Jiangsu Dilun International Trading Co., Ltd	Xuzhou Weilin Wood Co. Ltd. (Weilin)	22.14
Jiangsu Eastern Shengxin International Trading Co., Ltd	Xuzhou Huana Eraoor Wood Co. Ltd	22.14
Jiangsu Eastern Shengxin International Trading Co., Ltd	Xuzhou Meilinsen Wood Wood Co. Ltd	22.14
Jiangsu Eastern Shengxin International Trading Co., Ltd	Xuzhou Senya Wood Co. Ltd	22.14
Jiangsu Happy Wood Industrial Group Co., Ltd	Jiangsu Happy Wood Industrial Group Co., Ltd	22.14
Jiangsu Shengyang Industrial Joint Stock Co., Ltd	Jiangsu Shengyang Industrial Joint Stock Co., Ltd	22.14
Jiangsu Simba Flooring Co., Ltd	Yixing Lion-King Timber Industry Co., Ltd	22.14
Jiangsu Simba Flooring Co., Ltd	Jiangsu Simba Flooring Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Youcheng Jiafu Wood Products Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Xingying Wood Products Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Fengxian Jihe Wood Products Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Fengxian Zhongtuo Woods Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Huajun Wood Products Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Shandong Junxing Woods Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Hongtaiyang Woods Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Zhenyuan Wood Products Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Xicheng Wood Products Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Dongfang Juxin Wood Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Huifeng Wood Industry Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Xuzhou Zhongcai Wood Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Fengxian Fangyuan Wood Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Xuzhou Dayuan Wood Factory	22.14
Jiangsu Top Point International Co., Ltd	Linyi Dashun Wood Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Pingyi Futian Wood Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Pingyi Xinda Wood Factory	22.14
Jiangsu Top Point International Co., Ltd	Linyi Jiuda Wood Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi Laite Wood Factory	22.14
Jiangsu Top Point International Co., Ltd	Linyi Ruichen Wood Co., Ltd	22.14
Jiangsu Top Point International Co., Ltd	Linyi City Lanshan District Fubao Wood Factory	22.14
Jiangsu Top Point International Co., Ltd	Linyi Linyu Wood Factory	22.14
Jiangsu Top Point International Co., Ltd	Linyi Shunda Wood Factory	22.14
Jiangsu Top Point International Co., Ltd	Linyi City Lanshan District Bancheng Town Yulin Wood Factory	22.14
Jiangsu Top Point International Co., Ltd	Qufu Shengtai Super Plywood Ltd	22.14
Jiashan Dalin Wood Industry Co., Ltd	Jiashan Dalin Wood Industry Co., Ltd	22.14
Jiangsu Vermont Wood Products Co., Ltd	Jiangsu Vermont Wood Products Co., Ltd	22.14
Jiaxing Brilliant Import & Export Co., Ltd	Jiaxing Layo Decoration Materials Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Linyi Linhai Wood Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Shandong Fengtai Wood Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Feixian Hongsheng Wood Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Linyi Jianxin Wood Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Linyi Dayong Wood Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Linyi Yutai Timber Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Zhucheng Huifeng Wood Industry Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Linyi Dashun Wood Co., Ltd	22.14
Jiaxing Gsun Imp. & Exp. Co., Ltd	Linyi Huifeng Wood Industry Co., Ltd	22.14
Jiaxing Hengtong Wood Co., Ltd	Jiaxing Hengtong Wood Co., Ltd	22.14
Jiaxing Kaochuan Woodwork Co., Ltd	Jiaxing Kaochuan Woodwork Co., Ltd	22.14
Joc Yuantai International Trading Co., Ltd	Linyi Huasheng Yongbin Wood Corp	22.14
Joc Yuantai International Trading Co., Ltd	Fengxian Jihe Wood Co., Ltd	22.14

Exporter	Producer	Percent margin
Joc Yuantai International Trading Co., Ltd	Xuzhou Dayuan Wood Factory	22.14
Joc Yuantai International Trading Co., Ltd	Linyi Linyu Wood Factory	22.14
Joc Yuantai International Trading Co., Ltd	Linyi Lanshan District Fubo Woods Factory	22.14
Langfang Baomujie Wood Co., Ltd	Langfang Baomujie Wood Co., Ltd	22.14
Larkcop International Co., Ltd	Xuzhou Camry Wood Co., Ltd	22.14
Leadwood Industrial Corp	Leadwood Industrial Corp	22.14
Lianyungang Penghai International Trading Co., Ltd	Linyi Linxiang Boards Factory	22.14
Lianyungang Yuantai International Trade Co., Ltd	Linyi Huifeng Wood Industry Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Shandong Union Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Linyi Ruichen Economy and Trade Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Linyi Jinghua Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Pizhou Jiangshan Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Xuzhou Longyuan Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Xuzhou Zhongcai Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Linyi Baoshan Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Linyi Quanjin Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Shandong Compete Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Xinyi Chaohua Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Feixian Hongqiang Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Xinyi Lujiang Wood Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Linyi Dashun Woods Co., Ltd	22.14
Lianyungang Yuantai International Trade Co., Ltd	Pizhou Jinguoyuan Wood Co., Ltd	22.14
Linyi Anshun Timber Co., Ltd	Linyi Anshun Timber Co., Ltd	22.14
Linyi Dahua Wood Co., Ltd	Linyi Dahua Wood Co., Ltd	22.14
Linyi City Dongfang Jinxin Economic & Trade Co., Ltd	Linyi City Dongfang Jinxin Economic & Trade Co., Ltd	22.14
Linyi Dongfangjuxin Wood Co., Ltd	Linyi Dongfangjuxin Wood Co., Ltd	22.14
Linyi Evergreen Wood Co., Ltd	Linyi Evergreen Wood Co., Ltd	22.14
Linyi Glary Plywood Co., Ltd	Linyi Glary Plywood Co., Ltd	22.14
Linyi Hengsheng Wood Industry Co., Ltd	Linyi Hengsheng Wood Industry Co., Ltd	22.14
Linyi Huifeng Wood Industry Co., Ltd	Linyi Huifeng Wood Industry Co., Ltd	22.14
Linyi Jiahe Wood Industry Co., Ltd	Linyi Jiahe Wood Industry Co., Ltd	22.14
Linyi Kaier International Trade Co., Ltd	Linyi Lianyi Wood Co., Ltd	22.14
Linyi King Import and Export Co., Ltd	Linyi Celtic Wood Co., Ltd	22.14
Linyi Linhai Wood Co., Ltd	Linyi Linhai Wood Co., Ltd	22.14
Linyi Mingzhu Wood Co., Ltd	Linyi Mingzhu Wood Co., Ltd	22.14
Linyi Tianhe Wooden Industry Co., Ltd	Linyi Tianhe Wooden Industry Co., Ltd	22.14
Linyi Zhongtai Import and Export Co., Ltd	Linyi Cathay Pacific Wood Factory	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi City Qunxiang Wood Corp	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi Huachengyongbin Wood Corp	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi City Tiancai Wood Corp	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Shandong Jinqiu Wood Corp	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi City Jinghua Wood Corp	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi City Yongsen Wood Corp	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi Tianhe Wood Factory	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Juxian Dechang Wood Factory	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi Sanli Wood Factory	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Xuzhou Dayuan Wood Factory	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Feng County Zhongtuo Wood Factory	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Feng County Shuangxingyuan Wood Factory	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi Jinhao Wood Factory	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Suzhou Hengzheng Wood Co., Ltd	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Jiangsu Vermont Wood	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Linyi Dahua Wood Co., Ltd	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Yinhe Machinery Chemical Limited Company of Shandong Province.	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Suqian Bairun Wood Industry Co., Ltd	22.14
Suzhou Oriental Dragon Import and Export Corp. Ltd	Shandong Anxin Timber Co., Ltd	22.14
Pacific Plywood Co., Ltd	Pacific Plywood Co., Ltd	22.14
Pingyi Jinniu Wood Co., Ltd	Pingyi Jinniu Wood Co., Ltd	22.14
Pizhou Hengxing International Trade Co., Ltd	Xuzhou Fuyuan Timber Co., Ltd. (Fuyuan)	22.14
Qingdao King Sports Products Technology Co., Ltd	Anhui Fuyang Qinglin Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Feixian Tanyi Youchengjiafu Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Fengxian Jihe Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Feixian Longmen Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Linyi Xicheng Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Feixian Guangyuan Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Linyi Huifeng Wood Insustry Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Cangshan Hongrui Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Shandong Union Wood Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Xinyi Chaohua Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Fengxian Zhongtuo Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Fengxian Shuangxingyuan Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Yutai Zezhong Wood Products Co., Ltd	22.14

Exporter	Producer	Percent margin
Qingdao King Sports Products Technology Co., Ltd	Linyi Qiangsheng Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Shandong Lufeng Chaoyang Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Linyi Junxing Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Linyi Yiming Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Linyi Jianping Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Linyi Feihong Wood Products Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Linyi Jinghua Wood Co., Ltd	22.14
Qingdao King Sports Products Technology Co., Ltd	Fengxian Zhongtuo Wood Co., Ltd	22.14
Qingdao Top P&Q International Corp	Feixian Tanyi Youchengjiafu Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Feixian Xingying Wood Produts Co., Ltd	22.14
Qingdao Top P&Q International Corp	Feixian Tanyi Hongtaiyang Wood Produts Co., Ltd	22.14
Qingdao Top P&Q International Corp	Shandong Union Wood Co., Ltd	22.14
Qingdao Top P&Q International Corp	Xinyi Chaohua Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Feixian Hongsheng Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Shandong Ningjin Runkang Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Dahua Wood Product Co., Ltd	22.14
Qingdao Top P&Q International Corp	Shandong Zhengda Industry and Trad Development Co., Ltd	22.14
Qingdao Top P&Q International Corp	Feixian Longmen Plywood Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Huasheng Yongbin Wood Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Jiacheng Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Yutai Zezhong Wood Product Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Qianfeng Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Xuzhou Yujinfang Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Fengxian Zhongtuo Wood Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Jinqiu Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Laite Plywood Factory	22.14
Qingdao Top P&Q International Corp	Linyi City Lanshan District Yixing Wood Produts Co., Ltd	22.14
Qingdao Top P&Q International Corp	Xuzhou Qinyi Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Linhai Wood Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Qunshan Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Linyi Hongpanyong Wood Products Co., Ltd	22.14
Qingdao Top P&Q International Corp	Feixian Guangyuan Wood Products Co., Ltd	22.14
Qufu Luhan Woodwork Co., Ltd	Qufu Luhan Woodwork Co., Ltd	22.14
Qufu Shengfu Wood Work Co., Ltd	Qufu Shengfu Wood Work Co., Ltd	22.14
Shandong Anxin Timber Co., Ltd	Shandong Anxin Timber Co., Ltd	22.14
Shangdong Huaxin Jiasheng Wood Co., Ltd	Shangdong Huaxin Jiasheng Wood Co., Ltd	22.14
Shandong Jinli Imp.&Exp. Co., Ltd	Shandong Province Shouguang City Houzhen Town Fuli Plywood Factory.	22.14
Shandong Qishan International Trading Co., Ltd	Linyi Tuopu Zhixin Wooden Industry Co., Ltd	22.14
Shandong Qishan International Trading Co., Ltd	Cangshan County Hongrui Wooden Industry Co., Ltd	22.14
Shandong Union Wood Co., Ltd	Shandong Union Wood Co., Ltd	22.14
Shandong Xingang Group	Shandong Xingang Group	22.14
Shanghai Aviation Import & Export Co., Ltd	Zhonglin Enterprise (Dangshan) Co., Ltd	22.14
Shanghai Aviation Import & Export Co., Ltd	Pingyi County Futian Boards Factory	22.14
Shanghai Aviation Import & Export Co., Ltd	Shandong Zhengda Industrial Development Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Jinghua Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Lianbang Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Jiacheng Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Shandong Fengtai Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Huada Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Mingzhu Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Jinkun Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Tenghu Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Kaifeng Wooden Boards Factory	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Laite Boards Factory	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Yuqiao Boards Factory	22.14
Shanghai Futuwood Trading Co., Ltd	Yishui Senbao Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Yishui Zhili Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Tuopu Zhixin Wooden Industry Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Shandong Lufeng Chaoyang Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Shandong Huaxin Jiasheng Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Yishui Hongtai Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Feixian Huafeng Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Geluobao Artificial Board Factory	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Futai Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Yutai Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Feixian Yuansen Composite Board Factory	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Xincheng Wooden Products General Factory, Feixian Branch.	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Xinli Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Linyi Zhongxinsen Wood Co., Ltd	22.14
Shanghai Futuwood Trading Co., Ltd	Mengyin Hongxin Wood Co., Ltd	22.14
Shanghai Luli Trading Co., Ltd	Feixian Tanyi Town Hongtaiyang Wood Co., Ltd	22.14

Exporter	Producer	Percent margin
Shanghai Luli Trading Co., Ltd	Xuzhou Yujinfang Wood Co., Ltd	22.14
Shanghai Luli Trading Co., Ltd	Shandong Huaxin Jiasheng Wood Co., Ltd	22.14
Shanghai Luli Trading Co., Ltd	Feixian Nanzhangzhuang Town Qingqi Wood Product Co., Ltd	22.14
Shanghai Luli Trading Co., Ltd	Juxian Dechang Wood Co., Ltd	22.14
Shanghai Mailin International Trade Co., Ltd	Xuzhou Camry Wood Co., Ltd	22.14
Shanghai Mailin International Trade Co., Ltd	Fengxian Shuangxingyuan Wood Co., Ltd	22.14
Shanghai Mailin International Trade Co., Ltd	Juxian Dechang Wood Co., Ltd	22.14
Shanghai Mailin International Trade Co., Ltd	Pizhou Xuexin Wood Co., Ltd	22.14
Shanghai Mailin International Trade Co., Ltd	Pizhou Jinguoyuan Wood Co., Ltd	22.14
Shanghai S&M Trade Co., Ltd	Huaiyang Xiangyu Wood Industry Co., Ltd	22.14
Shanghai S&M Trade Co., Ltd	Langfang Baomujie Wood Co., Ltd	22.14
Shanghai S&M Trade Co., Ltd	Jiangsu Shuren Wood Industry Co., Ltd	22.14
Shanghai Senda Fancywood Industry Co	Shanghai Senda Fancywood Industry Co	22.14
Shouguang Sanyang Wood Industry Co., Ltd	Shouguang Sanyang Wood Industry Co., Ltd	22.14
Siyang Enika International Trade Co., Ltd	Jiangsu Shuren Wood Industry Co., Ltd	22.14
Siyang Enika International Trade Co., Ltd	Suqianshi Qiyi Plywood Co., Ltd	22.14
Sumec International Technology Co., Ltd	Suqian Huilin Wood Industry Co., Ltd	22.14
Sumec International Technology Co., Ltd	Yinli Lianyi Wood Industry Co., Ltd	22.14
Sumec International Technology Co., Ltd	Linyi Dashun Wood Industry Co., Ltd	22.14
Sumec International Technology Co., Ltd	Jiangsu Shuren Wood Industry Co., Ltd	22.14
Sumec International Technology Co., Ltd	Linyi Yiming Wood Industry Co., Ltd	22.14
Sumec International Technology Co., Ltd	Linyi Xicheng Wood Industry Co., Ltd	22.14
Sumec International Technology Co., Ltd	Shandong Junxing Wood Industry Co., Ltd	22.14
Sumec International Technology Co., Ltd	Xuzhou Zhongtai Wood Industry Co., Ltd	22.14
Sumec International Technology Co., Ltd	Linyi Lanshan District Linyu Panel Factory	22.14
Sumec International Technology Co., Ltd	Fengxian Jihe Wood Industry Co., Ltd	22.14
Suqian Foreign Trade Co., Ltd	Pizhou Jiangshan Wood Co., Ltd	22.14
Suqian Foreign Trade Co., Ltd	Suqian Bairun Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Xuzhou Henglin Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Qufu Shengda Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Qufu Dongyuan Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Xuzhou Fuyu Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Linyi Dahua Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Xuzhou Longyuan Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Linyi Dazhong Wood Co.Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Linyi Jinhua Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Feixian Jianxin Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Linyi Qianfeng Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Pizhou Jiangshan Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Jiangsu Vermont Wood Products Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Xuzhou Hongwei Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Linyi Dashun Wood Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Linyi City Dongfang Jinxin Economic and Trade Co., Ltd	22.14
Suqian Hopeway International Trade Co., Ltd	Guangxi Guigang Haixong Wood, Co., Ltd	22.14
Suzhou Dongda Wood Co., Ltd	Suzhou Dongda Wood Co., Ltd	22.14
Suzhou Fengshuwan Import and Export Trade Co., Ltd	Xuzhou Henglin Wood Co., Ltd	22.14
Suzhou Fengshuwan Import and Export Trade Co., Ltd	Qufu Shengda Wood Co., Ltd	22.14
Suzhou Fengshuwan Import and Export Trade Co., Ltd	Qufu Dongyuan Wood Co., Ltd	22.14
Suzhou Fengshuwan Import and Export Trade Co., Ltd	Xuzhou Fuyu Wood Co., Ltd	22.14
Suzhou Fengshuwan Import and Export Trade Co., Ltd	Linyi Dahua Wood Co., Ltd	22.14
Bergey (Tianjin) International Co., Ltd	Linyi Huifeng Wood Industry Co., Ltd	22.14
Bergey (Tianjin) International Co., Ltd	Suqian City Santai Wood Industry Co., Ltd	22.14
Bergey (Tianjin) International Co., Ltd	Jiangsu Shuren Wood Industry Co., Ltd	22.14
Jiangsu Vermont Wood Products Co., Ltd	Jiangsu Vermont Wood Products Co., Ltd	22.14
Wenzhou Eita Import & Export Co., Ltd	Linyi Ruichen Economic and Trade Co., Ltd	22.14
Wenzhou Eita Import & Export Co., Ltd	Hongye Wood Products Co., Ltd	22.14
Wenzhou Eita Import & Export Co., Ltd	Sahngdaong Lianbang Wooden Co., Ltd	22.14
Wenzhou Eita Import & Export Co., Ltd	Fei County Guangyuan Wood Product	22.14
Wenzhou Eita Import & Export Co., Ltd	Pingyi County Jufeng Wood Products Co., Ltd	22.14
Wenzhou Eita Import & Export Co., Ltd	Xuzhou Zhongda Cai Wood Products Co., Ltd	22.14
Wenzhou Eita Import & Export Co., Ltd	Linyi Hengda Wood Products Co., Ltd	22.14
Wenzhou Eita Import & Export Co., Ltd	Xuzhou Changchen Wood Products Co., Ltd	22.14
Wenzhou Eita Import & Export Co., Ltd	Zhucheng Hailong Industry and Trade Co., Ltd	22.14
Xuzhou Antop International Trade Co., Ltd	Xuzhou Anlian Wood Co., Ltd. (Anlian)	22.14
Xuzhou Baoqi Wood Product Co., Ltd	Linyi Quanjin Wood Co., Ltd	22.14
Xuzhou Baoqi Wood Product Co., Ltd	Linyi Huifeng Wood Industry Co., Ltd	22.14
Xuzhou Baoqi Wood Product Co., Ltd	Xingying Wood Co., Ltd	22.14
Xuzhou Baoqi Wood Product Co., Ltd	Linyi Lanshan District Rongxin Wood Packaging Plant	22.14
Xuzhou Chengxin Wood Co., Ltd	Xuzhou Chengxin Wood Co., Ltd	22.14
Xuzhou Ekea International Trade Co., Ltd	Cangshan Hongrui Wood Co., Ltd	22.14
Xuzhou Ekea International Trade Co., Ltd	Linyi Tianwei Wood & Decorative Panel Factory Co., Ltd	22.14
Xuzhou Ekea International Trade Co., Ltd	Fengxian Jihe Wood Co., Ltd	22.14
Xuzhou Ekea International Trade Co., Ltd	Suzhou Shunfa Wood Co., Ltd	22.14

Exporter	Producer	Percent margin
Xuzhou Hansun Import & Export Co., Ltd	Xuzhou Zhongyuan Wood Co., Ltd. (Zhongyuan)	22.14
Xuzhou Hongda Wood Co., Ltd	Xuzhou Hongda Wood Co., Ltd	22.14
Xuzhou Pengyu Wood Products Co., Ltd	Xuzhou Pengyu Wood Products Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Anhui Xinyuanda Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Feixian Xinyu Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Fengxian Fangyuan Wood Co, Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Linyi Changcheng Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Linyi Huifeng Wood Industry Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Linyi Qunshan Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Linyi Xinrui Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Pizhou Jiangshan Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Pizhou Jinguoyuan Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Pizhou Xuexin Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Shandong Hualianjushan Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Shandong Union Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Xinyi Zhongcai Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Xuzhou Anlian Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Xuzhou Changcheng Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Xuzhou Fuyu Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Xuzhou Hongmei Wood Development Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Xuzhou Longyuan Wood Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Xuzhou Yuanhao Wood Industry Co., Ltd	22.14
Xuzhou Pinlin International Trade Co., Ltd	Yanzhou Huashiluyuan Wood Development Co., Ltd	22.14
Xuzhou Runjin Import & Export Trade Co., Ltd	Xuzhou Camry Wood Co., Ltd. (Camry)	22.14
Xuzhou Runjin Import & Export Trade Co., Ltd	Lianyungang Wonderful Wood Co., Ltd. (Wonderful Wood)	22.14
Xuzhou Sanli Wood Co., Ltd	Xuzhou Sanli Wood Co., Ltd	22.14
Xuzhou Shenghe Wood Co., Ltd	Xuzhou Shenghe Wood Co., Ltd	22.14
Xuzhou Shengping Import & Export Co., Ltd	Fengxian Jihe Wood Industry Co. Ltd	22.14
Xuzhou Shengping Import & Export Co., Ltd	Fengxian Weiheng Wood Co., Ltd	22.14
Xuzhou Shengping Import & Export Co., Ltd	Xuzhou Longyuan Wood Co., Ltd	22.14
Xuzhou Sincere Wood Co., Ltd	Xuzhou Sincere Wood Co., Ltd	22.14
Xuzhou Tianshan Wood Co., Ltd	Xuzhou Tianshan Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Xuzhou Jiangheng Wood Products Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Xuzhou Jiangyang Wood Industries Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Xuzhou Changcheng Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Hebei Tongli Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Linyi Mingzhu Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Qufu City Shengda Wooden Industry Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Cangshan Hongrui Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Linyi Hualing Plywood Factory	22.14
Xuzhou Timber International Trade Co., Ltd	Linyi Quanjin Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Linyi Xinrui Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Linyi Huifeng Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Linyi Dazhong Wood Co., Ltd	22.14
Xuzhou Timber International Trade Co., Ltd	Pizhou Xuexin Wood Co., Ltd	22.14
Xuzhou Weilin Wood Co., Ltd	Xuzhou Weilin Wood Co., Ltd	22.14
Xuzhou Zhongda Building Materials Co., Ltd	Linyi Jianshun Wood Co., Ltd. (Jianshun)	22.14
Xuzhou Zhongda Building Materials Co., Ltd	Xuzhou Runcheng Wood Co., Ltd. (Runcheng)	22.14
Yijiang Wood Products (Kunshan) Co., Ltd	Yijiang Wood Products (Kunshan) Co., Ltd	22.14
Yinhe Machinery Chemical Limited Company of Shandong Province.	Yinhe Machinery Chemical Limited Company of Shandong Province.	22.14
Yishui Hongtai Wood-Made Co., Ltd	Yishui Hongtai Wood-Made Co., Ltd	22.14
Yutai Zezhong Wood Co., Ltd	Yutai Zezhong Wood Co., Ltd	22.14
Zhejiang Anji Tiancheng Flooring Co., Ltd	Zhejiang Anji Tiancheng Flooring Co., Ltd	22.14
Zhejiang Shenghua Yunfeng Import & Export Co., Ltd	Zhejiang Deqing Shengqiang Wood Co., Ltd	22.14
Zhejiang Xinyuan Bamboo Products Co., Ltd	Zhejiang Xinyuan Bamboo Products Co., Ltd	22.14
Zhejiang Yongyu Bamboo Joint-Stock Co., Ltd	Zhejiang Yongyu Bamboo Joint-Stock Co., Ltd	22.14
PRC-Wide Entity[2]		63.96

Disclosure and Public Comment

We will disclose the calculations performed to parties in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Case briefs or other written comments may be submitted to the Assistant Secretary for Import Administration no later than seven days after the date on which the final verification report is issued in this proceeding and rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline date for case briefs.[3] Additionally the Department will consider case briefs regarding scope-related issues filed by interested parties within 30 days after the date of publication of this notice in the **Federal Register**. Interested parties may file rebuttal briefs regarding scope issues, limited to those issues which are raised in the scope case briefs. The Department will consider scope-related rebuttal briefs filed not later than five days after

[2] This rate also applies to the companies listed in Attachment II of the Preliminary Decision Memorandum.

[3] *See* 19 CFR 351.309.

the time limit for filing scope case briefs. Additionally, all scope-related case and rebuttal briefs are required to be filed on the record of this investigation and the companion countervailing duty (''CVD'') investigation identically. A table of contents, list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. This summary should be limited to five pages total, including footnotes.

Interested parties, who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using Import Administration's IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Standard Time, within 30 days after the date of publication of this notice.[4] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, the Department intends to hold the hearing at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

For the final determination in this investigation interested parties may submit publicly available information to value the FOPs within 40 days after the publication of this preliminary determination.[5] Pursuant to section 735(a)(1) of the Act, we will make our final determination no later than 75 days after the date of publication of this preliminary determination.

Suspension of Liquidation

In accordance with section 733(d) of the Act, with the exception of entries produced and exported by Linyi San Fortune Wood, Co., Ltd. and Jiangyang Group, the Department will instruct U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all entries of plywood from the PRC, as described in the ''Scope of the Investigation'' section, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Pursuant to 19 CFR 351.205(d), the Department will instruct CBP to require a cash deposit equal to the weighted-average amount by which NV exceeds U.S. price, adjusted where appropriate for export subsidies and estimated domestic subsidy pass-through,[6] as follows: (1) The separate rate margin for the exporter/producer combinations listed in the table above will be the rate the Department has determined in this preliminary determination; (2) for all combinations of PRC exporters/producers of merchandise under consideration which have not received their own separate rate AD margin above, the cash-deposit rate will be the cash deposit rate established for the PRC-wide entity; and (3) for all non-PRC exporters of merchandise under consideration which have not received their own separate rate above, the cash-deposit rate will be the cash deposit rate applicable to the PRC exporter/producer combination that supplied that non-PRC exporter.

We have not adjusted the preliminary determination AD margins for export subsidies because the Department did not find evidence of export subsidies in the companion CVD proceeding. Additionally, the Department has not adjusted the preliminary determination AD margins for estimated domestic subsidy pass-through because it has concluded that concurrent application of non-market economy ADs and CVDs do not necessarily and automatically result in overlapping remedies.[7]

International Trade Commission (''ITC'') Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary affirmative determination of sales at LTFV. Section 735(b)(2) of the Act requires the ITC to make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of hardwood and decorative plywood, or sales (or the likelihood of sales) for importation, of the merchandise under consideration within 45 days of our final determination.

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act.

Dated: April 29, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

List of Topics Discussed in the Preliminary Decision Memorandum

1. Initiation
2. Period of Investigation
3. Postponement of Preliminary Determination
4. Scope of the Investigation
5. Scope Comments
6. Non-market Economy Country Status
7. Selection of Respondents
8. Surrogate Country
9. Surrogate Value Comments
10. Separate Rates
    a. Separate Rate Recipients
    b. Companies Not Receiving a Separate Rate
11. Margin for the Separate Rate Companies
12. Combination Rates
13. The PRC-Wide Entity
14. Application of Facts Available and Adverse Facts Available
15. Corroboration of Information
16. Affiliation/Single Entity
17. Date of Sale
18. Jiangyang's Reported Salvage Sales
19. Fair Value Comparisons
20. Export Price
21. Constructed Export Price
22. Normal Value
23. Factor Valuations Methodology
24. Determination To Apply an Alternative Methodology
25. Currency Conversion
26. Verification
27. Section 777A(f) of the Act
28. International Trade Commission Notification
29. Conclusion

[FR Doc. 2013–10532 Filed 5–2–13; 8:45 am]

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[4] *See* 19 CFR 351.310(c).

[5] *See* 19 CFR 351.301(c)(3)(i). In accordance with 19 CFR 351.301(c)(1), for the final determination of this investigation, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally will not accept the submission of additional, previously absent-from-the-record alternative surrogate value information. *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2. Additionally, for each piece of factual information submitted with surrogate value rebuttal comments, the interested party must provide a written explanation of what information that is already on the record of the ongoing proceeding the factual information is rebutting, clarifying, or correcting.

[6] *See* sections 772(c)(1)(C) and 777A(f) of the Act, respectively. Unlike in administrative reviews, the Department calculates the adjustment for export subsidies in investigations not in the margin calculation program, but in the cash deposit instructions issued to the CBP. *See Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India,* 71 FR 45012 (August 8, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

[7] *See* Preliminary Decision Memorandum.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC644

Marine Mammals; File No. 18016

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Tamara McGuire, LGL Alaska Research Associates, Inc., 2000 W International Airport Rd, Suite C1, Anchorage, AK 99502, has applied in due form for a permit to conduct research on Cook Inlet beluga whales (*Delphinapterus leucas*).

DATES: Written, telefaxed, or email comments must be received on or before June 3, 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. 18016 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

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907) 586–7221; fax (907) 586–7249.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Rosa L. González, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), 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 requests a 5-year permit to approach by vessel beluga whales in Cook Inlet, Alaska for photo-identification and observations. The purpose of the research is to identify individual whales and to provide information about movement patterns, habitat use, survivorship, reproduction, and population size. The applicant requests to harass up to 72 whales between April and November each year.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: April 30, 2013.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–10476 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC653

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Notice of receipt and request for comment.

SUMMARY: Notice is hereby given that NMFS has received an application for a direct take permit, in the form of a Hatchery and Genetic Management Plan (HGMP), pursuant to the Endangered Species Act of 1973, as amended (ESA). The application is for a hatchery program in Idaho, for the propagation of sockeye salmon. The proposed permit would be issued for a period of 10 years. This document serves to notify the public of the availability of the permit application for public review, comment, and submission of written data, views, arguments, or other relevant information. This document also serves to notify the public of NMFS' intent to adopt an existing environmental assessment that addresses the proposed Snake River sockeye salmon hatchery program. All comments and other information received will become part of the public record and will be available for review pursuant to section 10(c) of the ESA.

DATES: Comments and other submissions must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific time on June 3, 2013.

ADDRESSES: Written responses to the application and the proposed adoption of the associated environmental assessment should be sent to Craig Busack, National Marine Fisheries Services, Salmon Management Division, 1201 N.E. Lloyd Boulevard, Suite 1100, Portland, OR 97232. Comments may also be submitted by email to: *SockeyePlan.nwr@noaa.gov.* Include in the subject line of the email comment the following identifier: Comments on Snake River sockeye salmon hatchery plan. Comments may also be sent via facsimile (fax) to (503) 872–2737. The permit application and associated documents are available on the Internet at *www.nwr.noaa.gov.* Requests for copies of the permit application and associated documents may also be directed to the National Marine Fisheries Services, Salmon Management Division, 1201 N.E. Lloyd Boulevard, Suite 1100, Portland, OR 97232. Comments received will also be available for public inspection, by appointment, during normal business hours by calling (503) 230–5418.

FOR FURTHER INFORMATION CONTACT: Craig Busack at (503) 230–5412 or email: *craig.busack@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

Sockeye salmon (*Oncorhynchus nerka*): endangered, naturally produced and artificially propagated Snake River.

Background

Section 9 of the ESA and Federal regulations prohibit the ''taking'' of a species listed as endangered or threatened. The term ''take'' is defined under the ESA to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to

engage in any such conduct. NMFS may issue permits to take listed species for any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, under section 10(a)(1)(A) of the ESA. NMFS regulations governing permits for threatened and endangered species are promulgated at 50 CFR 222.307.

On May 15, 2012, NMFS received an application, including an HGMP, from the Idaho Department of Fish and Game, a section 10(a)(1)(A) research/enhancement permit for continued operation of the Redfish Lake Sockeye Salmon Captive Propagation program.

The proposed program would increase the abundance of the listed species through artificial propagation and to serve as a safety net to prevent extinction of the Snake River Sockeye Salmon Evolutionarily Significant Unit (ESU), which is listed as endangered under the ESA. The proposed program would maintain the Snake River sockeye salmon broodstock in captivity in several locations, largely at the Springfield Hatchery in eastern Idaho, collect and spawn adult sockeye salmon returning to the Snake River basin, rear juveniles, and release eggs, juveniles, and adult fish into upper Salmon River basin lakes. The proposed program would include best management practices to minimize adverse effects on the ESU. Best management practices would include the use of prudent fish husbandry practices and standard hatchery protocols to ensure health and survival of the program fish, selection of eggs and juveniles in a manner designed to represent to the greatest extent possible the entire genetic spectrum of the founding population, and the conduct of spawning ground surveys to estimate natural spawning escapement and to determine the effects of captive-reared fish on spawner distribution and behavior. An environmental assessment was prepared pursuant to the National Environmental Policy Act (NEPA) by the Bonneville Power Administration (BPA) for its funding of the Snake River sockeye salmon hatchery program, including modifications to the Springfield Hatchery. Because the BPA action is substantially the same as the actions addressed by the proposed ESA permit, because they are both administrative actions that allow IDFG to operate the Snake River sockeye salmon hatchery program consistent with the submitted HGMP and the Springfield Sockeye Hatchery Master Plan, NMFS proposes to adopt the BPA environmental assessment to comply with the NEPA.

Authority

This notice is provided pursuant to section 10(c) of the ESA. NMFS will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of section 10(a)(1)(A) of the ESA. If it is determined that the requirements are met, a permit will be issued to IDFG for the purpose of carrying out the hatchery program. NMFS will publish a record of its final action in the **Federal Register**.

NEPA requires Federal agencies to conduct an environmental analysis of their proposed actions to determine if the actions may affect the human environment. NMFS expects to take action on an application for a permit under section 10(a)(1)(A) of the ESA. Because NMFS' proposed action is closely linked to the BPA funding action already considered under NEPA, to reduce the potential for substantial redundancy and duplication of effort in complying with NEPA, NMFS is proposing to adopt the BPA environmental assessment for the proposed issuance of the permit. Therefore, NMFS is also seeking public input on its proposed adoption.

Dated: April 30, 2013.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–10477 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC657

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Highly Migratory Species Management Team (HMSMT) will hold a conference call, which is open to the public.

DATES: The HMSMT conference call will begin at 1 p.m. on Wednesday, May 22, 2013, and last for approximately one and a half hours. There will be public listening stations at the Council office and Southwest Fishery Science Center (see **ADDRESSES**, below).

ADDRESSES:

Southwest Fishery Science Center address: 8901 La Jolla Shores Drive, La Jolla, CA 92037.

Council address: Pacific Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Dr. Kit Dahl, Pacific Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The HMSMT requested further guidance on an assignment from the March 2013 Council meeting in Tacoma, WA. The Pacific Council directed the HMSMT to identify potential measures that should be implemented pursuant to the precautionary management framework for North Pacific albacore currently under development at the international level. The HMSMT will discuss further guidance with Pacific Council and NMFS staff during the conference call. The HMSMT will hold a separate meeting to prepare a report with recommendations on this topic for the June 20–25, 2013, Pacific Council meeting.

Although nonemergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during the meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document 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

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: April 30, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–10520 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC656

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Council to convene public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a meeting of the Shrimp Advisory Panel (AP).

DATES: The meeting will convene at 8 a.m. Eastern time on Thursday, May 23, 2013 and is expected to end no later than 4:30 p.m.

ADDRESSES: The meeting will be held at the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Dr. Carrie Simmons, Deputy Executive Director; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico Fishery Management Council will convene its Shrimp AP. The Shrimp AP will receive an orientation video about serving as an AP member for the Council. The Shrimp AP will nominate and elect a chair and vice-chair. The Shrimp AP will receive an overview of the current shrimp electronic logbook program (ELB) and discuss cost-sharing opportunities based on the current program. They will also be provided with a summary and demonstration of new shrimp ELB program units, program implementation, and calibration from staff at the Southeast Fisheries Science Center. They will review and provide recommendations on the Framework Action to Establish Funding Responsibilities for the Electronic Logbook Program in the Shrimp Fishery of the Gulf of Mexico. They will hear a biological review of the 2012 Texas closure, status of the brown, pink, and white shrimp stocks, and as well as an update on the 2012 offshore effort estimates. Under other business they will discuss siting and locations of decommissioned oil and gas platforms as part of the Rigs-to-Reef Program.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630.

Although other non-emergency issues not on the agenda may come before the Shrimp AP for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Shrimp AP will be restricted to those issues specifically identified in the agenda 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 action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: April 30, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–10518 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC655

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Council to convene public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a workshop of subject matter experts on Interrelationships between Coral Reef and Fisheries.

DATES: The workshop will convene at 1 p.m. on Monday, May 20 and conclude by 4 p.m. on Wednesday, May 22, 2013.

ADDRESSES: The meeting will be held at the Hilton Hotel located at 2225 North Lois Avenue, Tampa, FL 33607; telephone: (813) 877–6688.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Stephen Bortone, Executive Director and Mr. Mark Mueller, GIS Analyst; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The workshop on Interrelationships between Coral Reefs and Fisheries will examine topics related to linkages between corals and fisheries, management, threats and consequences, and future research. Presentations will include information on distribution and diversity of coral reefs and associated fisheries; current management of corals and fisheries (by staff from the National Oceanic and Atmospheric Administration and the Gulf, South Atlantic, Caribbean and Western Pacific Fishery Management Councils); critical linkages and interrelationships of form, function and life history; interactions within and among coral, seagrass & mangrove ecosystems; review and discussion of the various threats to coral/fishery health such as oil spills, invasive species, climate effects and coral diseases; spatial ecology methods and databases; short and long-term consequences of impacts to coral health; mitigation of coral losses; and future research needs and directions.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630 or can be downloaded from the Council's ftp site, *ftp.gulfcouncil.org,* in the Coral folder.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens 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

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: April 30, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–10519 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC652

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice, public meeting.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) will convene a meeting of its Coastal Pelagic Species Management Team (CPSMT) and the Coastal Pelagic Species Subcommittee of the Scientific and Statistical Committee (SSC). One representative of the Council's Coastal Pelagic Species Advisory Subpanel (CPSAS) will also attend. The purpose is to consider the possibility of using a different temperature index than is currently used, for the purposes of estimating Pacific sardine recruitment. Meeting participants will also discuss and consider an implementation plan for changing the start date of the *Pacific sardine* fishery, from January 1 to July 1.

DATES: The meeting will be held May 21–23, 2013.

ADDRESSES: *Meeting address:* The meeting will be held in the Large Conference Room of the National Oceanic and Atmospheric Administration's (NOAA) Southwest Fisheries Science Center, at 8901 La Jolla Shores Dr., La Jolla, CA 92037–1508.

Council Address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Kerry Griffin, Staff Officer; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The Council considered the issues of a new temperature index and a different fishery start date at its April 2013 meeting, and asked the CPSMT and SSC CPS subcommittee to report back at the June 2013 Council meeting for final action.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the CPSMT's intent to take final action to address the emergency.

Special Accommodations

This listening station is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Dale Sweetnam, (858) 546–7170, at least 5 days prior to the meeting date.

Dated: April 30, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–10517 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Final Notice of Applicability of Special Use Permit Requirements to Certain Categories of Activities Conducted Within the National Marine Sanctuary System

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: In accordance with a requirement of Public Law 106–513 (16 U.S.C. 1441(b)), NOAA hereby gives public notice of the final revised list of categories of activities subject to the special use permit requirements of Section 310 of the National Marine Sanctuaries Act.

DATES: This notice is effective May 3, 2013.

FOR FURTHER INFORMATION CONTACT: Vicki Wedell, Office of National Marine Sanctuaries, 1305 East West Highway (N/NMS2), Silver Spring, MD 20910, telephone (301) 713–3125, extension 237, email *Vicki.Wedell@noaa.gov.*

SUPPLEMENTARY INFORMATION: This **Federal Register** document is also accessible via the Internet at: [INSERT GPO ACCESS WEB ADDRESS—*http://www.access.gpo.gov/*]

I. Background

Section 310 of the National Marine Sanctuaries Act (NMSA) gives NOAA the authority to issue special use permits for the conduct of specific activities in national marine sanctuaries to establish conditions of access to and use of any sanctuary resource or to promote public use and understanding of a sanctuary resource (16 U.S.C. 1431 et seq.). In the National Marine Sanctuaries Amendments Act of 2000 (Pub. L. 106–513), Congress added a requirement that prior to requiring a special use permit for any category of activity, NOAA shall give appropriate public notice. On January 15, 2013, NOAA requested public comment on the modification of three of the existing special use permit categories and the addition of two new categories (78 FR 2597). The remaining two special use permit categories remain unchanged. NOAA did not receive any substantive comments during the 60-day public comment period.

This notice also updates the wording of two of the categories to use the term ''submerged lands'' rather than ''seabed'' to be consistent with definitions established in the NMSA and sanctuary regulations. NMSA section 302(3) states that the ''marine environment'' means those areas of coastal and ocean waters, the Great Lakes and their connecting waters and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law.'' The notice also clarifies that the requirements apply to the disposal of cremated human remains within or into any national marine sanctuary, as is consistent with sanctuary regulations on discharges.

II. Categories of Activities Subject to Special Use Permits

The final list of categories subject to the requirements of special use permits is:

1. The placement and recovery of objects associated with public or private events on non-living substrate of the submerged lands of any national marine sanctuary.
2. The placement and recovery of objects related to commercial filming.
3. The continued presence of commercial submarine cables on or within the submerged lands of any national marine sanctuary.
4. The disposal of cremated human remains within or into any national marine sanctuary.
5. Recreational diving near the USS Monitor.
6. Fireworks displays.
7. The operation of aircraft below the minimum altitude in restricted zones of national marine sanctuaries.

III. Classification

Refer to the notice of availability and request for public comment in 78 FR 2597 for a full discussion of the applicability of the National Environmental Policy Act and Paperwork Reduction Act.

A. National Environmental Policy Act

NOAA has concluded that this action will not have a significant effect, individually or cumulatively, on the human environment. This action is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement in accordance with Section 6.03c3(i) of NOAA Administrative Order 216–6.

Specifically, this action is a notice of an administrative and legal nature. Furthermore, individual permit actions by the ONMS will be subject to additional case-by-case analysis, as required under NEPA, which will be completed as new permit applications are submitted for specific projects and activities.

B. Paperwork Reduction Act

Applications for the special use permits discussed in this notice involve a collection-of information requirement subject to the requirements of the PRA. OMB has approved this collection-of-information requirement under OMB control number 0648–0141.

Dated: April 19, 2013.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries.

[FR Doc. 2013–10380 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC498

Takes of Marine Mammals Incidental to Specified Activities; Demolition and Construction Activities of the Children's Pool Lifeguard Station at La Jolla, California

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 City of San Diego for an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by Level B harassment, incidental to demolition and construction activities of the Children's Pool Lifeguard Station in La Jolla, California. NMFS has reviewed the application, including all supporting documents, and determined that it is adequate and complete. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to the City of San Diego to incidentally harass, by Level B harassment only, three species of marine mammals during the specified activities.

DATES: Comments and information must be received no later than June 3, 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–XC498 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* 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 address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at:*http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice, including the IHA application, 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

Sections 101(a)(5)(D) of the MMPA, as amended (16 U.S.C. 1371(a)(5)(D)), directs the Secretary of Commerce (Secretary) to allow, 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), 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]. 16 U.S.C. 1362(18).

Summary of Request

On December 3, 2012, NMFS received an application from the City of San Diego, Engineering and Capital Projects Department, requesting an IHA. A revised IHA application was submitted on April 1, 2013. The requested IHA would authorize the take, by Level B (behavioral) harassment, of small numbers of Pacific harbor seals (*Phoca vitulina richardii*), California sea lions (*Zalophus californianus*), and northern elephant seals (*Mirounga angustirostris*) incidental to demolition and construction activities of the Children's Pool Lifeguard Station at La Jolla, California. The demolition and construction operations are proposed to take place during June to December, 2013 in La Jolla, California. Additional information on the demolition and construction activities at the Children's Pool Lifeguard Station is contained in

the application, which is available upon request (see **ADDRESSES**).

Description of the Proposed Specified Activity

The Children's Pool was created in 1932 by building a breakwater wall which created a protected pool for swimming. This pool has partially filled with sand, but still has open water for swimming, as well as a beach for sunbathing and walking. The Children's Pool and nearby shore areas are used by swimmers, sunbathers, SCUBA divers and snorkelers, shore/surf fishermen, school classrooms, tide pool explorers, kayakers, surfers, boogie and skim boarders, seal, bird and nature waters as well as other activities by the general public. Over the last three years (2010 through 2012), an average of 1,556,184 people have visited the Children's Pool and lifeguards have taken an average of 8,147 preventive actions and 86 water rescues annually (CASA, 2010; 2011; 2012). The existing lifeguard facility was built in 1967, it is old, deteriorating from saltwater intrusion, and no longer serves neither the needs of the lifeguard staff nor the beach-going public. The structure was condemned on February 22, 2008 due to its deteriorated conditions and the lack of structural integrity; therefore, it can no longer be used in its current state. Since the existing building is no longer viable, a temporary lifeguard tower was moved in, but because of basic year-round working condition needs for the lifeguards and the demand for lifeguard services, a new station is required. The proposed project includes the demolition of the existing lifeguard station and construction of a new, three-story, lifeguard station on the same site. The new facility will have an observation tower, first aid room, male/female locker rooms, and a second observation/ready room area, an accessible ramp to the new proposed unisex public restrooms on the lower floor, a public viewing area, and a plaza in front of the lifeguard station. The new lifeguard station facilities will provide a 270° view of beaches, bluffs, and reefs for continued service to the public onshore as well as in the water.

Sound levels during all phases of the project will not exceed 110 dB re 20 μPa at five feet from the sound sources. The 110 dB estimate is based on equipment manufacturers estimates obtained by the construction contractor. The City of San Diego utilized the published manufacturers data based on the proposed equipment (i.e., a 980 Case backhoe, dump truck, air compressor, electric screw guns, jackhammer, concrete saw, and chop saws) to be utilized on the project site. Operation of the equipment is the primary activity within the demolition and construction of activities that is likely to affect marine mammals by potentially exposing them to in-air (i.e., airborne or sub-aerial) noise. It is difficult to predict what activities might cause noticeable behavioral reactions with Pacific harbor seals at this site. Children's Pool is a highly disturbed hauling-out site and seals at this location do not respond to stimuli as observed with other harbor seals in other areas (Hanan & Associates, 2004; 2011) (see *http://www.youtube.comwatch?v=4IRUYVTULsg*). During the working day, the City of San Diego estimates there will be sound source levels above 90 dB re 20 μPa during 106 days, including 27 days of 100 to 110 dB re 20 μPa at the demolition and construction site. The contractor used published or manufacturer's measurements to estimate sound levels. On average, pinnipeds will be about 30.5 meters (m) (100 feet [ft]) or more from the construction site with a potential minimum of about 15.2 m (50 ft) and a peak of about 83 dB re 20 μPa at the mean hauling-out distance (30.5 m). The City of San Diego used the formula and online calculator on the Web site: *http://sengpielaudio.com/calculator-distance.htm* and measured distances from the sound source to determine the area of potential impacts from in-air sound. No studies of ambient sound levels have been conducted at the Children's Pool, the City of San Diego intends to measure in-air background noise levels in the days immediately prior to construction.

The existing lifeguard station is located on a bluff above Children's Pool (32°50′50.02″ North, 117°16′42.8″ West) nearby reef and beach areas (see detailed maps and photographs on pages 30 to 31 of the ''Mitigated Negative Declaration'' in the IHA application). The building has deteriorated significantly and must be removed. A backhoe will be used for demolishing the existing structure, and materials will be loaded into dump trucks to be hauled offsite. Material will be hauled to a local landfill where it will be separated into recycled content and waste. In its place, a new lifeguard station is scheduled to be constructed within and adjacent to the existing facility. The new three-story, building will contain beach access level public restrooms and showers, lifeguard lockers, and sewage pump room; second level containing two work stations, ready/observation room, kitchenette, restroom, and first aid station; and third ''observation'' level will include a single occupancy observation space, radio storage closet, and exterior catwalk. Interior stairs will link the floors. The existing below grade retaining walls will remain in place and new retaining walls will be constructed for a ramp from street level to the lower level for emergency vehicle beach access and pedestrian access to the lower level restrooms and showers. A 5.6 m (18. 5 ft) wall would be located along the north end of the lower level. The walls would be designed for a minimum design life of 50 years and would not be undermined from ongoing coastal erosion. The walls would not be readily viewed from Coast Boulevard, the public sidewalks or the surrounding community.

Lower level improvements include new beach access restrooms and showers, lifeguard lockers, and a sewage pump room. The plaza level plan includes two work stations, a ready/observation room, kitchenette, restroom and first aid station. The observation level includes a single occupancy observation space, radio storage closet, and exterior catwalk. The existing plaza would be reconfigured to provide a 3.1 m (10 ft) wide ramp for emergency vehicles to the beach and for pedestrians to the lower level accessible restrooms and showers. Enhanced paving, seating and viewing space, drinking fountains, adapted landscaping and water efficient irrigation is also included. No material is expected to enter or be washed into the marine environment that may affect water quality, as the City of San Diego has developed the U.S. Environmental Protection Agency's National Pollutant Discharge Elimination System and the Stormwater Pollution Prevention Plan, required for the demolition and construction activities.

Demolition and construction of the new lifeguard station is estimated to take approximately 7 months (148 actual construction days of the 214 total days) and be completed by December 23, 2013. Demolition and construction activities will occur Monday through Friday (no work will occur on holidays) during daylight hours only (i.e., 8:30 a.m. to 3:30 p.m.), as stipulated in the ''Mitigated Negative Declaration'' and local ordinances. Demolition and construction activities are divided into phases:

(1.) Mobilization and temporary facilities;
(2.) Demolition and site clearing;
(3.) Site preparation and utilities;
(4.) Building foundation;
(5.) Building shell;
(6.) Building exterior;
(7.) Building interior;

(8.) Site improvements; and

(9.) Final inspection and demobilization.

Detail summary (phases overlap in time):

(1.) *Mobilization and temporary facilities:*

Install—temporary perimeter fencing, temporary utilities and foundation, temporary life guard tower, temporary office trailer, temporary sanitary facilities, and temporary sound wall/visual barrier.

Equipment—truck, backhoe, trailer, small auger, hand/power tools, and concrete truck.

Timeframe—June 3 to June 18, 2013.

(2.) *Demolition and site clearing:*

Dismantle and remove existing station, remove hardscape and landscape, trucks expected to haul-off less than 5 loads of debris via Coast Boulevard.

Equipment—excavator, hydraulic ram, jackhammer, trucks, and hand/power tools.

Timeframe—June 19 to July 5, 2013.

(3.) *Site preparation and utilities:*

Rough grade building site and modify underground utilities.

Equipment—loader, backhoe, and truck.

Timeframe—July 8 to July 30, 2013.

(4.) *Building foundation:*

Dig/shore foundation, pour concrete, waterproofing, and remove shoring.

Equipment—backhoe, concrete pump/truck, hand/power tools, small drill rig, and crane.

Timeframe—July 23 to August 21, 2013.

(5.) *Building shell:*

Pre-cast concrete panel walls, panel walls, rough carpentry and roof framing, wall board, cable railing, metal flashing, and roofing.

Equipment—crane, truck, fork lift, hand/power tools.

Timeframe—August 22 and October 9, 2013.

(6.) *Building exterior:*

Doors and windows, siding paint, light fixtures, and plumbing fixtures.

Equipment—truck, hand/power tools, and chop saw.

Timeframe—4 weeks.

(7.) *Building interiors:*

Walls, sewage lift station, rough and finish mechanical electrical plumbing structural (MEPS), wall board, door frames, doors and paint.

Equipment—truck, hand/power tools, and chop saw.

Timeframe—October 3 to November 22, 2013.

(8.) *Site improvements:*

Modify storm drain, concrete seat walls, curbs, and planters, fine grade, irrigation, hardscape, landscape, hand rails, plaques, and benches.

Equipment—backhoe, truck, hand/power tools, concrete pump/truck, and fork lift.

Timeframe—October 3 to November 22, 2013.

(9.) *Final inspection, demobilization:*

System testing, remove construction equipment, inspection, and corrections.

Equipment—truck, and hand/power tools.

Timeframe—October 18 to December 23, 2013.

If the City of San Diego's demolition and construction activities are not completed in 2013, then they would submit another IHA application for 2014. Additional details regarding the proposed demolition and construction activities of the Children's Pool Lifeguard Station can be found in the City of San Diego's IHA application. The IHA application can also be found online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

Proposed Dates, Duration, and Specific Geographic Region

The La Jolla Children's Pool Lifeguard Station is located at 827 ½ Coast Boulevard, La Jolla, California 92037 (32° 50′ 50.02″ North, 117° 16′42.8″ West. Because the City of San Diego is already requiring a moratorium on all construction activities during harbor seal pupping and weaning (i.e., January 1st to May 30th; see page 5 of the Negative Declaration in the IHA application), work on this proposed project can only be performed between June 1st and December 31st of any year. The City of San Diego is planning to begin the project at the Children's Pool in La Jolla, California on June 1, 2013, with site preparation (see page 30 to 31 of the Negative Declaration in the IHA application) followed by demolition of the existing station and construction of the new lifeguard station to be completed by December 23, 2013. The locations and distances (in ft) from the demolition/construction site to the Children's Pool haul-out area, breakwater ledge/rocks haul-out area, reef haul-out area, and Casa Beach haul-out area can be found in the City of San Diego's IHA application.

Description of Marine Mammals in the Area of the Proposed Specified Activity

Three species of pinnipeds are known to or could occur in the proposed Children's Pool action area and off the Pacific coastline (see Table 1 below). Pacific harbor seals, California sea lions, and northern elephant seals are the three species of marine mammals that occur and are likely to be found within the proposed activity area; thus, they are likely to be exposed to effects of the specified activities. NMFS and the City of San Diego do not expect incidental take of other marine mammal species. A variety of other marine mammals have on occasion been reported from the coastal waters of southern California. These include gray whales, killer whales, bottlenose dolphins, Steller sea lions, northern fur seals, and Guadalupe fur seals. However, none of these species have been reported to occur in the proposed action area. Table 1 below outlines the cetacean and pinnipeds species, their habitat, and conservation status in the nearshore area of the general region of the proposed project area.

TABLE 1—THE HABITAT, ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS INHABITING THE GENERAL REGION OF THE PROPOSED ACTION AREA IN THE PACIFIC OCEAN OFF THE SOUTHERN COAST OF CALIFORNIA

Species	Habitat	Best population estimate (minimum) [1]	ESA [2]	MMPA [3]	Population trend
Mysticetes:					
Gray whale (*Eschrichtius robustus*).	Coastal and shelf	19,126 (18,107)	DL—Eastern Pacific stock.	NC—Eastern Pacific stock.	Increasing over past several decades.
			EN—Western Pacific stock.	D—Western Pacific stock.	
Odontocetes:					
Killer whale (*Orcinus orca*)	Widely distributed	354 (354)—West Coast Transient stock.	NL	NC	Increasing—West Coast Transient stock.

TABLE 1—THE HABITAT, ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS INHABITING THE GENERAL REGION OF THE PROPOSED ACTION AREA IN THE PACIFIC OCEAN OFF THE SOUTHERN COAST OF CALIFORNIA—Continued

Species	Habitat	Best population estimate (minimum) [1]	ESA [2]	MMPA [3]	Population trend
		.....	EN—Southern resident population.	D—Southern Resident and AT1 Transient populations.	
Bottlenose dolphin (*Tursiops truncatus*).	Offshore, inshore, coastal, estuaries.	323 (290)—California Coastal stock.	NL	NC	Stable.
Long-beaked common dolphin (*Delphinus capensis*).	Inshore	107,016 (76,224)—California stock.	NL	NC	Increasing.
Pinnipeds:					
Pacific harbor seal (*Phoca vitulina richardii*).	Coastal	30,196 (26,667)—California stock.	NL	NC	Increased in California 1981 to 2004.
Northern elephant seal (*Mirounga angustirostris*).	Coastal, pelagic when not migrating.	124,000 (74,913)—California breeding stock.	NL	NC	Increasing through 2005, now stable.
California sea lion (*Zalophus californianus*).	Coastal, shelf	296,750 (153,337)—U.S. stock.	NL	NC	Increasing.
Steller sea lion (*Eumetopias jubatus*).	Coastal, shelf	72,223 (58,334)—Eastern U.S. stock.	T—Eastern U.S. stock.	D	Overall increasing, decreasing in California.
		.....	EN—Western U.S. stock.	.....	
Northern fur seal (*Callorhinus ursinus*).	Pelagic, offshore	9,968 (5,395)—San Miguel Island stock.	NL	NC—San Miguel Island stock.	Increasing.
Guadalupe fur seal (*Arctocephalus townsendi*).	Coastal, shelf	7,408 (3,028)—Mexico to California.	T	D	Increasing.

NA = Not available or not assessed.
[1] NMFS Marine Mammal Stock Assessment Reports
[2] U.S. Endangered Species Act: EN = Endangered, T = Threatened, DL = Delisted, and NL = Not listed.
[3] U.S. Marine Mammal Protection Act: D = Depleted, S = Strategic, and NC = Not classified.e rocks and beaches at or near the Children's Pool in La Jolla, California, are almost exclusively Pacific harbor seal hauling-out sites. On rare occasions, one or two California sea lions or a single juvenile northern elephant seal, have been observed on the sand or rocks at or near the Children's Pool (i.e., breakwater ledge/rocks haul-out area, reef haul-out area, and Casa Beach haul-out area). These sites are not usual haul-out locations for California sea lions and/or northern elephant seals. The City of San Diego commissioned two studies of harbor seal abundance trends at the Children's Pool. Both studies reported rare appearances of California sea lions and northern elephant seals (Yochem and Steward, 1998; Hanan & Associates, 2004).

Pacific Harbor Seal

Harbor seals are widely distributed in the North Atlantic and North Pacific. Two subspecies exist in the Pacific Ocean: *P. v. stejnegeri* in the western North Pacific near Japan, and *P. v. richardii* in the eastern North Pacific. The subspecies in the eastern North Pacific Ocean inhabits near-shore coastal and estuarine areas from Baja California, Mexico, to the Pribilof Islands in Alaska. These seals do not make extensive pelagic migrations, but do travel 300 to 500 km (162 to 270 nautical miles [nmi]) on occasion to find food or suitable breeding areas (Herder, 1986; Harvey and Goley, 2011). Previous assessments of the status of harbor seals have recognized three stocks along the west coast of the continental U.S.: (1) California, (2) Oregon and Washington outer coast waters, and (3) inland waters of Washington. An unknown number of harbor seals also occur along the west coast of Baja California, at least as far south as Isla Asuncion, which is about 100 miles south of Punta Eugenia. Animals along Baja California are not considered to be a part of the California stock because it is not known if there is any demographically significant movement of harbor seals between California and Mexico and there is no international agreement for joint management of harbor seals. In California, approximately 400 to 600 harbor seal haul-out sites are distributed along the mainland and on offshore islands, including intertidal sandbars, rocky shores, and beaches (Hanan, 1996; Lowery *et al.,* 2008). Harbor seals are one of the most common and frequently observed marine mammals along the coastal environment.

Pacific harbor seals haul-out on nearby beaches and rocks (i.e., breakwater ledge/rocks haul-out area, reef haul-out area, and Casa Beach haul-out area) below the lifeguard tower at Children's Pool. It is one of the three known haul-out sites for this species in San Diego County. They haul-out, give birth to pups, nurse, and molt their pelage on the beach and often forage for food in nearby areas. Harbor seal numbers have increased since 1979 and seals are documented to give birth on these beaches during January through May (Hanan, 2004; 2011). Several studies have identified seal behavior and estimated seal numbers including patterns of daily and seasonal area use (Yochem and Stewart, 1998; Hanan & Associates, 2004, 2011; Linder, 2011). Males, females, and pups (in season) of all ages and stages of development are observed at the Children's Pool and adjacent areas.

Harbor seals haul-out on the sand, rocks, and breakwater base at/near the Children's Pool in numbers of 0 to 15 seals to a maximum of about 150 to 200 seals depending on the time of day, season, and weather conditions. These animals have been observed in this area moving to/from the Children's Pool, exchanging with the rocky reef directly west of and adjacent to the breakwater and with Seal Rock, which is about 150 m (492 ft) west of the Children's Pool. Harbor seals have also been reported on

the sandy beach just southwest of the Children's Pool. Because space is limited behind the breakwater at Children's Pool, it is unlikely that the number of seals would ever exceed 250 individuals (Linder, 2011). At low tide, additional space for hauling-out is available on the rocky reef areas outside the retaining wall and on beaches immediately southward. Haul-out times vary by time of year, from less than an hour to many hours. There have been no foraging studies at this site, but harbor seals have been observed in nearshore waters and kelp beds nearby, including La Jolla Cove.

Radio-tagging and photographic studies have revealed that only a portion of seals utilizing a hauling-out site are present at any specific moment or day (Hanan, 1996, 2005; Gilbert *et al.,* 2005; Harvey and Goley, 2011; and Linder, 2011). These radio-tagging studies indicate that harbor seals in Santa Barbara County haul-out about 70 to 90% of the days annually (Hanan, 1996), the City of San Diego expects harbor seals to behave similarly at the Children's Pool. Tagged and branded harbor seals from other haul-out sites have been observed by Dr. Hanan at the Children's Pool. Harbor seals have been observed with red-stained heads and coats, which are typical of some harbor seals in San Francisco Bay, indicating that seals tagged at other locations and haul-out sites do visit the Children's Pool. A few seals have been tagged at the Children's Pool and there are no reports of these tagged animals at other sites (probably because of very low re-sighting efforts and a small sample size [10 individuals radio-tagged]), which may indicate a degree of site-fidelity (Yochem and Stewart, 1998). These studies further indicate that seals are constantly moving along the coast including to/from the offshore islands and that there may be as many as 600 harbor seals using Children's Pool during a year, but certainly not all at one time.

The City of San Diego has fitted a polynomial curve to the number of expected harbor seals hauling-out at the Children's Pool by month (see Figure 1 of the IHA application and below) based on counts at the Children's Pool by Hanan & Associates (2004, 2011), Yochem and Stewart (1998), and the Children's Pool docents (Hanan & Associates, 2004). A three percent annual growth rate of the population was applied to Yochem and Stewart (1998) counts to normalize them to Hanan & Associates and docent counts in 2003 to 2004.

A complete count of all harbor seals in California is impossible because some are always away from the haul-out sites. A complete pup count (as is done for other pinnipeds in California) is also not possible because harbor seals are precocial, with pups entering the water almost immediately after birth. Population size is estimated by counting the number of seals ashore during the peak haul-out period (May to July) and by multiplying this count by a correction factor equal to the inverse of the estimated fraction of seals on land. Based on the most recent harbor seal counts (2009) and including a revised correction factor, the estimated population of harbor seals in California is 30,196 individuals (NMFS, 2011), with an estimated minimum population of 26,667 for the California stock of harbor seals. Counts of harbor seals in California increased from 1981 to 2004. The harbor seal is not listed under the ESA and the California stock is not considered depleted or strategic under the MMPA.

California Sea Lion

The California sea lion is now considered to be a full species, separated from the Galapagos sea lion (*Zalophus wollebaeki*) and the extinct Japanese sea lion (*Zalophus japonicus*) (Brunner, 2003; Wolf *et al.,* 2007; Schramm *et al.,* 2009). The breeding areas of the California sea lion are on islands located in southern California, western Baja California, and the Gulf of California. Genetic analysis of California sea lions identified five genetically distinct geographic populations: (1) Pacific Temperate, (2) Pacific Subtropical, (3) Southern Gulf of California, (4) Central Gulf of California, and (5) Northern Gulf of California (Schramm *et al.,* 2009). In that study, the Pacific Temperate population included rookeries within U.S. waters and the Coronados Islands just south of U.S./Mexico border. Animals from the Pacific Temperate population range north into Canadian waters, and movement of animals between U.S. waters and Baja California waters has been documented, though the distance between the major U.S. and Baja California rookeries is at least 740.8 km (400 nmi). Males from western Baja California rookeries may spend most of the year in the U.S.

The entire population cannot be counted because all age and sex classes are never ashore at the same time. In lieu of counting all sea lions, pups are counted during the breeding season (because this is the only age class that is ashore in its entirety), and the numbers of births is estimated from the pup count. The size of the population is then estimated from the number of births and the proportion of pups in the population. Censuses are conducted in July after all pups have been born. There are no rookeries at or near the Children's Pool. Population estimates for the U.S. stock of California sea lions, range from a minimum of 153,337 to an average estimate of 296,750 animals. They are considered to be at carrying capacity of the environment. The California sea lion is not listed under the ESA and the U.S. stock is not considered depleted or strategic under the MMPA.

Northern Elephant Seal

Northern elephant seals breed and give birth in California (U.S.) and Baja California (Mexico), primarily on offshore islands (Stewart *et al.,* 1994), from December to March (Stewart and Huber, 1993). Males feed near the eastern Aleutian Islands and in the Gulf of Alaska, and females feed further south, south of 45°North (Stewart and Huber, 1993; Le Boeuf *et al.,* 1993). Adults return to land between March and August to molt, with males returning later than females. Adults return to their feeding areas again between their spring/summer molting and their winter breeding seasons.

Populations of northern elephant seals in the U.S. and Mexico were all originally derived from a few tens or a few hundreds of individuals surviving in Mexico after being nearly hunted to extinction (Stewart *et al.,* 1994). Given the very recent derivation of most rookeries, no genetic differentiation would be expected. Although movement and genetic exchange continues between rookeries when they start breeding (Huber *et al.,* 1991). The California breeding population is now demographically isolated from the Baja California population. The California breeding population is considered in NMFS stock assessment report to be a separate stock.

A complete population count of elephant seals is not possible because all age classes are not ashore at the same time. Elephant seal population size is typically estimated by counting the number of pups produced and multiplying by the inverse of the expected ratio of pups to total animals (McCann, 1985). Based on the estimated 35,549 pups born in California in 2005 and an appropriate multiplier for a rapidly growing population, the California stock was approximately 124,000 in 2005. The minimum population size for northern elephant seals can be estimated very conservatively as 74,913, which is equal to twice the observed pup count (to account for the pups and their mothers),

plus 3,815 males and juveniles counted at the Channel Islands and central California sites in 2005 (Lowry, NMFS unpublished data). Based on trends in pup counts, northern elephant seal colonies were continuing to grow in California through 2005, but appear to be stable or slowly decreasing in Mexico (Stewart *et al.,* 1994). Northern elephant seals are not listed under the ESA and are not considered as depleted or a strategic stock under the MMPA.

Further information on the biology and local distribution of these marine mammal species and others in the region can be found in the City of San Diego's application, which is available upon request (see **ADDRESSES**), and the NMFS Marine Mammal Stock Assessment Reports, which are available online at: *http://www.nmfs.noaa.gov/pr/sars/.*

Potential Effects on Marine Mammals

The City of San Diego requests authorization for Level B harassment of three species of marine mammals (i.e., Pacific harbor seals, California sea lions, and northern elephant seals) incidental to the use of equipment and its propagation of in-air noise from various acoustic mechanisms associated with the proposed demolition and construction activities of the Children's Pool Lifeguard Station at La Jolla, California discussed above. Behavioral disturbance may potentially occur as well incidental to the visual presence of humans and demolition/construction activities; however, pinnipeds at this site have likely adapted or become habituated to human presence at this site. Large numbers of people come to the site to view the pinnipeds at all hours and they perform many activities that can disturb pinnipeds at other sites, but this often does not occur at Children's Pool as they seem to have habituated to human presence and associated noises (Hanan & Associates, 2004; 2011). Lifeguards at the Children's Pool and nearby areas estimate that an average of 1,556,184 people per year or 129,682 per month visit the site from 2010 to 2012. A maximum of 15 personnel, at any one time, are expected to be part of the proposed demolition and construction activities. Several species of marine mammals may potentially occur in the proposed specified geographic area and thus may be affected by the proposed action. Pacific harbor seals are the most common species, the California sea lion and northern elephant seal are observed occasionally, and thus considered likely to be exposed to sound associated with the demolition and construction activities.

Current NMFS practice, regarding exposure of marine mammals to high-level in-air sounds, as a threshold for potential Level B harassment, is at or above 90 dB re 20 μPa for harbor seals and at or above 100 dB re 20 μPa for all other pinniped species (Lawson *et al.,* 2002; Southall *et al.,* 2007). NMFS does not expect exposure of marine mammals to high-level underwater sounds from demolition and construction activities that would be considered for potential Level B harassment. The acoustic mechanisms involved entail in-air non-impulsive noise caused by the demolition and construction activities. Expected in-air noise levels are anticipated to result in elevated sound intensities near the proposed demolition and construction activities. No other mechanisms are expected to affect marine mammal use of the area. The other activities, would not affect any haul-out and would not entail noise, and activity surrounding the water materially different from normal operations at the lifeguard station, to which the animals are likely already habituated.

Since no demolition or construction activities will be performed during the pupping and weaning season (i.e., January through May), there will be no impacts on birthing rates or pup survivorship at the Children's Pool. There will be no in-water demolition and construction activities in or near the water so pinniped activities in the water should not be affected. Additionally, pinnipeds utilizing the Children's Pool beach as a haul-out site are a very small portion of the species and/or stock populations and any impacts would have little effect at the species and/or stock population levels.

As noted above, current NMFS practice, regarding exposure of marine mammals to high-level in-air sounds, as a potential threshold for Level B harassment, is at or above 90 dB re 20 μPa for harbor seals and at or above 100 dB re 20 μPa for all other pinniped species. Pinnipeds at Children's Pool are likely already exposed to and habituated to loud noise and human presence, and thus may have areas of effect comparable to the radius of effect calculated for noise from the demolition and construction activities. Behavioral considerations suggest that the pinnipeds would be able to determine that a noise source does not constitute a threat if it is more than a certain distance away, and the sound levels involved are not high enough to result in injury (Level A harassment). Nonetheless, these data suggest that demolition and construction activities may affect pinniped behavior throughout the Children's Pool area, i.e., within approximately a few hundred feet of the proposed activity. The nature of that effect is unpredictable, but logical responses on the part of the pinnipeds include tolerance (noise levels would likely not be loud enough to induce temporary threshold shift in harbor seals), or avoidance by using haul-outs or by foraging outside of the immediate Children's Pool area.

In-Air Noise—The principal source of in-air noise would be from a 980 Case backhoe, dump truck, air compressor, electric screw guns, jackhammer, concrete saw, and chop saws used for the proposed demolition and construction activities. Background noise levels near the Children's Pool are likely already elevated due to normal activities. Marine mammals at Children's Pool haul-outs are presumably habituated to the daily coming and going of humans, automobiles, and to other existing activities at the proposed action area. These activities may occur at any time of the day for periods of up to several hours at a time. There have been no studies for ambient sound levels at the Children's Pool.

There are so many human visitors to the Children's Pool site at all hours of the day and night, season, and weather that human scent and visual presence are generally not considered issues (Hanan, 2004; 2011). At this site, the Pacific harbor seals are most disturbed when people get very close to them on the beach (i.e., probably 2 to 3 m [6.6 to 9.8 ft]. However, the City of San Diego wants to be authorized for incidental take coverage in case pinnipeds alert to the novel presence or sounds of equipment not previously experienced by pinnipeds at this location. The contractors will not directly approach the Pacific harbor seals during the proposed demolition and construction activities.

At the individual level, a newly arrived pinniped (moved in from another area) may not have habituated to humans and noise as pinnipeds that have been on site for awhile. These recent arrivals may alert to these stimuli, perhaps flushing into the water. However, after a few days of using the beach at Children's Pool, the City of San Diego would expect the pinnipeds to habituate and not react to humans (unless close to them) or noises at the demolition and construction activities site.

Although harbor seals could also be affected by in-air noise and activity associated with demolition and construction at the lifeguard, seals at Children's Pool haul-outs are

presumably habituated to human activity to some extent due to the daily coming and going of humans, and to other existing activities in the area. These activities may occur at any time of the day and may produce noise for periods of up to several hours at a time. The operation of loud equipment are above and outside of the range of normal activity at the Children's Pool and have the potential to cause seals to leave a haul-out at the Children's Pool. This would constitute Level B harassment (behavioral). In view of the relatively small area that would be affected by elevated in-air noise and the proximity to the haul-out sites, it appears probable that some seals could show a behavioral response, despite their habituation to current levels of human-generated noise; incidental take by this mechanism may occur during the demolition and construction activities.

Harbor seal presence in the activity area is perennial, with daily presence at a nearby haul-out during the months when the activity would occur. The potentially affected seals include adults of both sexes. The harbor seals at Children's Pool may be residents, non-migratory, exhibit site fidelity at the haul-out sites. It is likely that many seals in the population would be affected more than once over the course of the proposed demolition and construction period; therefore, it is possible that some measure of adaptation or habituation would occur on the part of the seals, whereby they would tolerate elevated noise levels and/or utilize haul-outs relatively distant from the demolition and construction activities. This strategy is possible, but it is difficult to predict whether the harbor seals would show such a response. Project scheduling avoids sensitive life history phases of harbor seals. Project activities producing in-air noise would commence in June. Project activities producing in-air noise are scheduled to terminate at the end of December, which is before female seals begin to seek sites suitable for pupping.

Effects on California Sea Lions and Northern Elephant Seals—California sea lions and northern elephant seals, although abundant in northern California waters, have seldom been recorded at the Children's Pool. Their low abundance in the area may be due to the presence of a large and active harbor seal population there, which likely competes with the California sea lions and northern elephant seals for foraging resources. Any California sea lions that visit the action area during construction activities would be subject to the same type of impacts described above for harbor seals. There is a possibility of behavioral effects related to project acoustic impacts, in the event of California sea lion and northern elephant seal presence in the activity area. California sea lions and northern elephant seals have been seen in the activity area, albeit infrequently, and there are no quantitative estimates of the frequency of their occurrence. Assuming that they are present, it is possible California sea lions and northern elephant seals might be subject to behavioral harassment.

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 adverse impact on affected marine mammal species or stocks.

Anticipated Effects on Marine Mammal Habitat

All construction activities are beyond or outside the habitat areas where harbor seals and other pinnipeds are found. Visual barriers will be erected to shield construction activities from the potential acoustic effects and visual perception of pinnipeds. The general public will not be excluded from the beaches and areas outside the demolition and construction zone. Because the public occasionally harasses the harbor seals with various activities, the NMFS-qualified monitor will make observations and attempt to attribute any observed harassment to the public or to the demolition and construction activities and give all details in the observation report. If any short-term, temporary impacts to habitat due to sounds or visual presence of equipment and workers did occur, the City of San Diego would expect pinniped behavior to return to pre-demolition and construction conditions soon after the proposed activities are completed which is anticipated to occur before the next pupping season. This site is already very disturbed by member of the public who come to the area during the day and night to view the pinnipeds. The City of San Diego and NMFS do not project any loss or modification of physical habitat for these species. Any potential temporary loss or modification of habitat due to in-air noise or visual presence of equipment and workers during the proposed activities is expected by the City of San Diego and NMFS to be quickly restored after demolition and construction activities end and all equipment and barriers are removed.

The anticipated adverse impacts upon habitat consist of temporary changes to the in-air acoustic environment, as detailed in the IHA application. These changes are minor, temporary, and of limited duration to the period of demolition and construction activities. No aspect of the proposed project is anticipated to have any permanent effect on the location of pinniped haul-outs in the area, and no permanent change in seal or sea lion use of haul-outs and related habitat features is anticipated to occur as a result of the proposed project. The temporary impacts on the acoustic environment are not expected to have any permanent effects on the species or stock populations of marine mammals occurring at the Children's Pool. The area of habitat affected is small and the effects are temporary, thus there is no reason to expect any significant reduction in habitat available for foraging and other habitat uses.

NMFS anticipates that the action will result in no impacts to marine mammal habitat beyond rendering the areas immediately around the Children's Pool less desirable during demolition and construction activities of the Children's Pool Lifeguard Station as the impacts will be localized. Impacts to marine mammals, invertebrates, and fish species are not expected to be detrimental.

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 adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

The City of San Diego has established the Children's Pool as a shared beach for pinnipeds and people. During the pupping season a rope is placed along the upper part of the beach to designate how close people can come to the haul-out area. Swimming and other water activities are still allowed as long as there is no direct harassment of the pinnipeds. The proposed demolition and construction activities are planned to occur outside the harbor seal pupping and weaning periods. Visual and acoustic barriers will be constructed. The visual and acoustic barrier will likely be constructed of plywood, 1.8 to

2.4 m (6 to 8 ft) tall. The barriers will be placed at the site with input from NMFS Southwest Regional Office (SWRO) personnel so that they will hide as advantageously as possible the demolition and construction activities that may be seen by pinnipeds. The barriers may dampen the acoustic sound sources, but are not expected to exclude sound from the environment. As the site is a beach with construction along the cliff and on flat areas above the cliff, a complete barrier cannot likely be constructed to hide all demolition and construction activities for the proposed project. Once the walls of the lifeguard station's building are in place, much of the demolition and construction activities will take place above the Children's Pool beach (i.e., out of sight) as well as inside the building (i.e., a visual and partial sound barrier). There will be no activities in the ocean or closer to the water's edge and since harbor seals mate underwater in the ocean, there will be no impacts on mating activities. California sea lions and northern elephant seals are such infrequent users of this area and their rookeries are so far away (at least 104.6 km [65 miles] at offshore islands) that there will be no adverse impact on these species.

The activity proposed by the applicant includes a variety of measures calculated to minimize potential impacts on marine mammals, including:

- Construction shall be prohibited during the Pacific harbor seal pupping season (January 1st to May 1st) and for an additional four weeks to accommodate lactation and weaning of late season pups. Thus, construction shall be prohibited from January 1st to June 1st.
- Heavy construction (highest sound levels) shall be scheduled during the annual period of lowest haul-out of occurrence, October to November.
- Construction shall be scheduled during the daily period of lowest haul-out occurrence, from approximately 8:30 a.m. to 3:30 p.m. Harbor seals typically have the highest daily or hourly haul-out period during the afternoon from 3:00 p.m. to 6:00 p.m.
- A visual and acoustic barrier will be erected and maintained for the duration of the project to shield demolition and construction activities from beach view. The temporary barrier shall consist of ½ to ¾ inch (1.3 to 1.9 centimeters [cm]) plywood constructed 1.8 to 2.4 meters (m) (6 to 8 feet [ft]) high depending on the location.
- Use of trained PSOs to detect, document, and minimize impacts (i.e., possible shut-down of noise-generating operations [turning off the equipment so that in-air sounds associated with construction no longer exceed levels that are potentially harmful to marine mammals]) to marine mammals.

Timing Constraints for In-Air Noise

To minimize in-air noise impacts on marine mammals, underwater construction activities shall be limited to the period when the species of concern will be least likely to be in the project area. The construction window for demolition and construction activities shall be from June 1, 2013 to December 23, 2013. Avoiding periods when the highest number of marine mammal individuals are in the action area is another mitigation measure to protect marine mammals from demolition and construction activities.

More information regarding the City of San Diego's monitoring and mitigation measures, for the demolition and construction activities at the Children's Pool Lifeguard Station can be found in the IHA application.

NMFS has carefully evaluated the applicant's proposed mitigation measures and 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 in one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation, including consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the activity.

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.

The City of San Diego has developed a monitoring plan (see Appendix I. Mitigated Negative Declaration in the IHA application) based on discussions between the project biologist, Dr. Doyle Hanan, and NMFS biologists. The plan has been vetted by City of San Diego planners and reviewers. The plan has been formal presented to the public for review and comment. The City of San Diego has responded in writing and in public testimony (see City of Council Hearing, December 14, 2011) to all public concerns.

The basic plan is to survey prior to construction activities and then monitor demolition and construction activities by NMFS-approved Protected Species Observers (PSOs) with binoculars and handheld digital sound level measuring devices. PSOs will observe from a station along the breakwater wall as well as the base of the cliff below the demolition/construction area. PSOs will be on site approximately 30 minutes before the start of demolition and construction activities and continue for 30 minutes after activities have ceased. Monitors will have authority to stop construction as necessary depending on sound levels, pinniped presence, and distance from sound sources. Daily monitoring reports will be maintained for periodic summary reports to the City of San Diego and to NMFS. Observations will be entered into maintained Hanan & Associates computers. The City of San Diego plans to follow the reporting in the Mitigated Negative Declaration that states ''the biologist shall document field activity via the Consultant Site Visit Record. The Consultant Site Visit Record shall be either emailed or faxed to the City of San Diego's Mitigation Monitoring Coordination process (MMC) on the 1st day of monitoring, the 1st week of each month, the last day of monitoring, and immediately in the case of any undocumented discovery. The project biologist shall submit a final construction monitoring report to MMC within 30 days of construction completion.'' The MMC ''coordinates the monitoring of development projects and requires that changes are approved and implemented to be in conformance with the permit requirements and to minimize any damage to the environment.'' These documents will also be sent to NMFS.

The City of San Diego will include sound measurements at and near the demolition and construction site in their initial survey prior to the proposed activities as a background and baseline for the project. While no specific

acoustic study is planned, the City of San Diego's Mitigated Negative Declaration states that marine mammal monitoring shall be conducted for three to five days prior to construction and shall include hourly systematic counts of pinnipeds using the beach, seal rock, and associated reef areas. Monitoring three to five days prior to construction will provide baseline data regarding recent haul-out behavior and patterns as well as background noise levels near the time of demolition and construction activities. No monitoring is planned to be conducted after demolition and construction activities have been finished, as it was not anticipated nor addressed in project funding. Monitoring shall assess behavior and potential behavioral responses to construction noise and activities. Visual digital recordings and photographs shall be used to document individuals and behavioral responses to construction. The City of San Diego plan to make hourly counts of the number of pinnipeds present and record sound or visual events that result in behavioral responses and changes, whether during construction or from public stimuli. During these events, pictures and video will also be taken when possible. The ''Mitigated Negative Declaration'' states ''monitoring shall assess behavior and potential behavioral responses to construction noise and activities. Visual digital recordings and photographs shall be used to document individuals and behavioral responses to construction.''

The City of San Diego is open to working with the Western Alliance for Nature's La Jolla Harbor Seal Webcam, which can be found online at: *http://www.wanconservancy.org/la_jolla_harbor_seal_earthcam.htm*. The City of San Diego may do periodic checks for monitoring purposes. The camera is not expected to replace Protected Species Observers at the site making accurate counts, measuring sound levels and observing the public and the construction, as well as the seals. In the camera view, you may be able to see visual evidence of Level B harassment, but it probably would not be able to be distinguished between harassment from demolition and construction activities and the public since the camera only shows the Children's Pool beach and seals (usually a specific portion of the beach, but not the reef nor nearby beaches).

Consistent with NMFS procedures, the following marine mammal monitoring and reporting shall be performed for the proposed action:

(1) A NMFS-approved or -qualified Protected Species Observer (PSO) shall attend the project site prior to, during, and after construction activities cease each day throughout the demolition and construction window.

(2) The PSO shall be approved by NMFS prior to demolition and construction activities.

(3) The PSO shall search for marine mammals within the Children's Pool area.

(4) The PSO shall be present on the pier during demolition and construction activities to observe for the presence of marine mammals in the vicinity of the proposed specified activity. All such activity will occur during daylight hours (i.e., 30 min after sunrise and 30 min before sunset). If inclement weather limits visibility within the area of effect, the PSO will perform visual scans to the extent conditions allow

(5) If marine mammals are sighted by the PSO within the acoustic thresholds areas, the PSO shall record the number of marine mammals within the area of effect and the duration of their presence while the noise-generating activity is occurring. The PSO will also note whether the marine mammals appeared to respond to the noise and if so, the nature of that response. The PSO shall record the following information: Date and time of initial sighting, tidal stage, weather, conditions, Beaufort sea state, species, behavior (activity, group cohesiveness, direction and speed of travel, etc.), number, group composition, distance to sound source, number of animals impacted, demolition/construction activities occurring at time of sighting, and monitoring and mitigation measures implemented (or not implemented). The observations will be reported to NMFS.

(6) A final report will be submitted summarizing all in-air demolition and construction activities and marine mammal monitoring during the time of the authorization, and any long term impacts from the project.

A written log of dates and times of monitoring activity will be kept. The log shall report the following information:

- Time of observer arrival on site;
- Time of the commencement of in-air noise generating activities, and description of the activities (e.g., pile removal, augering, or pile installation);
- Distances to all marine mammals relative to the sound source;
- For harbor seal observations, notes on seal behavior during noise-generating activity, as described above, and on the number and distribution of seals observed in the project vicinity;
- For observations of all marine mammals other than harbor seals, the time and duration of each animal's presence in the project vicinity; the number of animals observed; the behavior of each animal, including any response to noise-generating activities;
- Time of the cessation of in-air noise generating activities; and
- Time of observer departure from site.

All monitoring data collected during construction will be included in the biological monitoring notes to be submitted. A final report summarizing the construction monitoring and any general trends observed will also be submitted to NMFS within 90 days after monitoring has ended during the period of the lifeguard station construction.

The City of San Diego would notify NMFS Headquarters and the NMFS Southwest Regional Office prior to initiation of the demolition and construction activities. A draft final report must be submitted to NMFS within 90 days after the conclusion of the demolition and construction activities of the Children's Pool Lifeguard Station. The report would include a summary of the information gathered pursuant to the monitoring requirements set forth in the IHA, including dates and times of operations, and all marine mammal sightings (dates, times, locations, species, behavioral observations [activity, group cohesiveness, direction and speed of travel, etc.], tidal stage, weather conditions, Beaufort sea state and wind force, activities, associated demolition and construction activities). A final report must be submitted to the Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report would be considered to be the final report.

While the proposed IHA would not authorize injury (i.e., Level A harassment), serious injury, or mortality, should the applicant, contractor, monitor or any other individual associated with the demolition and construction project observe an injured or dead marine mammal, the incident (regardless of cause) will be reported to NMFS as soon as practicable. The report should include species or description of animal, condition of animal, location, time first found, observed behaviors (if alive) and photo or video, if available.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury or mortality, the City of San Diego shall immediately cease the specified activities and immediately report the incident to the Chief of the

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* and the Southwest Regional Stranding Coordinator (*Sarah.Wilkin@noaa.gov*). The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- The type of activity involved;
- Description of the circumstances during and leading up to the incident;
- Status of all sound source use 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 marine mammal observations in the 24 hours preceding the incident; species identification or description of the animal(s) involved;
- The fate of the animal(s); and photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with the City of San Diego to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The City of San Diego may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that the City of San Diego 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 described in the next paragraph), the City of San Diego will immediately report the incident to the Chief of the 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,* and the NMFS Southwest Regional Office (562–980–4017) and/or by email to the Southwest Regional Stranding Coordinator (*Sarah.Wilkin@noaa.gov*). The report must include the same information identified above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Trinidad Rancheria to determine whether modifications in the activities are appropriate.

In the event that the City of San Diego 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 activities authorized (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the City of San Diego shall report the incident to the Chief of the 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,* and the NMFS Southwest Regional Office (562–980–4017) and/or by email to the Southwest Regional Stranding Coordinator (*Sarah.Wilkin@noaa.gov*), within 24 hours of the discovery. The City of San Diego shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

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].

The City of San Diego and NMFS anticipate takes of Pacific harbor seals, California sea lions, and northern elephant seals by Level B (behavioral) harassment only incidental to the proposed project at the Children's Pool. No takes by injury (Level A harassment), serious injury, or mortality is expected. There is a high likelihood that many of the harbor seals present during the demolition and construction activities will not be flushed off of the beach or rocks, as pinnipeds at this site are conditioned to human presence and loud noises (Hanan, 2004; 2011) (see *http://www.youtube.com/watch?v=4IRUYVTULsg*).

With demolition and construction activities scheduled to begin June 1, 2013, the City of San Diego expects a range of 0 to 190 harbor seals to be present daily during June and a seasonal decline through November to about 0 to 50 harbor seals present daily. If all of the estimated harbor seals present are taken by incidental harassment each day, there could be a maximum of 12,783 takes (i.e., approximately 3,579 adult males and 2,684 juvenile males, 3,451 adult females and 2,429 juvenile females based on age and sex ratios presented in Harkonen *et al.,* 1999) over the entire duration of the demolition and construction activities. The City of San Diego expects about 90% of the adult females to be pregnant after June and July (Greig, 2002). An unknown portion of the incidental takes would be from repeated exposures as harbor seals leave and return to the Children's Pool area. A polynomial curve fit to counts by month was used by the City of San Diego to estimate the number of harbor seals expected to be hauled-out by day (see below and Figure 1 of the IHA application).

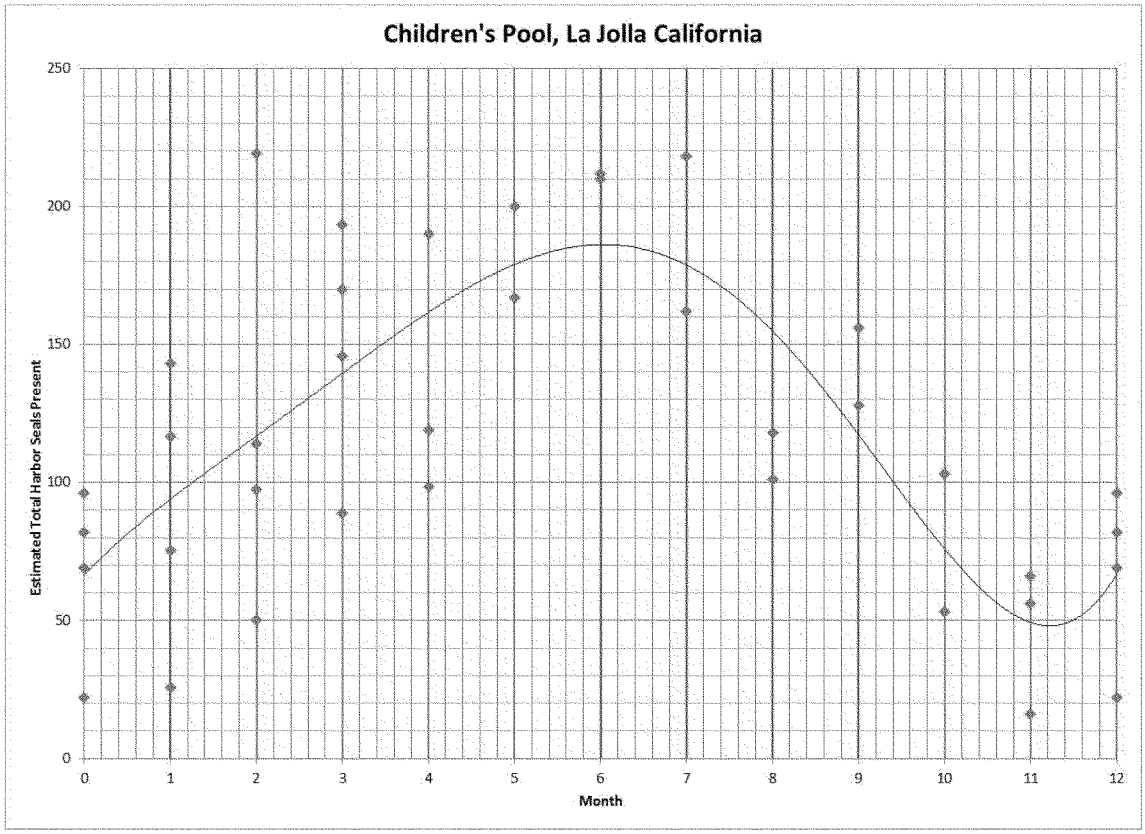

Figure 1. Estimated total harbor seals by month based on counts at the site by Hanan & Associates, Yochem and Stewart, and Children's Pool docents. The polynomial curve fits to counts by moths was used to estimate harbor seals expected to be hauled-out by day.

Assuming the total seals predicted to haul-out daily at the Children's Pool are exposed to sound levels that are considered Level B harassment during days where sound is predicted to exceed 90 dB at the demolition/construction site (106 days), there could be a maximum of approximately 12,783 incidental takes (i.e., exposures) of approximately 600 individual Pacific harbor seals over the duration of the proposed activities. The estimated 600 individual Pacific harbor seals will be taken by Level B harassment multiple times during the proposed demolition and construction activities. Very few California sea lions and/or northern elephant seals are ever observed at the Children's Pool (i.e., one or two individuals). The City of San Diego requests the authority to incidentally take (i.e., exposures) 12,783 Pacific harbor seals, 100 California sea lions, and 25 northern elephant seals of 600, 2, and 1 individual, respectively. More information on the number of requested authorized takes, estimated number of individuals, and the approximate percentage of the stock for the three species in the proposed action area can be found in Table 2 (below).

NMFS will consider pinnipeds flushing into the water; moving more than 1 m (3.3 ft), but not into the water; becoming alert and moving, but do not move more than 1 m; and changing direction of current movement by individuals as behavioral criteria for take by Level B harassment. The City of San Diego will estimate the portion of pinnipeds present that are observed to exhibit these behaviors as well as the apparent source of the stimulus.

TABLE 2—SUMMARY OF THE ANTICIPATED INCIDENTAL TAKE BY LEVEL B HARASSMENT OF PINNIPEDS FOR THE CITY OF SAN DIEGO'S PROPOSED DEMOLITION AND CONSTRUCTION ACTIVITIES GENERATING IN-AIR NOISE AT THE CHILDREN'S POOL LIFEGUARD STATION IN LA JOLLA, CALIFORNIA

Species	Requested take authorization (number of exposures)	Estimated number of individuals taken	Approximate percentage of estimated stock (individuals)
Pacific harbor seal	12,783	600	1.98
California sea lion	100	2	<0.01
Northern elephant seal	25	1	<0.01

Encouraging and Coordinating Research

Each demolition/construction phase and potential harassment activity will be evaluated as to observed sound levels and any pinniped reaction by type of sound source. Flushing will be documented by sex and age class. These data will provide instructional for IHA permitting in future projects. Potential mitigation will be discussed and suggested in the final report.

Negligible Impact and Small Numbers Analysis Determination

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.

No injuries (Level A harassment), serious injuries, or mortalities are anticipated to occur as a result of the City of San Diego's proposed demolition and construction activities, and none are proposed to be authorized by NMFS. The proposed activities are not expected to result in the alteration of reproductive behaviors, and the potentially affected species would be subjected to temporary only to temporary and minor behavioral impacts. The project scheduling avoids sensitive life stages for Pacific harbor seals. Project activities producing in-air noise would commence in June. This is after the end of the pupping season and affords additional time to accommodate lactation and weaning of season pups as well as considers periods of lowest haul-out occurrence. Table 2 of this document outlines the number of requested Level B harassment takes that are anticipated as a result of these activities. 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, this activity is not expected to impact rates of annual recruitment or survival for the affected species or stock (i.e., Pacific harbor seals, California sea lions, and northern elephant seals), particularly given the NMFS and the applicant's proposal to implement mitigation, monitoring, and reporting measures to minimize impacts to marine mammals.

For the other marine mammal species that may occur within the proposed action area, there are no known designated or important feeding and/or reproductive areas. Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (i.e., 24 hour 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). However, for many years Pacific harbor seals have been hauling-out at Children's Pool during the year (including during pupping season and while females are pregnant) and have been exposed to anthropogenic sound sources such as vehicle traffic, human voices, etc. and are frequently exposed to stimuli from human presence. While studies have shown the types of sound sources used during the proposed demolition and construction activities have the potential to displace marine mammals from breeding areas for a prolonged period (e.g., Lusseau and Bejder, 2007; Weilgart, 2007), based on the best available information, this does not seem to be the case for the Pacific harbor seals at the Children's Pool. Over many years, the Pacific harbor seals have repeatedly hauled-out to pup and overall the NMFS Stock Assessment Reports (NMFS, 2011) for this stock have shown that the population is increasing and is considered stable. Additionally, the demolition and construction activities will be increasing sound levels in the environment in a relatively small area surrounding the lifeguard station (compared to the range of the animals), and some animals may only be exposed to and harassed by sound for less than a day.

Of the 3 marine mammal species under NMFS jurisdiction that may or are known to likely occur in the action area, none are listed as threatened or endangered under the ESA. No incidental take has been requested to be authorized for ESA-listed species as none are expected to be within the proposed action area. There is generally insufficient data to determine population trends for the other depleted species in the study area. To protect these animals (and other marine mammals in the action area), the City of San Diego must prohibit demolition and construction activities during harbor seal pupping season; scheduling demolition and construction activities with highest sound levels during the annual period of lowest haul-out occurrence and during the daily period of lowest haul-out occurrence; limiting activities to the hours of daylight; erecting a temporary visual and acoustic barrier; and using PSOs. No injury, serious injury, or mortality is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, and the activity is not expected to impact rates of recruitment or survival.

As mentioned previously, NMFS estimates that 3 species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. It is estimated that 600 individual Pacific harbor seals, 2 individual California sea lions, and 1 northern elephant seal will be taken (multiple times) by Level B harassment, which would be approximately 1.98, less than 0.01, and less than 0.01 of the respective stocks. The population estimates for the marine mammal species that may be taken by Level B harassment were provided in Table 2 of this document. NMFS's practice has been to apply the 90 dB re 20 μPa and 100 dB re 20 μPa received level threshold for in-air 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 not established a threshold for Level A harassment (injury) for marine mammals exposed to in-air noise, however, Southall *et al.* (2007) recommends 149 dB re 20 μPa (peak flat) as the potential threshold for injury from in-air noise for all pinnipeds. No in-air sounds from demolition and construction activities will exceed 110 dB at the source.

While behavioral modifications, including temporarily vacating the area during the demolition and construction activities, 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 activities, have led NMFS to preliminarily 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. NMFS believes that the time period of the demolition and construction activities, the requirement to implement mitigation measures (e.g., prohibiting demolition and construction activities during pupping season, scheduling operations to periods of the lowest haul-out occurrence, and visual and acoustic barriers), and the inclusion of the monitoring and reporting measures, will reduce the amount and severity of the potential impacts from the activity to the degree that will have a negligible impact on the species or stocks in the action area.

NMFS has preliminarily determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of the demolition and construction activities at the Children's Pool Lifeguard Station in La Jolla, California, June to December, 2013, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals. See Table 2 for the requested authorized take numbers 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 (off of southern California in the northeast Pacific Ocean) that implicate MMPA section 101(a)(5)(D).

Endangered Species Act

NMFS (Permits and Conservation Division) has determined that a section 7 consultation for the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity is not necessary for any ESA-listed marine mammal species under its jurisdiction as the proposed action will not affect ESA-listed species.

National Environmental Policy Act

NMFS will conduct a NEPA analysis to evaluate the effects of authorizing the proposed take of marine mammals prior to making a final determination on the issuance of the IHA. This notice, and referenced documents, including the IHA application provide the environmental issues and information relevant to the demolition and construction activities as well as those specific to NMFS's issuance of the IHA.

Proposed Authorization

NMFS proposes to issue an IHA to the City of San Diego, 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: April 29, 2013.

Perry Gayaldo,

Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–10529 Filed 5–2–13; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletion

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to and Deletion From Procurement List.

SUMMARY: The Committee is proposing to add services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities and to delete a product previously furnished by such agency.

DATES: *Comments Must Be Received On or Before:* 6/3/2013.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 10800, Arlington, Virginia 22202–4149.

For Further Information or To Submit Comments Contact: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Services

Service Type/Location: Custodial and Ground Maintenance Services, El Paso Service Processing Center, 8915 Montana Avenue, El Paso, TX

NPA: Mavagi Enterprises, Inc., San Antonio, TX

Contracting Activity: U.S. IMMIGRATION

AND CUSTOMS ENFORCEMENT, DETENTION MANAGEMENT—DC OFFICE, Washington DC

Service Type/Location: Janitorial Service, Dubois Ranger District Office, Caribou-Targhee National Forest, 98 North Oakley, Dubois, ID

NPA: Development Workshop, Inc., Idaho Falls, ID

Contracting Activity: Forest Service, Caribou-Targhee National Forest, Idaho Falls, ID

Service Type/Locations: Military Personnel Support Services, Force Support Div., Manpower & Military Personnel Branch, Joint Base Langley-Eustis, VA, Force Support Div., Manpower & Military Personnel Branch, JEB Little Creek, Fort Story, VA

NPA: ServiceSource, Inc., Alexandria, VA

Contracting Activity: 633rd Contracting Squadron, Joint Base Langley-Eustis, VA

Deletion

The following product is proposed for deletion from the Procurement List:

Product

NSN: 2540–00–737–3309—Cushion Seat, Vehicular

NPA: EnableUtah, Ogden, UT

Contracting Activity: DLA LAND AND MARITIME, COLUMBUS, OH

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2013–10496 Filed 5–2–13; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List, Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 6/3/2013.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 10800, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 9/23/2011 (76 FR 59117–59118) and 3/15/2013 (78 FR 16475–16476), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following services are added to the Procurement List:

Services

Service Type/Location: Laundry Refurbishment and Repair Services, Army Contracting Command, 6501 E.11 Mile Road, Warren, MI, (Off-site: 2307 Business Center Dr, Austin TX)

NPA: Travis Association for the Blind, Austin, TX.

CONTRACTING ACTIVITY: DEPT OF THE ARMY, W4GG HQ US ARMY TACOM, WARREN, MI

Service Type/Locations: Facilities Support Services, Navy Operational Support Center Fort Schuyler-Bronx, 4 Pennyfield Avenue, Bronx, NY

NPAs: Work, Incorporated, Dorchester, MA (Prime), The Corporate Source, Inc., New York, NY (Subcontractor), Navy Operational Support Center Plainville, 1 Linsley Drive, Plainville, CT

NPAs: Work, Incorporated, Dorchester, MA (Prime), Easter Seals Capital Region & Eastern Connecticut, Inc., Windsor, CT (Subcontractor), Navy Operational Support Center Quincy, 85 Sea Street, Quincy, MA

NPAs: Work, Incorporated, Dorchester, MA (Prime), Community Workshops, Inc., Boston, MA (Subcontractor), Navy Operational Support Center White River Junction, 207 Holiday Drive, White River Junction, VT

NPAs: Work, Incorporated, Dorchester, MA (Prime), Northern New England Employment Services, Portland, ME (Subcontractor), USS Constitution, Boston Navy Yard, Building 5, Charlestown, MA

NPAs: Work, Incorporated, Dorchester, MA (Prime), Morgan Memorial Goodwill Industries, Boston, MA (Subcontractor)

CONTRACTING ACTIVITY: DEPT OF THE NAVY, NAVAL FAC ENGINEERING CMD MID LANT, NORFOLK, VA

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2013–10495 Filed 5–2–13; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board; Notice of Advisory Committee Meetings

AGENCY: Department of Defense.

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board will meet in closed session on May 22–23, 2013, from 8:00 a.m. to 5:00 p.m. at the Pentagon, Room 3E863, Washington, DC.

DATES: May 22–23, 2013, from 8:00 a.m. to 5:00 p.m.

ADDRESSES: The Pentagon, Room 3E863, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Debra Rose, Executive Officer, Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301–3140, via email at *debra.rose@osd.mil,* or via phone at (703) 571–0084.

SUPPLEMENTARY INFORMATION: The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting, the Board will discuss interim finding and recommendations resulting from ongoing Task Force activities. The Board will also discuss plans for future consideration of scientific and technical aspects of specific strategies, tactics, and policies as they may affect the U.S. national defense posture and homeland security.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. 2) and 41 CFR 102–3.155, the Department of Defense has determined that these Defense Science Board quarterly meetings will be closed

to the public. Specifically, the Under Secretary of Defense (Acquisition, Technology and Logistics), with the coordination of the DoD Office of General Counsel, has determined in writing that all sessions of these meetings will be closed to the public because they will be concerned throughout with matters listed in 5 U.S.C. 552b(c)(1) and (4).

Interested persons may submit a written statement for consideration by the Defense Science Board. Individuals submitting a written statement must submit their statement to the Designated Federal Official at the address detailed in **FOR FURTHER INFORMATION CONTACT**, at any point, however, if a written statement is not received at least 10 calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the Defense Science Board. The Designated Federal Official will review all timely submissions with the Defense Science Board Chairperson, and ensure they are provided to members of the Defense Science Board before the meeting that is the subject of this notice.

Dated: April 30, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–10474 Filed 5–2–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Establishment of the Response Systems to Adult Sexual Crimes Panel

AGENCY: DoD.

ACTION: Establishment of Federal Advisory Committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.50(a), the Department of Defense gives notice that it is establishing the charter for the Response Systems to Adult Sexual Assault Crimes Panel (''the Response Systems Panel''). The Response Systems Panel has been determined to be in the public interest.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: The Response Systems Panel is a non-discretionary federal advisory committee that shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120 of the UCMJ). The Response Systems Panel's review shall include the following:

a. Using criteria the Response Systems Panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the UCMJ, and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period 2007 through 2011.

b. A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims, and the identification of civilian best practices that may be incorporated into any phase of the military system.

c. An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial.

d. An assessment of the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, as compared to prosecution and defense counsel for similar cases in the Federal and State court systems.

e. An assessment and comparison of military court-martial conviction rates with those in the Federal and State courts and the reasons for any differences.

f. An assessment of the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault, including the role of a commander under Article 60, UCMJ.

g. An assessment of the strengths and weakness of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

h. An assessment of the adequacy of the systems and proceedings to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by 18 U.S.C. 3771, Department of Defense Directive 1030.1, and Department of Defense Instruction 1030.2.

i. Such other matters and materials the Response Systems Panel considers appropriate. In conducting reviews and assessments and preparing reports, the Response Systems Panel may review and incorporate, as appropriate, the dates and findings of applicable ongoing and completed studies. The Response Systems Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Panel considers appropriate to carry out its duties. Upon request by the Chair of the Response Systems Panel, a department or agency of the Federal Government shall provide information that the Response Systems Panel considers necessary to carry out its duties.

Pursuant to Section 567(b)(1)(A) of the FY 2013 NDAA, the Response Systems Panel shall be comprised of nine members, five of whom are appointed by the Secretary of Defense and one member each appointed by the Chairmen and Ranking Members of the Committees on Armed Services of the Senate and House of Representatives, respectively. Appointments shall be made not later than 120 days after the date of the enactment of the FY 2013 NDAA.

The members shall be selected from among private United States citizens, who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in Federal and State criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Response Systems Panel.

Members shall be appointed for the life of the Response Systems Panel. Any vacancy in the Response Systems Panel shall be filled in the same manner as the original appointment. Members of the Response Systems Panel, who were appointed by the Secretary of Defense, shall be appointed as experts or consultants under the authority of 5 U.S.C. 3109 to serve as special government employee (SGE) members. With the exception of travel and per diem for official travel, Response Systems Panel members shall serve without compensation.

The DoD General Counsel, according to the DoD policies and procedures, may select experts and consultants as subject matter experts under the authority of 5 U.S.C. 3109 to advise the Response Systems Panel or its subcommittees;

these individuals do not count toward the Response Systems Panel's total membership nor do they have voting privileges. In addition, these subject matter experts, when appointed, shall not participate in any discussions dealing with the substantive matters before the Response Systems Panel or its subcommittees. The DoD, when necessary and consistent with the Response Systems Panel's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Response Systems Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD General Counsel as the DoD Sponsor.

These subcommittees shall not work independently of the Response Systems Panel and shall report all of their recommendations and advice to the Response Systems Panel for full deliberation and discussion. Subcommittees, task forces, or working groups have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Response Systems Panel. No subcommittee or any of its members can update or report, verbally or in writing, on behalf of the Response Systems Panel directly to the DoD or any Federal officer or employee. The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Response Systems Panel. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants under the authority of 5 U.S.C. 3109 to serve as SGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of travel and per diem for official travel related to the Response Systems Panel or its subcommittees, subcommittee members shall serve without compensation.

All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established the DoD policies and procedures. The Response Systems Panel's Designated Federal Officer (DFO), pursuant to the DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed, in accordance with governing the DoD policies and procedures.

In addition, the Response Systems Panel's DFO is required to be in attendance at all meetings of the Response Systems Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the Response Systems Panel's DFO, a properly approved Alternate DFO, duly appointed to the Response Systems Panel according to the DoD policies and procedures, shall attend the entire duration of the Response Systems Panel and its subcommittee meetings.

The DFO, or the Alternate DFO, shall approve all of the meetings of the Response Systems Panel and its subcommittees called by the Chair; prepare and approve all meeting agendas; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public interest or required by governing regulations or the DoD policies and procedures. Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Response Systems to Adult Sexual Assault Crimes Panel membership about the Response System Panel's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of Response Systems to Adult Sexual Assault Crimes Panel.

All written statements shall be submitted to the Designated Federal Officer for the Response Systems to Adult Sexual Assault Crimes Panel, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Response Systems to Adult Sexual Assault Crimes Panel's Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.* The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Response Systems to Adult Sexual Assault Crimes Panel. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: April 29, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–10440 Filed 5–2–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Final Environmental Impact Statement for the Real Property Master Plan at the Presidio of Monterey, CA

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army announces the availability of the Final Environmental Impact Statement (EIS) for the Real Property Master Plan (RPMP) at the Presidio of Monterey (POM). The Final EIS analyzes and evaluates the potential environmental and socioeconomic impacts associated with proposed development at two properties: the POM and the Ord Military Community (OMC), collectively referred to as the POM Installation.

DATES: The Army will execute a record of decision no earlier than 30 days after publication of the NOA in the **Federal Register** by the U.S. Environmental Protection Agency.

ADDRESSES: Correspondence or questions regarding the Final EIS should be forwarded to U.S. Army Garrison, Directorate of Public Works, Master Planning Division (Attention: Robert Guidi), P.O. Box 5004, Presidio of Monterey, CA 93944–5004, or emailed to *robert.g.guidi.civ@mail.mil.* For media inquiries, please contact Daniel Carpenter, Presidio of Monterey Public Affairs, at *presidiopao@gmail.com.*

FOR FURTHER INFORMATION CONTACT: Mr. Robert Guidi at (831) 242–7928 or via email at *robert.g.guidi.civ@mail.mil.*

SUPPLEMENTARY INFORMATION: The Proposed Action is intended to meet the ongoing mission requirements of the installation by implementing both short-range and long-range projects. Proposed facility improvements and phased construction are designed to sustain and enhance the professional standards established by the Defense Language Institute Foreign Language Center (DLIFLC). Facilities, construction, improvements, renovations, replacements and upgrades ensure students, faculty, staff, military service members, and their Families would have modern facilities consistent with Army standards well into the 21st Century. The overall goal is to improve the learning environment and quality of life at the POM installation.

The Final EIS identifies proposed development projects to be implemented over a 20-year planning horizon. There is one short-range project (POM Barracks Complex Phase I) scheduled to begin in late 2013. Construction of the long-range projects

is projected between 2018 and 2025, extending out to 2030. Long-range projects include barracks, classrooms, other instructional buildings, facilities renovations, access control point (i.e., gates) upgrades, infrastructure modernization and other projects.

Three alternatives are analyzed in the Final EIS:

(1) Alternative 1—POM Centric. Under the POM Centric Alternative (Preferred Alternative), the majority of the proposed projects, such as barracks, classrooms and a dining facility, occur on the POM. Several new support facilities, such as the combined fire and police Emergency Services Center, are planned at the OMC. The Preferred Alternative preserves the centralized campus desired by the DLIFLC.

(2) Alternative 2—POM and OMC. Under the POM and OMC Alternative, new construction is proposed at both locations. Some of the new classrooms and housing facilities are planned at the OMC instead of the POM. New construction is limited to Army-owned land on the OMC and in close proximity to the existing military housing.

(3) No Action. Under the No-Action Alternative, the POM installation continues to operate under the existing but outdated 1983 Master Plan without modern or upgraded facilities. This Alternative provides the environmental baseline conditions for comparing the impacts associated with the other two alternatives.

The Final EIS addresses impacts from implementation of the Proposed Action to 16 resource areas. Impacts range from beneficial to no effect to significant. There could be significant impacts to cultural resources from the long-range projects, which are analyzed in the document at a programmatic level. The POM Installation has conducted and will engage in appropriate consultation under the National Historic Preservation Act. As project planning and design progresses, there could be requirements for supplemental environmental documentation and regulatory compliance, including adoption of mitigation measures. There are less than significant impacts to other resources. The EIS identifies mitigation to lessen the adverse impacts. Several changes to the proposed projects and to the Final EIS result from public and agency comments. These changes lessen the impacts on natural resources. Facilities are also planned to Leadership in Energy and Environmental Design standards to conserve resources.

The U.S. Army plans to issue a Record of Decision following a 30-day waiting period.

Copies of the Final EIS are available at public libraries in the cities of Monterey, Pacific Grove and Seaside, and the Chamberlain Library on the OMC. An electronic version of the Final EIS can be viewed or downloaded from the POM Web site at *http://www.monterey.army.mil/DPW/env_assessment.html.*

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2013–10432 Filed 5–2–13; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2013–0008]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to reinstate four Systems of Records.

SUMMARY: The Department of the Army proposes to reinstate four system of records to its inventory of record systems to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. After review, it has been determined that the records covered under these previously deleted notices were erroneously deleted; therefore these notices are being reinstated. A0210–190 AHRC was published on March 7, 2012 (77 FR 13571–13573). A0600–8–23 AHRC, A0601–210 AHRC, and A0614–200 AHRC were published on March 7, 2012 (77 FR 13573–13574).

DATES: This proposed action will be effective on June 3, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before June 3, 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, Jr., Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22315–3827 or by phone at 703–428–6185.

SUPPLEMENTARY INFORMATION: The Department of the Army system 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 reinstate four system of records to its inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The previous system of records notice is being republished in its entirety, below. The reinstatements are not within the purview of subsection 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: April 30, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

A0210–190 AHRC

SYSTEM NAME:

Individual Gravesite Interment Files.

SYSTEM LOCATION:

Commander, U.S. Army Human Resources Command, ATTN: AHRC–PED–A, 2461 Eisenhower Avenue, Alexandria, VA 22331–0482 for Army post cemeteries and at Army installations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active and former Armed Forces personnel and their dependents who are or will be interred in grave plots in Army post cemeteries or who reserved grave plots prior to 1975.

CATEGORIES OF RECORDS IN THE SYSTEM:

Gravesite record of interment (DA Forms 2122 and 2123); reservations prior to 1961; deceased individuals' name, address, date of birth, date of death, and section of grave reserved or interred in, military service, or dependent name and the relationship to service member.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 3013, Secretary of the Army.

PURPOSE(S):

To maintain records of individuals interred in Army post cemeteries; to conduct periodic surveys to determine validity of reservations; and to respond to inquiries.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Department of Veteran Affairs for the purposes of issuing a government headstone.

The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders.

RETRIEVABILITY:

By individual's surname.

SAFEGUARDS:

Records are maintained in areas accessible only to authorized personnel having official need therefore in the performance of their duties. Records are kept in secure office areas in a secure building.

RETENTION AND DISPOSAL:

Permanent.

SYSTEM MANAGER(S) AND ADDRESS:

Commander, U.S. Army Human Resources Command, ATTN: AHRC–PED–A, 2461 Eisenhower Avenue, Alexandria, VA 23321–0482 for Army post cemeteries.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this records system should address written inquiries to the Commander, U.S. Army Human Resources Command, ATTN: AHRC–PED–A, 2461 Eisenhower Avenue, Alexandria, VA 23321–0482.

Individual should provide full name of veteran, or deceased individual's name and sufficient details to permit locating pertinent records and signature.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Commander, U.S. Army Human Resources Command, ATTN: AHRC–PED–A, 2461 Eisenhower Avenue, Alexandria, VA 23321–0482.

Individual should provide full name of veteran, or deceased individual's name and sufficient details to permit locating pertinent records and signature.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, contesting contents, and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, his/her representative or next-of-kin; Army records and reports.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

A0601–210 AHRC

SYSTEM NAME:

Eligibility Determination Files.

SYSTEM LOCATION:

U.S. Army Human Resources Command, Non-Commissioned Officer In Charge of Eligibility Inquiries Section, 2461 Eisenhower Avenue, Alexandria, VA 22331–0450.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Applicants for enlistment who require a waiver for an adult felony; soldiers requesting continuation on active duty who require waiver for certain disqualifications.

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains requests for enlistment eligibility or waiver of disqualifications for enlistment/reenlistment, requests for grade determination, documents reflecting determinations made thereon, copies or extracted items from basic records, transmittals, and suspense documents needed to assure that requests are acted upon in a timely manner.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 504, Persons not Qualified; 10 U.S.C. 3013, Secretary of the Army; Army Regulation 601–210, Regular Army and Army Reserve Enlisted Program; Army Regulation 635–200, Enlisted Personnel; Army Regulation 601–280, Army Retention Program and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To evaluate waiver requests, determine appropriate action and render decision.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and on electronic storage media.

RETRIEVABILITY:

By SSN and surname.

SAFEGUARDS:

Records are maintained in areas accessible only to properly cleared, trained, and authorized personnel. Records are in a secure office in a secure building.

RETENTION AND DISPOSAL:

Enlisted eligibility records are destroyed upon reenlistment of individual. Inquiry records and other related documents are maintained for 7 years then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Commander, U.S. Army Human Resources Command, 2461 Eisenhower Avenue, Alexandria, VA 22332–0400.

NOTIFICATION PROCEDURE:

Individuals seeking to determine if information about themselves is contained in this records system should address written inquiries to the U.S. Army Human Resources Command, Eligibility Inquiries Section, Retention Management Division, Enlistment Personnel Management Directorate, 2461 Eisenhower Avenue, Alexandria, VA 22331–0451.

Individual should provide the full name, SSN, date of separation and service component, if applicable, current address and telephone number, and signature.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this record system should address written inquiries to the U.S. Army Human Resources Command, Eligibility Inquiries Section, Retention Management Division, Enlistment

Personnel Management Directorate, 2461 Eisenhower Avenue, Alexandria, VA 22331–0451.

Individual should provide the full name, SSN, date of separation and service component, if applicable, current address and telephone number, and signature.

CONTESTING RECORD PROCEDURES:

The Army's rule for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, official military personnel records; investigative/security dossiers; medical evaluations; Army records and reports.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

A0614–200 AHRC

SYSTEM NAME:

Classification and Reclassification of Soldiers.

SYSTEM LOCATION:

U.S. Army Human Resources Command, Reclassification Management Branch, 2461 Eisenhower Avenue, Alexandria, VA 22331–0400.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty Army, Army National Guard and U.S. Army Reserve enlisted members on active duty.

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains name, Social Security Number (SSN), grade, military occupational specialty (MOS), additional information substantiating the soldier's or Army's request for exception to or interpretation of regulatory guidance for the classification, reclassification or utilization of soldiers, Personnel Actions Request, Enlisted Records Brief, MOS and Medical retention board documents and other related documents.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 3013, Secretary of the Army; Army Regulation 614–200, Enlisted Assignments and Utilization Management; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To perform the objective of maintaining a balance of authorization versus requirements by military occupational specialty within each career management field.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

By individual's SSN and surname.

SAFEGUARDS:

Records are accessed only by designated officials having official need therefore in the performance of official duties. Records are kept in file cabinets in locked rooms. Building housing records are protected by security guards.

RETENTION AND DISPOSAL:

MOS classification board proceeding documents and related information maintain for 2 years then destroy.

SYSTEM MANAGER(S) AND ADDRESS:

Commander, U.S. Army Human Resources Command, Reclassification Management Branch, 2461 Eisenhower Avenue, Alexandria, VA 22331–0400.

NOTIFICATION PROCEDURE:

Individuals seeking to determine if information about themselves is contained in this record system should address written inquiries to the Commander, U.S. Army Human Resources Command, Public Affairs Office, Freedom of Information Act and Privacy Act, 200 Stovall Street, Alexandria, VA 22332–0400.

Individual should provide the full name, SSN, current address, and signature.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this record system should address written inquiries to the Commander, U.S. Army Human Resources Command, Public Affairs Office, Freedom of Information Act and Privacy Act, 200 Stovall Street, Alexandria, VA 22332–0400.

Individual should provide the full name, SSN, current address, and signature.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, Army personnel records and reports, and automated personnel systems.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

A0600–8–23 AHRC

SYSTEM NAME:

Standard Installation/Division Personnel System (SIDPERS).

SYSTEM LOCATION:

National Guard records are located at the Army National Guard Readiness Center, 111 South George Mason Drive, Arlington, VA 22204–1382. Reserve Component records are located at the U.S. Army Human Resources Command, 9700 Page Boulevard, St. Louis, MO 63132–5200. Regular Army records are located at the Army Information Processing Centers located in Chambersburg, PA 17201–4150; Huntsville, AL 35898–7340; Rock Island, IL 61299–7210; and St. Louis, MO 63120–1798.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All active duty Army personnel, personnel attached from National Guard and/or Army reserve members of the Army National Guard, individuals currently assigned to a U.S. Army Reserve unit, and family members.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), home address, sex, race, citizenship, status, religious denomination, marital status, number of dependents, date of birth, physical profile, ethnic group, grade and date of rank, term of service for enlisted personnel, security clearance, service agreement for non-regular officers, promotion data and dates, special pay and bonus, unit of assignment and identification code, military occupational specialty, civilian occupation, additional skill identifiers, civilian and military education levels, languages, military qualification, assignment eligibility, availability and termination date thereof, security status, suspension of favorable personnel action indicator, Privacy Act disputed record indicator, and similar relevant data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 3013, Secretary of the Army; Army Regulation 600–8–23, Standard Installation/Division Personnel System Database Management; and E.O. 9397(SSN), as amended.

PURPOSE(S):

To support personnel management decisions concerning the selection, distribution and utilization of all personnel in military duties, strength accounting and manpower management, promotions, demotions, transfers, and other personnel actions essential to unit readiness; to identify and fulfill training needs; and to support automated interfaces with authorized information systems for pay, mobilization, and other statistical reports.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD Blanket Routine Uses set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

By Name, SSN, or other individually identifying characteristics.

SAFEGUARDS:

Access to data and data storage is controlled and accessible only to authorized personnel and authorized personnel with password capability for the electronic media access.

RETENTION AND DISPOSAL:

Records are maintained one year in records holding area or current file area then retired to National Personnel Records Center and maintained there for 75 years then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

National Guard: Chief, National Guard Bureau, Army National Guard Readiness Center, 111 South George Mason Drive, Arlington, VA 22204–1382. Reserve Component: Deputy Chief of Staff for Personnel, Headquarters, Department of the Army, 300 Army Pentagon, Washington, DC 20310–0300. Regular Army: Commander, U.S. Army Human Resources Command, 200 Stovall Street, Alexandria, VA 22332–0400.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the appropriate address below: National Guard individuals should address inquiries to the National Guard Bureau, Army National Guard Readiness Center, 111 South George Mason Drive, Arlington, VA 22204–1382. Reserve individuals should address inquiries to the Commander of the Army Headquarters in which the unit is located. Regular Army individuals should address inquiries to their local Commander.

All individuals should furnish full name, service identification number, current address and telephone number, signature, and specific information concerning the event or incident that will assist in locating the record. Personal visits may be made. Individual must furnish proof of identity.

RECORD ACCESS PROCEDURES:

Individuals seeking to access information about themselves contained in this system should address written inquiries to the appropriate address below: National Guard individuals should address inquiries to the National Guard Bureau, Army National Guard Readiness Center, 111 South George Mason Drive, Arlington, VA 22204–1382. Reserve individuals should address inquiries to the Commander of the Army Headquarters in which the unit is located. Regular Army individuals should address inquiries to their local Commander.

All individuals should furnish full name, service identification number, current address and telephone number, signature, and specific information concerning the event or incident that will assist in locating the record. Personal visits may be made. Individual must furnish proof of identity.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

National Guard and Reserve Component: From the individual, individual's personnel and pay files, from the Defense Enrollment Eligibility Reporting (DEERS) database, and other Army records and reports. Regular Army: From individual, commanders, Army records and documents, other Federal agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2013–10534 Filed 5–2–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Investing in Innovation Fund, Scale-up Grants

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice.

Overview Information

Investing in Innovation Fund, Scale-up grants Notice inviting applications for new awards for fiscal year (FY) 2013.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.411A (Scale-up grants).

DATES: *Applications Available:* May 6, 2013.

Deadline for Notice of Intent to Apply: May 23, 2013.

Deadline for Transmittal of Applications: July 2, 2013.

Deadline for Intergovernmental Review: September 3, 2013.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Investing in Innovation Fund (i3), established under section 14007 of the American Recovery and Reinvestment Act of 2009 (ARRA), provides funding to support (1) local educational agencies (LEAs), and (2) nonprofit organizations in partnership with (a) one or more LEAs or (b) a consortium of schools. The i3 program is designed to generate and validate solutions to persistent educational challenges and to support the expansion of effective solutions across the country to serve substantially larger numbers of students. The central design element of the i3 program is its multi-tier structure that links the amount of funding that an applicant may receive to the quality of the evidence supporting the efficacy of the proposed project. Applicants proposing practices supported by limited evidence can receive relatively small grants that support the development and initial evaluation of promising practices and help to identify new solutions to pressing challenges; applicants proposing practices supported by evidence from rigorous evaluations, such as large randomized controlled trials, can receive sizable

grants to support expansion across the Nation. This structure provides incentives for applicants to build evidence of effectiveness of their proposed projects and to address the barriers to serving more students across schools, districts, and States so that applicants can compete for more sizeable grants.

As importantly, all i3 projects are required to generate additional evidence of effectiveness. All i3 grantees must use part of their budgets to conduct independent evaluations (as defined in this notice) of their projects. This ensures that projects funded under the i3 program contribute significantly to improving the information available to practitioners and policymakers about which practices work, for which types of students, and in what contexts.

The Department awards three types of grants under this program: ''Development'' grants, ''Validation'' grants, and ''Scale-up'' grants. These grants differ in terms of the level of prior evidence of effectiveness required for consideration of funding, the level of scale the funded project should reach, and, consequently, the amount of funding available to support the project.

This notice invites applications for Scale-up grants only. The notice inviting applications for Validation grants is published elsewhere in this issue of the **Federal Register**. The notice inviting applications for Development grants was published in the **Federal Register** on March 27, 2013 (78 FR 18710) and is available at *www.gpo.gov/fdsys/pkg/FR-2013-03-27/pdf/2013-07003.pd.*

Scale-up grants provide funding to support expansion of projects supported by strong evidence of effectiveness (as defined in this notice) to the national level (as defined in this notice). In addition to improving outcomes for an increasing number of high-need students, Scale-up grants will generate information about the students and contexts for which a practice is most effective. We expect that Scale-up grants will increase practitioners' and policymakers' understanding of strategies that allow organizations or practices to expand quickly and efficiently while maintaining their effectiveness.

All Scale-up grantees must evaluate the effectiveness of the i3-supported practice that the project implements and expands. This is particularly important in instances in which the proposed project includes changing the i3-supported practice in order to more efficiently reach the proposed level of scale (for example, by developing technology-enabled training tools). The evaluation of a Scale-up grant must identify the core elements of, and codify, the i3-supported practice that the project implements in order to support adoption or replication by other entities. We also expect that evaluations of Scale-up grants will be conducted in a variety of contexts and for a variety of students in order to determine the context(s) and population(s) for which the i3-supported practice is most effective.

We remind LEAs of the continuing applicability of the provisions of the Individuals with Disabilities Education Act (IDEA) for students who may be served under i3 grants. Any grants in which LEAs participate must be consistent with the rights, protections, and processes established under IDEA for students who are receiving special education and related services or are in the process of being evaluated to determine their eligibility for such services.

As described later in this notice, in connection with making competitive grant awards, an applicant is required, as a condition of receiving assistance under this program, to make civil rights assurances, including an assurance that its program or activity will comply with Section 504 of the Rehabilitation Act of 1973 and the Department's section 504 implementing regulations, which prohibit discrimination on the basis of disability. Regardless of whether a student with disabilities is specifically targeted as a ''high-need student'' (as defined in this notice) in a particular grant application, recipients are required to comply with all legal nondiscrimination requirements, including, but not limited to the obligation to ensure that students with disabilities are not denied access to the benefits of the recipient's program because of their disability. The Department also enforces Title II of the Americans with Disabilities Act (ADA), as well as the regulations implementing Title II of the ADA, which prohibit discrimination on the basis of disability by public entities.

Furthermore, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin. On December 2, 2011, the Departments of Education and Justice jointly issued guidance that explains how educational institutions can promote student diversity or avoid racial isolation within the framework of Title VI (e.g., through consideration of the racial demographics of neighborhoods when drawing assignment zones for schools or through targeted recruiting efforts). The ''Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools'' is available on the Department's Web site at *www.ed.gov/ocr/docs/guidance-ese-201111.pdf.*

Background: The FY 2013 i3 Scale-up competition incorporates lessons learned from prior i3 competitions. As such, it includes several changes from prior i3 competitions that prospective applicants should note. These changes reflect the recently revised i3 program design, as described in the notice of final priorities, requirements, definitions, and selection criteria for this program (2013 i3 NFP), published in the **Federal Register** on March 27, 2013 (78 FR 18682) and available at *www.gpo.gov/fdsys/pkg/FR–2013–03–27/pdf/2013–07016.pdf.*

In the 2013 i3 NFP, the Department redesigned key aspects of the i3 program to improve the FY 2013 and future i3 competitions by accelerating the identification of promising solutions to pressing challenges in K–12 public education, supporting the evaluation of the efficacy of such solutions, and developing new approaches to scaling effective practices to serve more students.

One example of the various changes we established in the 2013 i3 NFP pertains to the breadth and specificity of the potential priorities for a given i3 competition. Specifically, the 2013 i3 NFP includes 11 priorities, representing a range of education topics that the Secretary may select from when establishing the priorities for an i3 competition for a given year. Although the Department has used broad priorities in the past, the 2013 i3 NFP includes subparts under each priority that target specific needs. These subparts facilitate the i3 program's goal of building a portfolio of solutions and corresponding evidence regarding different approaches to addressing critical challenges in public education. When selecting the priorities for a given competition, the Department considers several factors, including the Department's policy priorities, the need for new solutions in a particular priority area, other available funding for a particular priority area, and the results and lessons learned from prior i3 competitions. This change is most noticeable in the i3 Development and Validation competitions and less so in the Scale-up competition.

We include five absolute priorities in the FY 2013 Scale-up competition. The Department is interested in a diverse portfolio in these areas. Therefore, we encourage applicants to propose projects that address pressing needs under these priorities.

First, we include an absolute priority on improving the effectiveness of teachers or principals because such improvements are integral to the Department's mission. Research indicates that teachers and principals are the most critical in-school factors in improving student achievement.[1] This priority, therefore, encourages applicants to focus on improving the effectiveness of teachers or principals on any dimension of the teacher or principal career path. The priority also encourages applicants to identify effective methods for recruiting, preparing, supporting, evaluating, or retaining effective teachers or principals, particularly in schools that serve high-need students.

Second, we include an absolute priority on ensuring that all students receive a high-quality K–12 education by supporting activities that accelerate the performance of low-performing schools (such as schools with the lowest academic performance in the State or schools with the largest within-school performance gaps between student subgroups; see the requirements related to this priority for a full description of the schools that must be served by projects addressing it). This priority aims to identify and support multiple approaches to accelerate the performance of severely low-performing schools, as well as their feeder schools, in order to improve outcomes for students.

Third, we include an absolute priority aimed at improving science, technology, engineering, and mathematics (STEM) education. Ensuring that all students can access and excel in STEM fields is essential to our Nation's economy and future prosperity. An increasing number of careers require an understanding of STEM concepts and the application of STEM skills and techniques. In addition, recent Bureau of Labor Statistics data show that, between 2010 and 2020, employment in STEM occupations is expected to expand faster than employment in non-STEM occupations (by 17 versus 14 percent).[2] To address this need, we include this priority to support projects that will prepare students for future STEM careers.

Fourth, we include an absolute priority focused on implementing internationally benchmarked, college- and career-ready elementary and secondary academic standards. There has been much discussion about whether high standards alone are likely to improve student achievement. As reports such as the *2012 Brown Center Report on American Education*[3] point out, the implementation of such standards is crucial to their effectiveness in improving student achievement. In order to support the implementation of standards, we include this priority to support projects that will help teachers, principals, and others translate these standards into classroom practices that help high-need students excel.

Finally, we include an absolute priority that focuses on serving rural communities. Prior i3 competitions, as well as other Department programs, have demonstrated that rural areas confront a plethora of challenges as they work to provide students with a high-quality education. In this year's competition, applicants applying under this priority must address one of the other four absolute priorities for the FY 2013 i3 Scale-up competition, as described above, while serving students enrolled in rural LEAs.

We also include three competitive preference priorities in the FY 2013 Scale-up competition. The Department encourages applicants to design projects that address these competitive preference priorities in their applications if they seek additional points.

First, we include a competitive preference priority focusing on improving cost-effectiveness and productivity. Improvements in operational, organizational, and instructional processes and structures will allow organizations to achieve the best results in the most efficient manner. The Department continues to emphasize the importance of cost-effectiveness and productivity. This priority strengthens that focus by requiring sufficient detail about how the applicant aims to modify its processes and structures to improve productivity and how the applicant will evaluate whether the proposed project is cost-effective when implemented. Further, applicants addressing this priority must provide a detailed budget, an examination of different types of costs, and a plan to monitor and evaluate cost savings, all of which are essential to any reasoned attempt at improving productivity.

Second, we include a competitive preference priority for projects that enable the broad adoption of effective practices. A primary goal of the i3 program is to identify and support the expansion of effective practices. This competitive preference priority rewards applicants who will implement systematic methods for doing so. While Scale-up grantees must codify the core elements of their i3-supported practices, we are particularly interested in projects that deliberately focus on this area. In addition, the education field needs access to strong, reliable data to make informed decisions about effective practices that could replace less effective practices. This competitive preference priority supports strategies that identify key elements of effective practices and that capture lessons learned about the implementation of the practices. In addition, an applicant addressing this priority must commit to implementing the practice in other settings and locations in order to ensure that the practice can be successfully replicated.

Third, in order to expand the reach of the i3 program and encourage entities that have not applied previously for an i3 grant, the Department includes a competitive preference priority for novice i3 applicants. A novice i3 applicant is an applicant that has never received a grant under the i3 program. An applicant must identify whether it is a novice applicant when completing the applicant information sheet. Instructions on how applicants should complete the applicant information sheet are included in the application package.

Finally, we include one invitational priority in the FY 2013 Scale-up competition. Too many children, particularly those from low-income families, lack access to high-quality early education and may enter school less prepared than their peers for success. High-quality early learning programs can improve children's vocabulary, improve their social and emotional development so they arrive in school ready to learn, and help them stay on track and engaged in early

[1] Wright, S.P., Horn, S.P., Sanders, W.L. (1997). *Teacher and classroom context effects on student achievement: Implications for teacher evaluation.* Journal of Personnel Evaluation in Education 11:57–67; Rivkin, S.G., Hanushek, E.A., Kain, J.F. (2005). *Teachers, schools, and academic achievement.* Econometrica, 73(2):417–458.

Leithwood, K., Louis, K.S., Anderson, S., and Wahlstrom, K. (2004). *Review of research: How leadership influences student learning.* University of Minnesota, Center for Applied Research and Educational Improvement. Available at: *www.cehd.umn.edu/carei/Leadership/ReviewofResearch.pdf.*

[2] Chairman's Staff of the Joint Economic Committee. Calculations using data from the Bureau of Labor Statistics. Employment Projections: 2010–20. Table 1.7 Occupational Employment and Job Openings Data, Projected 2010–20, and Worker Characteristics, 2010. February 2012. Available at: *bls.gov/emp/.* For the purposes of this calculation, STEM occupations are defined as in the U.S. Department of Commerce's Economics and Statistics Administration report, STEM: Good Jobs Now and for the Future. ESA Issue Brief #03–11. July 2011. Available at: *esa.doc.gov/sites/default/files/reports/documents/stemfinalyjuly14_1.pdf.*

[3] Available at: *www.brookings.edu/~/media/newsletters/0216_brown_education_loveless.pdf.*

elementary grades. To support the Department's early learning efforts, we include an invitational priority for projects that, in addition to addressing one of i3's absolute priorities, include high-quality early learning components to help ensure that children, especially those from low-income families, enter kindergarten prepared for success.

In addition to the changes to the priorities, the 2013 i3 NFP also modified aspects of the i3 program's requirements, definitions, and selection criteria. In general, these changes improve clarity and strengthen the requirements and design aspects of the i3 program. Most notably, we have clarified that all i3 grantees must implement practices that serve students who are in grades K–12 at some point during the funding period. Further, we have revised the evidence standards and definitions so that applicants can better understand what is required to meet each level of evidence.

For the FY 2013 Scale-up competition, applicants must be able to show strong evidence of effectiveness for the proposed process, product, strategy, or practice included in their applications. Applicants should review the requirements section of this notice for instructions on how to demonstrate strong evidence of effectiveness and for information on the other eligibility and program requirements.

The i3 program includes a statutory requirement for a private-sector match for all i3 grantees. Based on feedback from previous i3 applicants, we are modifying the process for applicants to secure, and demonstrate evidence of, the required private-sector match for the FY 2013 i3 competition. While an applicant must secure 5 percent of its Federal grant award to be eligible for an i3 Scale-up grant, the timeframe in which an applicant must secure and submit evidence of the required private-sector matching funds is expanded. In the past, the highest-rated applicants only had approximately 30 days to secure 100 percent of their required private-sector matches, which proved difficult for both applicants and potential private-sector funders. While all of the past highest-rated i3 applicants successfully secured their matches and became i3 grantees, the Department is eager to improve the matching process to facilitate deeper public-private partnerships. Therefore, for the FY 2013 i3 competition, each highest-rated applicant, as identified by the Department following peer review of the applications, must submit evidence of 50 percent of the required private-sector match prior to the awarding of an i3 grant. An applicant must provide evidence of the remaining 50 percent of the required private-sector match no later than six months after the project start date (i.e., for the FY 2013 competition, six months after January 1, 2014, or by July 1, 2014). The grant will be terminated if the grantee does not secure its private-sector match by the established deadline. By decreasing the amount of the required match that must be secured before the i3 award can be made, the burden for both applicants and private-sector funders will be reduced, which in turn will foster improved collaboration.

This notice also includes selection criteria for the FY 2013 Scale-up competition that are designed to ensure that applications selected for funding have the best potential to generate substantial improvements in student achievement (and other key outcomes), and include well-articulated plans for the implementation and evaluation of the proposed projects. Applicants should review the selection criteria and submission instructions carefully to ensure their applications address this year's criteria.

An entity that submits an application for a Scale-up grant must include the following information in its application: an estimate of the number of students to be served by the project; evidence of the applicant's ability to implement and appropriately evaluate the proposed project; and information about its capacity (i.e., qualified personnel, financial resources, and management capacity) to further develop and bring the project to a national level, working directly or through partners, either during or following the grant period, if positive results are obtained.

We recognize that LEAs are not typically responsible for taking their practices, strategies, or programs to scale; however, all applicants can and should partner with others to disseminate and take their effective practices, strategies, and programs to scale.

The Department will screen applications that are submitted for Scale-up grants in accordance with the requirements in this notice and determine which applications meet the eligibility and other requirements in the 2013 i3 NFP. Peer reviewers will review all applications for Scale-up grants that are submitted by the established deadline.

Applicants should note, however, that we may screen for eligibility at multiple points during the competition process, including before and after peer review; applicants that are determined to be ineligible will not receive a grant award regardless of peer reviewer scores or comments. If we determine that a Scale-up grant application is not supported by strong evidence of effectiveness, or that the applicant does not demonstrate the required prior record of improvement, or does not meet any other requirement established in the 2013 i3 NFP, the application will not be considered for funding.

Priorities: This competition includes five absolute priorities and three competitive preference priorities from the 2013 i3 NFP and the Department's notice of final supplemental priorities and definitions (''Supplemental Priorities'') published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637). The competition also includes one invitational priority.

Absolute Priorities: For FY 2013 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet one of these priorities.

An applicant for a Scale-up grant must choose one of the five absolute priorities contained in this notice and address that priority in its application. An applicant must provide information on how its proposed project addresses the selection criteria in the project narrative section of its application. Applications will be peer reviewed and scored by absolute priority, so an applicant must clearly identify the specific absolute priority that the proposed project addresses. Applicants that choose to submit an application under the absolute priority for Serving Rural Communities must identify an additional absolute priority.

These priorities are:

Absolute Priority 1—Improving the Effectiveness of Teachers or Principals

Projects addressing pressing needs related to improving teacher or principal effectiveness.

Absolute Priority 2—Improving Low-Performing Schools

Projects addressing pressing needs related to improving low-performing schools.

Other requirements related to Absolute Priority 2:

To meet this priority, a project must serve schools among (1) The lowest-performing schools in the State on academic performance measures; (2) schools in the State with the largest within-school performance gaps between student subgroups described in section 1111(b)(2) of the ESEA; or (3) secondary schools in the State with the

lowest graduation rate over a number of years or the largest within-school gaps in graduation rates between student subgroups described in section 1111(b)(2) of the ESEA. Additionally, projects funded under this priority must complement the broader turnaround efforts of the school(s), LEA(s), or State(s) where the projects will be implemented.

Absolute Priority 3—Improving Science, Technology, Engineering, and Mathematics (STEM) Education

Projects addressing pressing needs for improving STEM education.

Absolute Priority 4—Implementing Internationally Benchmarked, College- and Career-Ready Elementary and Secondary Academic Standards

Projects that are designed to support the implementation of internationally benchmarked, college- and career-ready academic standards held in common by multiple States and to improve instruction and learning, including strategies that translate the standards into classroom practice.

Absolute Priority 5—Serving Rural Communities

Under this priority, we provide funding to projects addressing one of the absolute priorities established for the 2013 Scale-up i3 competition and under which the majority of students to be served are enrolled in rural local educational agencies (as defined in this notice).

Competitive Preference Priorities: For FY 2013 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award an additional three points to applications that meet the first competitive preference priority, an additional five points to applications that meet the second competitive preference priority, and an additional three points to applications that meet the third competitive preference priority.

Applicants may address more than one of the competitive preference priorities. An applicant must identify in the project narrative section of its application the priority or priorities it wishes the Department to consider for purposes of earning competitive preference priority points.

Note: The Department will not review or award points under any competitive preference priority that fails to clearly identify the competitive preference priority or priorities the applicant wishes the Department to consider for purposes of earning competitive preference priority points.

These priorities are:

Competitive Preference Priority 1—Improving Cost-Effectiveness and Productivity (zero or 3 points).

Under this priority, we provide funding to projects that address one of the following areas:

(a) Substantially improving student outcomes without commensurately increasing per-student costs.

(b) Maintaining student outcomes while substantially decreasing per-student costs.

(c) Substantially improving student outcomes while substantially decreasing per-student costs.

Other requirements related to Competitive Preference Priority 1:

An application addressing this priority must provide—

(1) A clear and coherent budget that identifies expected student outcomes before and after the practice, the cost per student for the practice, and a clear calculation of the cost per student served;

(2) A compelling discussion of the expected cost-effectiveness of the practice compared with alternative practices;

(3) A clear delineation of one-time costs versus ongoing costs and a plan for sustaining the project, particularly ongoing costs, after the expiration of i3 funding;

(4) Identification of specific activities designed to increase substantially the cost-effectiveness of the practice, such as re-designing costly components of the practice (while maintaining efficacy) or testing multiple versions of the practice in order to identify the most cost-effective approach; and

(5) A project evaluation that addresses the cost-effectiveness of the proposed practice.

Competitive Preference Priority 2—Enabling Broad Adoption of Effective Practices (zero or 5 points).

Under this priority, we provide funding to projects that enable broad adoption of effective practices. An application proposing to address this priority must, as part of its application:

(a) Identify the practice or practices that the application proposes to prepare for broad adoption, including formalizing the practice (i.e., establish and define key elements of the practice), codifying (i.e., develop a guide or tools to support the dissemination of information on key elements of the practice), and explaining why there is a need for formalization and codification.

(b) Evaluate different forms of the practice to identify the critical components of the practice that are crucial to its success and sustainability, including the adaptability of critical components to different teaching and learning environments and to diverse learners.

(c) Provide a coherent and comprehensive plan for developing materials, training, toolkits, or other supports that other entities would need in order to implement the practice effectively and with fidelity.

(d) Commit to assessing the replicability and adaptability of the practice by supporting the implementation of the practice in a variety of locations during the project period using the materials, training, toolkits, or other supports that were developed for the i3-supported practice.

Competitive Preference Priority 3—Supporting Novice i3 Applicants (zero or 3 points).

Eligible applicants that have never directly received a grant under this program.

Invitational Priority: For FY 2013 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Invitational Priority—Supporting High-Quality Early Learning.

The Secretary encourages applicants to propose projects that incorporate high-quality early learning components that are aligned with the early learning, elementary and secondary education systems in participating schools and help ensure that all children, especially those from low-income families, enter kindergarten ready to succeed.

Definitions:

These definitions are from the 2013 i3 NFP. We may apply these definitions in any year in which this program is in effect.

Note: This notice invites applications for Scale-up grants. The following definitions apply to the three types of grants under the i3 program (i.e., Development, Validation, and Scale-up). Therefore, some of the definitions included in this section, primarily those related to demonstrations of evidence, may be more applicable to applications for Validation grants.

Consortium of schools means two or more public elementary or secondary schools acting collaboratively for the purpose of applying for and implementing an i3 grant jointly with an eligible nonprofit organization.

Evidence of promise means there is empirical evidence to support the theoretical linkage between at least one critical component and at least one relevant outcome presented in the logic model (as defined in this notice) for the proposed process, product, strategy, or practice. Specifically, evidence of promise means the following conditions are met:

(a) There is at least one study that is either a—

(1) Correlational study with statistical controls for selection bias;

(2) Quasi-experimental study (as defined in this notice) that meets the What Works Clearinghouse Evidence Standards with reservations [4]; or

(3) Randomized controlled trial (as defined in this notice) that meets the What Works Clearinghouse Evidence Standards with or without reservations; [5] and

(b) Such a study found a statistically significant or substantively important (defined as a difference of 0.25 standard deviations or larger), favorable association between at least one critical component and one relevant outcome presented in the logic model for the proposed process, product, strategy, or practice.

High-need student means a student at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English learners.

High-minority school is defined by a school's LEA in a manner consistent with the corresponding State's Teacher Equity Plan, as required by section 1111(b)(8)(C) of the ESEA. The applicant must provide, in its i3 application, the definition(s) used.

High school graduation rate means a four-year adjusted cohort graduation rate consistent with 34 CFR 200.19(b)(1) and may also include an extended-year adjusted cohort graduation rate consistent with 34 CFR 200.19(b)(1)(v) if the State in which the proposed project is implemented has been approved by the Secretary to use such a rate under Title I of the ESEA.

Highly effective principal means a principal whose students, overall and for each subgroup as described in section 1111(b)(3)(C)(xiii) of the ESEA (economically disadvantaged students, students from major racial and ethnic groups, migrant students, students with disabilities, students with limited English proficiency, and students of each gender), achieve high rates (e.g., one and one-half grade levels in an academic year) of student growth. Eligible applicants may include multiple measures, provided that principal effectiveness is evaluated, in significant part, based on student growth. Supplemental measures may include, for example, high school graduation rates; college enrollment rates; evidence of providing supportive teaching and learning conditions, support for ensuring effective instruction across subject areas for a well-rounded education, strong instructional leadership, and positive family and community engagement; or evidence of attracting, developing, and retaining high numbers of effective teachers.

Highly effective teacher means a teacher whose students achieve high rates (e.g., one and one-half grade levels in an academic year) of student growth. Eligible applicants may include multiple measures, provided that teacher effectiveness is evaluated, in significant part, based on student academic growth. Supplemental measures may include, for example, multiple observation-based assessments of teacher performance or evidence of leadership roles (which may include mentoring or leading professional learning communities) that increase the effectiveness of other teachers in the school or LEA.

Independent evaluation means that the evaluation is designed and carried out independent of, but in coordination with, any employees of the entities who develop a process, product, strategy, or practice and are implementing it.

Innovation means a process, product, strategy, or practice that improves (or is expected to improve) significantly upon the outcomes reached with status quo options and that can ultimately reach widespread effective usage.

Large sample means a sample of 350 or more students (or other single analysis units) who were randomly assigned to a treatment or control group, or 50 or more groups (such as classrooms or schools) that contain 10 or more students (or other single analysis units) and that were randomly assigned to a treatment or control group.

Logic model (also referred to as theory of action) means a well-specified conceptual framework that identifies key components of the proposed process, product, strategy, or practice (i.e., the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the relationships among the key components and outcomes, theoretically and operationally.

Moderate evidence of effectiveness means one of the following conditions is met:

(a) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that: meets the What Works Clearinghouse Evidence Standards without reservations; [6] found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant and overriding unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); and includes a sample that overlaps with the populations or settings proposed to receive the process, product, strategy, or practice.

(b) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that: meets the What Works Clearinghouse Evidence Standards with reservations,[7] found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant and overriding unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); includes a sample that overlaps with the populations or settings proposed to receive the process, product, strategy, or practice; and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice) (Note: multiple studies can cumulatively meet the large and multi-site sample requirements as long as each study meets the other requirements in this paragraph).

Multi-site sample means more than one site, where site can be defined as an LEA, locality, or State.

[4] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

[5] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

[6] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

[7] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

National level describes the level of scope or effectiveness of a process, product, strategy, or practice that is able to be effective in a wide variety of communities, including rural and urban areas, as well as with different groups (e.g., economically disadvantaged, racial and ethnic groups, migrant populations, individuals with disabilities, English learners, and individuals of each gender).

Nonprofit organization means an entity that meets the definition of ''nonprofit'' under 34 CFR 77.1(c), or an institution of higher education as defined by section 101(a) of the Higher Education Act of 1965, as amended.

Quasi-experimental design study means a study using a design that attempts to approximate an experimental design by identifying a comparison group that is similar to the treatment group in important respects. These studies, depending on design and implementation, can meet What Works Clearinghouse Evidence Standards with reservations [8] (they cannot meet What Works Clearinghouse Evidence Standards without reservations).

Randomized controlled trial means a study that employs random assignment of, for example, students, teachers, classrooms, schools, or districts to receive the intervention being evaluated (the treatment group) or not to receive the intervention (the control group). The estimated effectiveness of the intervention is the difference between the average outcome for the treatment group and for the control group. These studies, depending on design and implementation, can meet What Works Clearinghouse Evidence Standards without reservations.[9]

Regional level describes the level of scope or effectiveness of a process, product, strategy, or practice that is able to serve a variety of communities within a State or multiple States, including rural and urban areas, as well as with different groups (e.g., economically disadvantaged, racial and ethnic groups, migrant populations, individuals with disabilities, English learners, and individuals of each gender). For an LEA-based project to be considered a regional level project, a process, product, strategy, or practice must serve students in more than one LEA, unless the process, product, strategy, or practice is implemented in a State in which the State educational agency is the sole educational agency for all schools.

Relevant outcome means the student outcome or outcomes (or the ultimate outcome if not related to students) that the proposed project is designed to improve, consistent with the specific goals of the project and the i3 program.

Rural local educational agency means a local educational agency (LEA) that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Eligible applicants may determine whether a particular LEA is eligible for these programs by referring to information on the Department's Web site at *www2.ed.gov/nclb/freedom/local/reap.html*.

Strong evidence of effectiveness means that one of the following conditions is met:

(a) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that: meets the What Works Clearinghouse Evidence Standards without reservations; [10] found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant and overriding unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); includes a sample that overlaps with the populations and settings proposed to receive the process, product, strategy, or practice; and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice). (Note: multiple studies can cumulatively meet the large and multi-site sample requirements as long as each study meets the other requirements in this paragraph).

(b) There are at least two studies of the effectiveness of the process, product, strategy, or practice being proposed, each of which: meets the What Works Clearinghouse Evidence Standards with reservations; [11] found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant and overriding unfavorable impacts on that outcome for relevant populations in the studies or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); includes a sample that overlaps with the populations and settings proposed to receive the process, product, strategy, or practice; and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice).

Strong theory means a rationale for the proposed process, product, strategy, or practice that includes a logic model (as defined in this notice).

Student achievement means—

(a) For grades and subjects in which assessments are required under ESEA section 1111(b)(3): (1) A student's score on such assessments and may include (2) other measures of student learning, such as those described in paragraph (b), provided they are rigorous and comparable across schools within an LEA.

(b) For grades and subjects in which assessments are not required under ESEA section 1111(b)(3): alternative measures of student learning and performance such as student results on pre-tests, end-of-course tests, and objective performance-based assessments; student learning objectives; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across schools within an LEA.

Student growth means the change in student achievement (as defined in this notice) for an individual student between two or more points in time. An applicant may also include other measures that are rigorous and comparable across classrooms.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14007, Pub. L. 111–5.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department suspension and debarment regulations in 2 CFR part 3485. (c) The notice of final priorities, requirements, definitions, and selection criteria for this program, published in the **Federal Register** on March 27, 2013 (78 FR 18682). (d) The Supplemental Priorities published in the **Federal Register** on December 15, 2010 (75 FR 78486), and corrected on May 12, 2011 (76 FR 27637).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

[8] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19*.

[9] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19*.

[10] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19*.

[11] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19*.

II. Award Information

Type of Award: Cooperative agreements or discretionary grants.

Estimated Available Funds: $134,500,000.

These estimated available funds are the total available for all three types of grants under the i3 program (i.e., Development, Validation, and Scale-up grants).

Contingent upon the availability of funds and the quality of the applications received, we may make additional awards in FY 2014 or later years from the list of unfunded applicants from this competition.

Estimated Range of Awards:

Scale-up grants: Up to $20,000,000.
Validation grants: Up to $12,000,000.
Development grants: Up to $3,000,000.

Estimated Average Size of Awards:

Scale-up grants: $19,000,000.
Validation grants: $11,500,000.
Development grants: $3,000,000.

Estimated Number of Awards:

Scale-up grants: 0–2 awards.
Validation grants: 4–8 awards.
Development grants: 10–20 awards.

Note: The Department is not bound by any estimates in this notice.

Project Period: 36–60 months.

III. Eligibility Information

1. *Innovations That Improve Achievement for High-Need Students:* All grantees must implement practices that are designed to improve student achievement (as defined in this notice) or student growth (as defined in this notice), close achievement gaps, decrease dropout rates, increase high school graduation rates (as defined in this notice), or increase college enrollment and completion rates for high-need students (as defined in this notice).

2. *Innovations That Serve Kindergarten-Through-Grade-12 (K–12) Students:* All grantees must implement practices that serve students who are in grades K–12 at some point during the funding period. To meet this requirement, projects that serve early learners (i.e., infants, toddlers, or preschoolers) must provide services or supports that extend into kindergarten or later years, and projects that serve postsecondary students must provide services or supports during the secondary grades or earlier.

3. *Eligible Applicants:* Entities eligible to apply for i3 grants include either of the following:

(a) An LEA.

(b) A partnership between a nonprofit organization and—

(1) One or more LEAs; or

(2) A consortium of schools.

Statutory Eligibility Requirements: Except as specifically set forth in the *Note about Eligibility for an Eligible Applicant that Includes a Nonprofit Organization* that follows, to be eligible for an award, an eligible applicant must—

(a)(1) Have significantly closed the achievement gaps between groups of students described in section 1111(b)(2) of the ESEA (economically disadvantaged students, students from major racial and ethnic groups, students with limited English proficiency, students with disabilities); or

(2) Have demonstrated success in significantly increasing student academic achievement for all groups of students described in that section;

(b) Have made significant improvements in other areas, such as high school graduation rates (as defined in this notice) or increased recruitment and placement of high-quality teachers or principals, as demonstrated with meaningful data;

(c) Demonstrate that it has established one or more partnerships with the private sector, which may include philanthropic organizations, and that organizations in the private sector will provide matching funds in order to help bring results to scale; and

(d) In the case of an eligible applicant that includes a nonprofit organization, provide in the application the names of the LEAs with which the nonprofit organization will partner, or the names of the schools in the consortium with which it will partner. If an eligible applicant that includes a nonprofit organization intends to partner with additional LEAs or schools that are not named in the application, it must describe in the application the demographic and other characteristics of these LEAs and schools and the process it will use to select them.

Note: An entity submitting an application should provide, in Appendix C, under ''Other Attachments Form,'' of its application, information addressing the eligibility requirements described in this section. An applicant must provide, in its application, sufficient supporting data or other information to allow the Department to determine whether the applicant has met the eligibility requirements. If the Department determines that an applicant has provided insufficient information in its application, the applicant will not have an opportunity to provide additional information.

Note about LEA Eligibility: For purposes of this program, an LEA is an LEA located within one of the 50 States, the District of Columbia, or the Commonwealth of Puerto Rico.

Note about Eligibility for an Eligible Applicant that Includes a Nonprofit Organization: The authorizing statute specifies that an eligible applicant that includes a nonprofit organization meets the requirements in paragraphs (a) and (b) of the eligibility requirements for this program if the nonprofit organization has a record of significantly improving student achievement, attainment, or retention. For an eligible applicant that includes a nonprofit organization, the nonprofit organization must demonstrate that it has a record of significantly improving student achievement, attainment, or retention through its record of work with an LEA or schools. Therefore, an eligible applicant that includes a nonprofit organization does not necessarily need to include as a partner for its i3 grant an LEA or a consortium of schools that meets the requirements in paragraphs (a) and (b) of the eligibility requirements in this notice.

In addition, the authorizing statute specifies that an eligible applicant that includes a nonprofit organization meets the requirements of paragraph (c) of the eligibility requirements in this notice if the eligible applicant demonstrates that it will meet the requirement for private-sector matching.

4. *Cost Sharing or Matching:* To be eligible for an award, an applicant must demonstrate that one or more private-sector organizations, which may include philanthropic organizations, will provide matching funds in order to help bring project results to scale. An eligible applicant must obtain matching funds, or in-kind donations, equal to at least 5 percent of its Federal grant award. The highest-rated eligible applicants must submit evidence of 50 percent of the required private-sector matching funds following the peer review of applications. A Federal i3 award will not be made unless the applicant provides adequate evidence that the 50 percent of the required private-sector match has been committed or the Secretary approves the eligible applicant's request to reduce the matching-level requirement. An applicant must provide evidence of the remaining 50 percent of required private-sector match six months after the project start date.

The Secretary may consider decreasing the matching requirement on a case-by-case basis, and only in the most exceptional circumstances. An eligible applicant that anticipates being unable to meet the full amount of the private-sector matching requirement must include in its application a request that the Secretary reduce the matching-level requirement, along with a statement of the basis for the request.

Note: An applicant that does not provide a request for a reduction of the matching-level requirement in its

application may not submit that request at a later time.

5. *Other:* The Secretary establishes the following requirements for the i3 program. These requirements are from the 2013 i3 NFP. We may apply these requirements in any year in which this program is in effect.

• *Evidence Standards:* To be eligible for an award, an application for a Scale-up grant must be supported by strong evidence of effectiveness (as defined in this notice). (2013 i3 NFP)

Note: An applicant should identify up to four study citations to be reviewed against WWC Evidence Standards for the purposes of meeting the i3 evidence standard requirement. An applicant should clearly identify these citations in Appendix D, under the ''Other Attachments Form,'' of its application. The Department will not review a study citation that an applicant fails to clearly identify for review.

An applicant must either ensure that all evidence is available to the Department from publicly available sources and provide links or other guidance indicating where it is available; or, in the application, include copies of evidence in Appendix D. If the Department determines that an applicant has provided insufficient information, the applicant will not have an opportunity to provide additional information at a later time.

• *Funding Categories:* An applicant will be considered for an award only for the type of i3 grant (i.e., Development, Validation, and Scale-up grants) for which it applies. An applicant may not submit an application for the same proposed project under more than one type of grant. (2013 i3 NFP)

• *Limit on Grant Awards:* (a) No grantee may receive more than two new grant awards of any type under the i3 program in a single year; (b) in any two-year period, no grantee may receive more than one new Scale-up or Validation grant; and (c) no grantee may receive in a single year new i3 grant awards that total an amount greater than the sum of the maximum amount of funds for a Scale-up grant and the maximum amount of funds for a Development grant for that year. For example, in a year when the maximum award value for a Scale-up grant is $25 million and the maximum award value for a Development grant is $5 million, no grantee may receive in a single year new grants totaling more than $30 million. (2013 i3 NFP)

• *Subgrants:* In the case of an eligible applicant that is a partnership between a nonprofit organization and (1) one or more LEAs or (2) a consortium of schools, the partner serving as the applicant and, if funded, as the grantee, may make subgrants to one or more entities in the partnership. (2013 i3 NFP)

• *Evaluation:* The grantee must conduct an independent evaluation (as defined in this notice) of its project. This evaluation must estimate the impact of the i3-supported practice (as implemented at the proposed level of scale) on a relevant outcome (as defined in this notice). The grantee must make broadly available digitally and free of charge, through formal (e.g., peer-reviewed journals) or informal (e.g., newsletters) mechanisms, the results of any evaluations it conducts of its funded activities.

In addition, the grantee and its independent evaluator must agree to cooperate with any technical assistance provided by the Department or its contractor and comply with the requirements of any evaluation of the program conducted by the Department. This includes providing to the Department, within 100 days of a grant award, an updated comprehensive evaluation plan in a format and using such tools as the Department may require. Grantees must update this evaluation plan at least annually to reflect any changes to the evaluation. All of these updates must be consistent with the scope and objectives of the approved application. (2013 i3 NFP)

• *Communities of Practice:* Grantees must participate in, organize, or facilitate, as appropriate, communities of practice for the i3 program. A community of practice is a group of grantees that agrees to interact regularly to solve a persistent problem or improve practice in an area that is important to them. (2013 i3 NFP)

• *Management Plan:* Within 100 days of a grant award, the grantee must provide an updated comprehensive management plan for the approved project in a format and using such tools as the Department may require. This management plan must include detailed information about implementation of the first year of the grant, including key milestones, staffing details, and other information that the Department may require. It must also include a complete list of performance metrics, including baseline measures and annual targets. The grantee must update this management plan at least annually to reflect implementation of subsequent years of the project. (2013 i3 NFP)

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www2.ed.gov/programs/innovation/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.411A.

2. a. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Deadline for Notice of Intent To Submit Application: May 23, 2013.

We will be able to develop a more efficient process for reviewing grant applications if we know the approximate number of applicants that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify us of the applicant's intent to submit an application by completing a web-based form. When completing this form, applicants will provide (1) the applicant organization's name and address and (2) the one absolute priority the applicant intends to address. Applicants may access this form online at *http://go.usa.gov/TrVG.* Applicants that do not complete this form may still submit an application.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Applicants should limit the application narrative [Part III] for a Scale-up application to no more than 50 pages. Applicants are also strongly encouraged not to include lengthy appendices that contain information that could not be included in the narrative. Applicants should use the following standards:

• A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions.

• Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

• Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The page limit for the application does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support of the application. However, the page limit does apply to all of the application narrative section [Part III] of the application.

b. *Submission of Proprietary Information:*

Given the types of projects that may be proposed in applications for the i3 program, some applications may include proprietary information as it relates to confidential commercial information. Confidential commercial information is defined as information the disclosure of which could reasonably be expected to cause substantial competitive harm. Upon submission, applicants should identify any information contained in their application that they consider to be confidential commercial information. Consistent with the process followed in the prior i3 competitions, we plan on posting the project narrative section of funded i3 applications on the Department's Web site. Identifying proprietary information in the submitted application will help facilitate this public disclosure process. Applicants are encouraged to identify only the specific information that the applicant considers to be proprietary and list the page numbers on which this information can be found in the appropriate Appendix section, under ''Other Attachments Form,'' of their applications. In addition to identifying the page number on which that information can be found, eligible applicants will assist the Department in making determinations on public release of the application by being as specific as possible in identifying the information they consider proprietary. Please note that, in many instances, identification of entire pages of documentation would not be appropriate.

3. *Submission Dates and Times:*

Deadline for Notice of Intent To Submit Application: May 23, 2013.

Informational Meetings: The i3 program intends to hold meetings designed to provide technical assistance to interested applicants for all three types of grants. Detailed information regarding these meetings will be provided on the i3 Web site at *http://www2.ed.gov/programs/innovation/index.html.*

Deadline for Transmittal of Applications: July 2, 2013.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: September 3, 2013.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, Central Contractor Registry, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR)—and, after July 24, 2012, with the System for Award Management (SAM),the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR or SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR or SAM registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days to complete. Information about SAM is available at SAM.gov.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:*

Applications for grants under the i3 program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the i3 program, CFDA number 84.411A (Scale-up grants), must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions.

Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the i3 program at *www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.411, not 84.411A).

Please note the following:

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system;

and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Carol Lyons, U.S. Department of Education, 400 Maryland Avenue SW., Room 4W203, Washington, DC 20202–5930. FAX: (202) 205–5631.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.411A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (84.411A), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for the Scale-up competition are from the 2013 i3 NFP, and are as follows:

The points assigned to each criterion are indicated in the parenthesis next to the criterion. An applicant may earn up to a total of 100 points based on the selection criteria for the application.

Note: In responding to the selection criteria, applicants should keep in mind that peer reviewers may consider only the information provided in the written application when scoring and commenting on the application. Therefore, applicants should structure their applications with the goal of helping peer reviewers understand:

- What the applicant is proposing to do, including the absolute priority (or, if the applicant has selected the absolute priority for Serving Rural Communities, the absolute priorities) under which the applicant intends the application to be reviewed;
- How the proposed project will reach a national scale that the applicant was previously unable to reach; and
- What the outcomes of the project will be if it is successful, including how those outcomes will be evaluated.

Selection Criteria for the Scale-up Grant Application:

A. Significance (up to 20 points)

In determining the significance of the project, the Secretary considers the following factors:

(1) The extent to which the proposed project addresses a national need.

(2) The extent of the expected impact of the project on relevant outcomes (as defined in this notice), including the estimated impact of the project on student outcomes (particularly those related to student achievement (as defined in this notice)) and the breadth of the project's impact, compared with alternative practices or methods of addressing similar needs.

(3) The likelihood that the project will have the estimated impact, including the extent to which the applicant demonstrates that unmet demand for the proposed project or the proposed services will enable the applicant to reach the proposed level of scale.

Note: In responding to this criterion, the Secretary encourages applicants to explain how the proposed project will address a national need and address unmet demands. Applicants are also encouraged to explain how the proposed project will impact student outcomes in comparison to other practices. Additionally, the Secretary encourages applicants to quantify the expected impact of their proposed project if it is successful, and explain why the applicant expects the proposed project to have the described impact.

B. Quality of the Project Design (up to 20 points)

In determining the quality of the proposed project design, the Secretary considers the following factors:

(1) The extent to which the applicant will use grant funds to address a particular barrier or barriers that prevented the applicant, in the past, from reaching the level of scale proposed in the application.

(2) The extent to which the project would build the capacity of the applicant to scale up and sustain the project or would create an organization capable of expanding if successful outcomes are achieved.

Note: In responding to this criterion, the Secretary encourages applicants to address how the proposed project will overcome previous barriers that prevented the applicant from previously scaling the project. The Secretary also encourages applicants to explain how capacity will be built into the proposed project to further scale and sustain the work.

C. Quality of the Management Plan (up to 20 points)

In determining the quality of the management plan and personnel for the proposed project, the Secretary considers the following factors:

(1) The extent to which the management plan articulates key responsibilities and well-defined objectives, including the timelines and milestones for completion of major project activities, the metrics that will be used to assess progress on an ongoing basis, and annual performance targets the applicant will use to monitor whether the project is achieving its goals.

(2) The clarity and coherence of the applicant's multi-year financial and operating model and accompanying plan to operate the project at a national level (as defined in this notice) during the project period.

(3) The extent to which the applicant demonstrates that it will have the resources to operate the project at the proposed level of scale during the project period and beyond the length of the grant, including the demonstrated commitment of any partners and evidence of broad support from stakeholders critical to the project's long-term success (e.g., State educational agencies, teachers' unions).

Note: In responding to this criterion, the Secretary encourages applicants to address how the project team will evaluate the success or challenges of the project and use that feedback to make improvements to the project. Applicants are also encouraged to explain the organization's plan that will enable the project to operate at a national level over the life of the grant.

D. Personnel (up to 10 points)

In determining the quality and personnel for the proposed project, the Secretary considers the following factor:

(1) The qualifications and experience of the project director and other key project personnel and the extent to which they have the expertise to accomplish the proposed tasks.

Note: In responding to this criterion, the Secretary encourages applicants to address how the team's prior experiences have prepared them for implementing the proposed project successfully.

E. Quality of Project Evaluation (up to 30 points)

In determining the quality of the project evaluation to be conducted, the Secretary considers the following factors:

(1) The clarity and importance of the key questions to be addressed by the project evaluation, and the appropriateness of the methods for how each question will be addressed.

(2) The extent to which the methods of evaluation will, if well implemented, produce evidence about the project's effectiveness that would meet the What Works Clearinghouse Evidence Standards without reservations.[12]

(3) The extent to which the evaluation will study the project at the proposed level of scale, including, where appropriate, generating information about potential differential effectiveness of the project in diverse settings and for diverse student population groups.

(4) The extent to which the evaluation plan includes a clear and credible analysis plan, including a proposed sample size and minimum detectable effect size that aligns with the expected project impact, and an analytic approach for addressing the research questions.

(5) The extent to which the evaluation plan clearly articulates the key components and outcomes of the project, as well as a measurable threshold for acceptable implementation.

Note: In responding to this criterion, the Secretary encourages applicants to describe the key evaluation questions and address how the proposed evaluation methodologies will allow the project to answer those questions. These methods for evaluation should include whether the evaluation would meet What Works Clearinghouse Standards. Further, the Secretary encourages applicants to identify how the project will be evaluated at the proposed scale, including a description of the proposed sample size and project impacts as well as the key components of the proposed project for implementation.

We encourage eligible applicants to review the following technical assistance resources on evaluation:

(1) What Works Clearinghouse Procedures and Standards Handbook: *http://ies.ed.gov/ncee/wwc/references/idocviewer/doc.aspx?docid=19&tocid=1;* and

(2) IES/NCEE Technical Methods papers: *http://ies.ed.gov/ncee/tech_methods/.*

2. *Review and Selection Process:* As described earlier in this notice, before making awards, we will screen applications submitted in accordance with the requirements in this notice to determine whether applications have met eligibility and other requirements. This screening process may occur at various stages of the process; applicants that are determined to be ineligible will not receive a grant, regardless of peer reviewer scores or comments.

We will use independent peer reviewers with varied backgrounds and professions, including pre-kindergarten-12 teachers and principals, college and university educators, researchers and evaluators, social entrepreneurs, strategy consultants, grant makers and managers, and others with education expertise for the peer review process. All reviewers will be thoroughly screened for conflicts of interest to ensure a fair and competitive review process.

Peer reviewers will read, prepare a written evaluation, and score the assigned applications, using the selection criteria provided in this notice. For Scale-up grant applications, the Department intends to conduct a single tier review. If an eligible applicant has chosen to address either of the first two competitive preference priorities (Improving Cost-Effectiveness and Productivity or Enabling Broad Adoption of Effective Practices) in order to earn competitive preference priority points, reviewers will review and score these competitive preference priorities. If competitive preference priority points are awarded, those points will be included in the eligible applicant's overall score. If an eligible applicant chooses to address the last competitive preference priority (Supporting Novice i3 Applicants) to earn competitive preference priority points, the Department will review its list of previous i3 grantees in scoring this competitive preference priority.

We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

Finally, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

[12] *See* What Works Clearinghouse Procedures and Standards Handbook. (Version 2.1, September 2011), which can currently be found at the following link: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The overall purpose of the i3 program is to expand the implementation of, and investment in, innovative practices that are demonstrated to have an impact on improving student achievement or student growth for high-need students. We have established several performance measures for the i3 Scale-up grants.

Short-term performance measures: (1) The percentage of grantees that reach their annual target number of students as specified in the application; (2) the percentage of programs, practices, or strategies supported by a Scale-up grant with ongoing well-designed and independent evaluations that will provide evidence of their effectiveness at improving student outcomes at scale; (3) the percentage of programs, practices, or strategies supported by a Scale-up grant with ongoing evaluations that are providing high-quality implementation data and performance feedback that allow for periodic assessment of progress toward achieving intended outcomes; and (4) the cost per student actually served by the grant.

Long-term performance measures: (1) The percentage of grantees that reach the targeted number of students specified in the application; (2) the percentage of programs, practices, or strategies supported by a Scale-up grant that implement a completed well-designed, well-implemented and independent evaluation that provides evidence of their effectiveness at improving student outcomes at scale; (3) the percentage of programs, practices, or strategies supported by a Scale-up grant with a completed well-designed, well-implemented and independent evaluation that provides information about the key elements and the approach of the project so as to facilitate replication or testing in other settings; and (4) the cost per student for programs, practices, or strategies that were proven to be effective at improving educational outcomes for students.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Carol Lyons, U.S. Department of Education, 400 Maryland Avenue SW., Room 4W203, Washington, DC 20202–5930. Telephone: (202) 453–7122. FAX: (202) 205–5631 or by email: *i3@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: April 30, 2013.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2013–10464 Filed 5–2–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Investing in Innovation Fund, Validation Grants

AGENCY: Office of Innovation and Improvement, Department of Education

ACTION: Notice.

Overview Information:

Investing in Innovation Fund, Validation grants; Notice inviting applications for new awards for fiscal year (FY) 2013.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.411B (Validation grants).

DATES:

Applications Available: May 6, 2013.

Deadline for Notice of Intent to Apply: May 23, 2013.

Deadline for Transmittal of Applications: July 2, 2013.

Deadline for Intergovernmental Review: September 3, 2013.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Investing in Innovation Fund (i3), established under section 14007 of the American Recovery and Reinvestment Act of 2009 (ARRA), provides funding to support (1) local educational agencies (LEAs), and (2) nonprofit organizations in partnership with (a) one or more LEAs or (b) a consortium of schools. The i3 program is designed to generate and validate solutions to persistent educational challenges and to support the expansion of effective solutions across the country to serve substantially larger numbers of students. The central design element of the i3 program is its multi-tier structure that links the amount of funding that an applicant may receive to the quality of the evidence supporting the efficacy of the proposed project. Applicants proposing practices supported by limited evidence can receive relatively small grants that support the development and initial evaluation of promising practices and help to identify new solutions to pressing challenges; applicants proposing practices

supported by evidence from rigorous evaluations, such as large randomized controlled trials, can receive sizable grants to support expansion across the Nation. This structure provides incentives for applicants to build evidence of effectiveness of their proposed projects and to address the barriers to serving more students across schools, districts, and States so that applicants can compete for more sizeable grants.

As importantly, all i3 projects are required to generate additional evidence of effectiveness. All i3 grantees must use part of their budgets to conduct independent evaluations (as defined in this notice) of their projects. This ensures that projects funded under the i3 program contribute significantly to improving the information available to practitioners and policymakers about which practices work, for which types of students, and in what contexts.

The Department awards three types of grants under this program: ''Development'' grants, ''Validation'' grants, and ''Scale-up'' grants. These grants differ in terms of the level of prior evidence of effectiveness required for consideration of funding, the level of scale the funded project should reach, and, consequently, the amount of funding available to support the project.

This notice invites applications for Validation grants only. The notice inviting applications for Scale-up grants is published elsewhere in this issue of the **Federal Register**. The notice inviting applications for Development grants was published in the **Federal Register** on March 27, 2013 (78 FR 18710) and available at *www.gpo.gov/fdsys/pkg/FR-2013-03-27/pdf/2013-07003.pdf.*

Validation grants provide funding to support expansion of projects supported by moderate evidence of effectiveness (as defined in this notice) to the national or regional level (as defined in this notice). Validation grants must further assess the effectiveness of the i3-supported practice through a rigorous evaluation, with particular focus on the populations for, and the contexts in, which the practice is most effective. We expect and consider it appropriate that each applicant proposes to use the Validation funding to build its capacity to deliver the i3-supported practice, particularly early in the funding period, to successfully reach the level of scale proposed in its application. Additionally, we expect each applicant to address any specific barriers to the growth or scaling of the organization or practice (including barriers related to cost-effectiveness) in order to deliver the i3-supported practice at the proposed level of scale and provide strategies to address these barriers as part of its proposed scaling plan.

All Validation grantees must evaluate the effectiveness of the practice that the supported project implements and expands. We expect that these evaluations will be conducted in a variety of contexts and for a variety of students, will identify the core elements of the practice, and will codify the practices to support adoption or replication by the applicant and other entities.

We remind LEAs of the continuing applicability of the provisions of the Individuals with Disabilities Education Act (IDEA) for students who may be served under i3 grants. Any grants in which LEAs participate must be consistent with the rights, protections, and processes established under IDEA for students who are receiving special education and related services or are in the process of being evaluated to determine their eligibility for such services.

As described later in this notice, in connection with making competitive grant awards, an applicant is required, as a condition of receiving assistance under this program, to make civil rights assurances, including an assurance that its program or activity will comply with Section 504 of the Rehabilitation Act of 1973 and the Department's section 504 implementing regulations, which prohibit discrimination on the basis of disability. Regardless of whether a student with disabilities is specifically targeted as a ''high-need student'' (as defined in this notice) in a particular grant application, recipients are required to comply with all legal nondiscrimination requirements, including, but not limited to the obligation to ensure that students with disabilities are not denied access to the benefits of the recipient's program because of their disability. The Department also enforces Title II of the Americans with Disabilities Act (ADA), as well as the regulations implementing Title II of the ADA, which prohibit discrimination on the basis of disability by public entities.

Furthermore, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin. On December 2, 2011, the Departments of Education and Justice jointly issued guidance that explains how educational institutions can promote student diversity or avoid racial isolation within the framework of Title VI (e.g., through consideration of the racial demographics of neighborhoods when drawing assignment zones for schools or through targeted recruiting efforts). The ''Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools'' is available on the Department's Web site at *www.ed.gov/ocr/docs/guidance-ese-201111.pdf.*

Background: The FY 2013 i3 Validation competition incorporates lessons learned from prior i3 competitions. As such, it includes several changes from prior i3 competitions that prospective applicants should note. These changes reflect the recently revised i3 program design, as described in the notice of final priorities, requirements, definitions, and selection criteria for this program (2013 i3 NFP), published in the **Federal Register** on March 27, 2013 (78 FR 18682) and available at *www.gpo.gov/fdsys/pkg/FR-2013-03-27/pdf/2013-07016.pdf.*

In the 2013 i3 NFP, the Department redesigned key aspects of the i3 program to improve the FY 2013 and future i3 competitions by accelerating the identification of promising solutions to pressing challenges in K–12 public education, supporting the evaluation of the efficacy of such solutions, and developing new approaches to scaling effective practices to serve more students.

One example of the various changes we established in the 2013 i3 NFP pertains to the breadth and specificity of the potential priorities for a given i3 competition. Specifically, the 2013 i3 NFP includes 11 priorities, representing a range of education topics that the Secretary may select from when establishing the priorities for an i3 competition for a given year. Although the Department has used broad priorities in the past, the 2013 i3 NFP includes subparts under each priority that target specific needs. These subparts facilitate the i3 program's goal of building a portfolio of solutions and corresponding evidence regarding different approaches to addressing critical challenges in public education. When selecting the priorities for a given competition, the Department considers several factors, including the Department's policy priorities, the need for new solutions in a particular priority area, other available funding for a particular priority area, and the results and lessons learned from prior i3 competitions. The Department also considered the existing evidence of effectiveness when selecting the subparts for this year's Validation competition.

We include five absolute priorities in the FY 2013 Validation competition. Under each, we identify subparts from

which applicants must select in order to meet the absolute priority.

First, we include an absolute priority on improving the effectiveness of teachers or principals because such improvements are integral to the Department's mission. Research indicates that teachers and principals are the most critical in-school factors in improving student achievement.[1] This priority, therefore, encourages applicants to focus on improving the effectiveness of teachers or principals, and encourages applicants to identify effective methods for supporting, evaluating, or retaining effective teachers or principals, particularly at schools that serve high-need students. Specifically, we include a subpart under this priority for projects that develop and implement models of induction and support for improving the knowledge and skills of novice teachers or novice principals. Currently, the Department funds several i3 projects that focus on teacher recruitment or content-specific professional development for teachers, but few of these projects focus on supporting current teachers in their early years of teaching. Given that many of the Nation's teachers are first- or second-year teachers, and given the rates at which novice teachers leave the profession, we are interested in adding projects that focus on novice teachers to the i3 portfolio. Similarly, few of the current i3 projects focus on novice principals; as such, we include this subpart to encourage applicants to propose projects that will improve the ability of novice principals to improve their schools' instructional programs and operations.

We also include a subpart that encourages applicants to implement projects that extend highly effective teachers' reach to allow effective teachers to serve more students. Given how important it is for students, particularly high-need students on which the i3 program focuses, to access highly effective teachers, applicants are encouraged to propose innovative ways to expand the reach of highly effective teachers, without necessarily increasing the workload of such teachers. Applicants might consider, for example, using technology-enabled learning opportunities to facilitate student access to highly effective teachers in subject areas that a school may not offer, or offering highly effective teachers relief from some of their administrative responsibilities in order to allow them to teach additional students. This subpart provides the opportunity for applicants to change the operating conditions within schools and districts in ways that professionalize teaching and improve outcomes for high-need students. It also supports increased efficiencies at the school and district levels.

Second, we include an absolute priority on science, technology, engineering, and mathematics (STEM) education. Ensuring that all students can access coursework and excel in STEM fields is essential to our Nation's economy and future prosperity. An increasing number of careers require an understanding of STEM concepts and the application of STEM skills and techniques; therefore, this priority addresses this growing need. The President's Council of Advisors on Science and Technology (PCAST)[2] has produced reports on K–12 and undergraduate STEM education that provide recommendations on increasing achievement and postsecondary enrollment in STEM fields. The recommendations include cultivating and recruiting STEM teachers, creating STEM-related experiences to inspire and engage students, and encouraging partnerships among stakeholders in order to diversify pathways to STEM careers.

Under this priority, the Department seeks to fund projects that would address these recommendations by including subparts focusing on recruiting individuals with content expertise in STEM into teaching roles in public schools and on increasing the high-quality preparation or professional development for teachers or educators in STEM subjects.

Third, we include an absolute priority focused on improving academic outcomes for English learners (ELs). School districts across the country are experiencing increases in the enrollment of students who cannot speak, read, or write English well enough to participate meaningfully in educational programs and who therefore need specialized support services. Too often, these students' needs are not met, thereby inhibiting them from achieving the academic outcomes of which they are capable. To address this concern, we include a subpart that focuses on projects that would develop, implement, and evaluate new instructional approaches and tools to increase the number of ELs successfully completing courses in core academic areas.

Fourth, we include an absolute priority that focuses on the effective use of technology. Technology can improve student academic outcomes, often rapidly and in unprecedented ways. While there have been significant advances in the use of technology in numerous fields, the core operations of most schools and LEAs remain untouched. The Department's *National Education Technology Plan 2010*[3] highlighted the potential of ''connected teaching'' that makes it possible to, for example, use online tools to provide customized instruction for different learners, such as integrated assessments and continuous feedback, or to produce high-quality learning resources that can reach learners wherever and whenever needed. To support efforts to enhance technology-based student learning, we include three subparts under this priority.

The first subpart, which is consistent with the Department's focus on helping schools and LEAs personalize learning for their students, focuses on projects that provide students and teachers with equitable ''anytime, anywhere'' access to learning materials and experiences to which they otherwise may not have access. There are currently no other Department-funded projects that focus explicitly on this area.

The second subpart, which is consistent with the Department's efforts to enhance schools' use of technology to increase student achievement, supports projects that develop new methods and resources for professional development to improve teachers' abilities to use technology.

The third subpart focuses on integrating technology with rigorous college- and career-ready standards to increase student achievement and teacher efficacy. Across all three subparts, we are particularly interested in supporting projects that use technology to meet students' diverse learning needs.

Finally, we include an absolute priority that focuses on serving rural communities. Prior i3 competitions, as well as other Department programs, have demonstrated that rural areas confront a plethora of challenges as they work to provide students with a high-quality education. In this year's competition, applicants applying under

[1] Wright, S.P., Horn, S.P., Sanders, W.L. (1997). *Teacher and classroom context effects on student achievement: Implications for teacher evaluation.* Journal of Personnel Evaluation in Education 11:57–67; Rivkin, S.G., Hanushek, E.A., Kain, J.F. (2005). *Teachers, schools, and academic achievement.* Econometrica, 73(2):417–458.

Leithwood, K., Louis, K.S., Anderson, S., and Wahlstrom, K. (2004). *Review of research: How leadership influences student learning.* University of Minnesota, Center for Applied Research and Educational Improvement. Available at *www.cehd.umn.edu/carei/Leadership/ReviewofResearch.pdf.*

[2] See *www.whitehouse.gov/administration/eop/ostp/pcast/docsreports.*

[3] Found at *www.ed.gov/technology/netp-2010.*

this priority must address one of the other four absolute priorities for the FY 2013 i3 Validation competition, as described above, while serving students enrolled in rural LEAs.

We also include three competitive preference priorities in the FY 2013 Validation competition. The Department encourages applicants to design projects that address these competitive preference priorities in their applications if they seek additional points.

First, we include a competitive preference priority focusing on improving cost-effectiveness and productivity. Improvements in operational, organizational, and instructional processes and structures will enable organizations to achieve the best possible results in the most efficient manner. The Department continues to emphasize the importance of cost-effectiveness and productivity. The priority strengthens that focus by requiring sufficient detail about how the applicant aims to modify its processes and structures to improve productivity and how the applicant will evaluate whether the proposed project is cost-effective when implemented. Further, applicants addressing this priority must provide a detailed budget, an examination of different types of costs, and a plan to monitor and evaluate cost savings, all of which are essential to any reasoned attempt at improving productivity.

Second, we include a competitive preference priority for projects that enable the broad adoption of effective practices. A primary goal of the i3 program is to identify and support the expansion of effective practices. This competitive preference priority rewards applicants that will implement systematic methods for doing so. While Validation grantees must codify the core elements of its i3-supported practices, we are interested in projects that have a particular focus in this area. In addition, the education field needs access to strong, reliable data to make informed decisions about effective practices that could replace less effective practices. This competitive preference priority supports strategies that identify key elements of effective practices and that capture lessons learned about the implementation of the practices. In addition, an applicant addressing this priority must commit to implementing the practice in other settings and locations in order to ensure that the practice can be successfully replicated.

Third, in order to expand the reach of the i3 program and encourage entities that have not applied previously for an i3 grant, the Department includes a competitive preference priority for novice i3 applicants. A novice i3 applicant is an applicant that has never received a grant under the i3 program. An applicant must identify whether it is a novice applicant when completing the applicant information sheet. Instructions on how to complete the applicant information sheet are included in the application package.

Finally, we include one invitational priority in the FY 2013 Validation competition. Too many children, particularly those from low-income families, lack access to high-quality early education and may enter school less prepared than their peers for school success. High-quality early learning programs can improve children's vocabulary, improve their social and emotional development so they arrive in school ready to learn, and help them stay on track and engaged in early elementary grades. To support the Department's early learning efforts, we include an invitational priority for projects that, in addition to addressing one of i3's absolute priorities, include high-quality early learning components to help ensure that children, especially those from low-income families, enter kindergarten prepared for success.

In addition to the changes to the priorities, the 2013 i3 NFP also modifies aspects of the i3 program's requirements, definitions, and selection criteria. In general, these changes improve clarity and strengthen the requirements and design aspects of the i3 program. Most notably, we have clarified that all i3 grantees must implement practices that serve students who are in grades K–12 at some point during the funding period. Further, we have revised the evidence standards and definitions so that applicants can better understand what is required to meet each level of evidence.

For the FY 2013 Validation competition, applicants must be able to show moderate evidence of effectiveness (as defined in this notice) for the proposed process, product, strategy, or practice included in their applications. Applicants should review the requirements section of this notice for instructions on how to demonstrate moderate evidence of effectiveness and for information on the other eligibility and program requirements.

The i3 program includes a statutory requirement for a private-sector match for all i3 grantees. Based on feedback from previous i3 applicants, we are modifying the process for applicants to secure and demonstrate evidence of, the required private-sector match for the FY 2013 i3 competition. While an applicant must secure 10 percent of its Federal grant award to be eligible for an i3 Validation grant, the timeframe in which an applicant must secure and submit evidence of the required private-sector matching funds is expanded. In the past, the highest-rated applicants only had approximately 30 days to secure 100 percent of their required private-sector matches, which proved difficult for both applicants and potential private-sector funders. While all of the past highest-rated i3 applicants successfully secured their matches and became i3 grantees, the Department is eager to improve the matching process to facilitate deeper public-private partnerships. Therefore, for the FY 2013 i3 competition, each highest-rated applicant as identified by the Department following peer review of the applications, must submit evidence of 50 percent of the required private-sector match prior to the awarding of an i3 grant. An applicant must provide evidence of the remaining 50 percent of the required private-sector match no later than six months after the project start date (i.e., for the FY 2013 competition, six months after January 1, 2014, or by July 1, 2014). The grant will be terminated if the grantee does not secure its private-sector match by the established deadline. By decreasing the amount of the required match that must be secured before the i3 award can be made, the burden for both applicants and private-sector funders will be reduced, which in turn will foster improved collaboration.

This notice also includes selection criteria for applications for the FY 2013 Validation competition that are designed to ensure that applications selected for funding have the best potential to generate substantial improvements in student achievement (and other key outcomes), and include well-articulated plans for the implementation and evaluation of the proposed projects. Applicants should review the selection criteria and submission instructions carefully to ensure their applications address this year's criteria.

An entity that submits an application for a Validation grant must include the following information in its application: an estimate of the number of students to be served by the project; evidence of the applicant's ability to implement and appropriately evaluate the proposed project; and information about its capacity (i.e., qualified personnel, financial resources, and management capacity) to further develop and bring the project to a State or regional level, working directly or through partners,

either during or following the grant period, if positive results are obtained.

We recognize that LEAs are not typically responsible for taking their practices, strategies, or programs to scale; however, all applicants can and should partner with others to disseminate and take their effective practices, strategies, and programs to scale.

The Department will screen applications that are submitted for Validation grants in accordance with the requirements in this notice and determine which applications meet the eligibility and other requirements in the 2013 i3 NFP. Peer reviewers will review all applications for Validation grants that are submitted by the established deadline.

Applicants should note, however, that we may screen for eligibility at multiple points during the competition process, including before and after peer review; applicants that are determined to be ineligible will not receive a grant award regardless of peer reviewer scores or comments. If we determine that a proposed project in a Validation grant application is not supported by moderate evidence of effectiveness, or that the applicant does not demonstrate the required prior record of improvement, or does not meet any other requirement established in the 2013 i3 NFP, the application will not be considered for funding.

Priorities: This competition includes five absolute priorities and three competitive preference priorities, from the 2013 i3 NFP. The competition also includes one invitational priority.

Absolute Priorities: For FY 2013 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet one of these priorities.

Under the Validation grant competition, each of the five absolute priorities constitutes its own funding category. The Secretary intends to award grants under each absolute priority for which applications of sufficient quality are submitted.

An applicant for a Validation grant must choose one of the five absolute priorities. Applications will be peer reviewed and scored; scores will be rank ordered by absolute priority, so an applicant must clearly identify the specific absolute priority that the proposed project addresses. Applicants that choose to submit an application under the absolute priority for Serving Rural Communities must identify an additional absolute priority. The peer-reviewed scores for applications submitted under the Serving Rural Communities priority will be ranked with other applications under the Serving Rural Communities priority and not included in the ranking for the additional priority that the applicant identifies. This design helps to ensure that applicants under the Serving Rural Communities priority receive an ''apples to apples'' comparison with other rural applicants.

These priorities are:

Absolute Priority 1—Improving the Effectiveness of Teachers or Principals.

Projects addressing one of the following priority areas:

(a) Developing and implementing models of induction and support for improving the knowledge and skills of novice teachers or novice principals to accelerate student performance, including but not limited to strategies designed to increase teacher retention or improve teacher or principal effectiveness.

(b) Extending highly effective teachers' reach to serve more students, including strategies such as new course designs, staffing models, technology platforms, or new opportunities for collaboration that allow highly effective teachers to reach more students, or approaches or tools that reduce administrative and other burden while maintaining or improving effectiveness.

Absolute Priority 2—Improving Science, Technology, Engineering, and Mathematics (STEM) Education.

Projects addressing one of the following priority areas:

(a) Developing and implementing new methods and resources for recruiting individuals with content expertise in STEM subject areas into teaching.

(b) Increasing the high-quality preparation of, or professional development for, teachers or other educators in STEM subjects, through activities that include building content and pedagogical content knowledge.

Absolute Priority 3—Improving Academic Outcomes for English Learners (ELs).

Projects addressing the following priority area:

Increasing the number and proportion of ELs successfully completing courses in core academic subjects by developing, implementing, and evaluating new instructional approaches and tools that are sensitive to the language demands necessary to access challenging content, including technology-based tools.

Absolute Priority 4—Effective Use of Technology.

Projects addressing one of the following priority areas:

(a) Providing students and teachers with equitable ''anytime, anywhere'' access to learning materials and experiences that they otherwise would not have access to, such as rigorous coursework that is not offered in a particular school, or effective professional development activities or learning communities enabled by technology.

(b) Developing new methods and resources for teacher preparation or professional development that increase teachers' abilities to utilize technology to enhance their knowledge and skills to improve student achievement (as defined in this notice) and to close achievement gaps.

(c) Integrating technology with the implementation of rigorous college- and career-ready standards to increase student achievement (as defined in this notice), student engagement, and teacher efficacy, such as by providing embedded, real-time assessment and feedback to students and teachers.

Absolute Priority 5—Serving Rural Communities.

Under this priority, we provide funding to projects addressing one of the absolute priorities established for the 2013 Validation i3 competition and under which the majority of students to be served are enrolled in rural local educational agencies (as defined in this notice).

Competitive Preference Priorities: For FY 2013 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award an additional point to applications that meet competitive preference priority one, an additional two points to applications that meet competitive preference priority two, and an additional point to applications that meet competitive preference priority three.

Applicants may address more than one of the competitive preference priorities. An applicant must identify in the project narrative section of its application the priority or priorities it wishes the Department to consider for purposes of earning competitive preference priority points.

Note: The Department will not review or award points under any competitive preference priority that fails to clearly identify the competitive preference priority or priorities the applicant wishes the Department to consider for purposes of earning competitive preference priority points.

These priorities are:

Competitive Preference Priority 1—Improving Cost-Effectiveness and Productivity (zero or 1 points).

Under this priority, we provide funding to projects that address one of the following areas:

(a) Substantially improving student outcomes without commensurately increasing per-student costs.

(b) Maintaining student outcomes while substantially decreasing per-student costs.

(c) Substantially improving student outcomes while substantially decreasing per-student costs.

Other requirements related to Competitive Preference Priority 1:

An application addressing this priority must provide—

(1) A clear and coherent budget that identifies expected student outcomes before and after the practice, the cost per student for the practice, and a clear calculation of the cost per student served;

(2) A compelling discussion of the expected cost-effectiveness of the practice compared with alternative practices;

(3) A clear delineation of one-time costs versus ongoing costs and a plan for sustaining the project, particularly ongoing costs, after the expiration of i3 funding;

(4) Identification of specific activities designed to increase substantially the cost-effectiveness of the practice, such as re-designing costly components of the practice (while maintaining efficacy) or testing multiple versions of the practice in order to identify the most cost-effective approach; and

(5) A project evaluation that addresses the cost-effectiveness of the proposed practice.

Competitive Preference Priority 2—Enabling Broad Adoption of Effective Practices (zero or 2 points).

Under this priority, we provide funding to projects that enable broad adoption of effective practices. An application proposing to address this priority must, as part of its application:

(a) Identify the practice or practices that the application proposes to prepare for broad adoption, including formalizing the practice (i.e., establish and define key elements of the practice), codifying (i.e., develop a guide or tools to support the dissemination of information on key elements of the practice), and explaining why there is a need for formalization and codification.

(b) Evaluate different forms of the practice to identify the critical components of the practice that are crucial to its success and sustainability, including the adaptability of critical components to different teaching and learning environments and to diverse learners.

(c) Provide a coherent and comprehensive plan for developing materials, training, toolkits, or other supports that other entities would need in order to implement the practice effectively and with fidelity.

(d) Commit to assessing the replicability and adaptability of the practice by supporting the implementation of the practice in a variety of locations during the project period using the materials, training, toolkits, or other supports that were developed for the i3-supported practice.

Competitive Preference Priority 3—Supporting Novice i3 Applicants (zero or 1 point).

Eligible applicants that have never directly received a grant under this program.

Invitational Priority: For FY 2013 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Invitational Priority—Supporting High-Quality Early Learning.

The Secretary encourages applicants to propose projects that incorporate high-quality early learning components that are aligned with the early learning, elementary and secondary education systems in participating schools and help ensure that all children, especially those from low-income families, enter kindergarten and ready to succeed.

Definitions:

These definitions are from the 2013 i3 NFP. We may apply these definitions in any year in which this program is in effect.

Note: This notice invites applications for Validation grants. The following definitions apply to the three types of grants under the i3 program (i.e., Development, Validation, and Scale-up). Therefore, some of the definitions included in this section, primarily those related to demonstrations of evidence, may be more applicable to applications for Development and Scale-up grants.

Consortium of schools means two or more public elementary or secondary schools acting collaboratively for the purpose of applying for and implementing an i3 grant jointly with an eligible nonprofit organization.

Evidence of promise means there is empirical evidence to support the theoretical linkage between at least one critical component and at least one relevant outcome presented in the logic model (as defined in this notice) for the proposed process, product, strategy, or practice. Specifically, evidence of promise means the following conditions are met:

(a) There is at least one study that is either a—

(1) Correlational study with statistical controls for selection bias;

(2) Quasi-experimental study (as defined in this notice) that meets the What Works Clearinghouse Evidence Standards with reservations;[4] or

(3) Randomized controlled trial (as defined in this notice) that meets the What Works Clearinghouse Evidence Standards with or without reservations;[5] and

(b) Such a study found a statistically significant or substantively important (defined as a difference of 0.25 standard deviations or larger), favorable association between at least one critical component and one relevant outcome presented in the logic model for the proposed process, product, strategy, or practice.

High-need student means a student at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools (as defined in this notice), who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English learners.

High-minority school is defined by a school's LEA in a manner consistent with the corresponding State's Teacher Equity Plan, as required by section 1111(b)(8)(C) of the ESEA. The applicant must provide, in its i3 application, the definition(s) used.

High school graduation rate means a four-year adjusted cohort graduation rate consistent with 34 CFR 200.19(b)(1) and may also include an extended-year adjusted cohort graduation rate consistent with 34 CFR 200.19(b)(1)(v) if the State in which the proposed project is implemented has been approved by the Secretary to use such a rate under Title I of the ESEA.

Highly effective principal means a principal whose students, overall and for each subgroup as described in

[4] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

[5] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

section 1111(b)(3)(C)(xiii) of the ESEA (economically disadvantaged students, students from major racial and ethnic groups, migrant students, students with disabilities, students with limited English proficiency, and students of each gender), achieve high rates (e.g., one and one-half grade levels in an academic year) of student growth. Eligible applicants may include multiple measures, provided that principal effectiveness is evaluated, in significant part, based on student growth. Supplemental measures may include, for example, high school graduation rates; college enrollment rates; evidence of providing supportive teaching and learning conditions, support for ensuring effective instruction across subject areas for a well-rounded education, strong instructional leadership, and positive family and community engagement; or evidence of attracting, developing, and retaining high numbers of effective teachers.

Highly effective teacher means a teacher whose students achieve high rates (e.g., one and one-half grade levels in an academic year) of student growth. Eligible applicants may include multiple measures, provided that teacher effectiveness is evaluated, in significant part, based on student academic growth. Supplemental measures may include, for example, multiple observation-based assessments of teacher performance or evidence of leadership roles (which may include mentoring or leading professional learning communities) that increase the effectiveness of other teachers in the school or LEA.

Independent evaluation means that the evaluation is designed and carried out independent of, but in coordination with, any employees of the entities who develop a process, product, strategy, or practice and are implementing it.

Innovation means a process, product, strategy, or practice that improves (or is expected to improve) significantly upon the outcomes reached with status quo options and that can ultimately reach widespread effective usage.

Large sample means a sample of 350 or more students (or other single analysis units) who were randomly assigned to a treatment or control group, or 50 or more groups (such as classrooms or schools) that contain 10 or more students (or other single analysis units) and that were randomly assigned to a treatment or control group.

Logic model (also referred to as theory of action) means a well-specified conceptual framework that identifies key components of the proposed process, product, strategy, or practice (i.e., the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the relationships among the key components and outcomes, theoretically and operationally.

Moderate evidence of effectiveness means one of the following conditions is met:

(a) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that: Meets the What Works Clearinghouse Evidence Standards without reservations;[6] found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant and overriding unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); and includes a sample that overlaps with the populations or settings proposed to receive the process, product, strategy, or practice.

(b) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that: Meets the What Works Clearinghouse Evidence Standards with reservations,[7] found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant and overriding unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); includes a sample that overlaps with the populations or settings proposed to receive the process, product, strategy, or practice; and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice) (Note: multiple studies can cumulatively meet the large and multi-site sample requirements as long as each study meets the other requirements in this paragraph).

Multi-site sample means more than one site, where site can be defined as an LEA, locality, or State.

National level describes the level of scope or effectiveness of a process, product, strategy, or practice that is able to be effective in a wide variety of communities, including rural and urban areas, as well as with different groups (e.g., economically disadvantaged, racial and ethnic groups, migrant populations, individuals with disabilities, English learners, and individuals of each gender).

Nonprofit organization means an entity that meets the definition of ''nonprofit'' under 34 CFR 77.1(c), or an institution of higher education as defined by section 101(a) of the Higher Education Act of 1965, as amended.

Quasi-experimental design study means a study using a design that attempts to approximate an experimental design by identifying a comparison group that is similar to the treatment group in important respects. These studies, depending on design and implementation, can meet What Works Clearinghouse Evidence Standards with reservations[8] (they cannot meet What Works Clearinghouse Evidence Standards without reservations).

Randomized controlled trial means a study that employs random assignment of, for example, students, teachers, classrooms, schools, or districts to receive the intervention being evaluated (the treatment group) or not to receive the intervention (the control group). The estimated effectiveness of the intervention is the difference between the average outcome for the treatment group and for the control group. These studies, depending on design and implementation, can meet What Works Clearinghouse Evidence Standards without reservations.[9]

Regional level describes the level of scope or effectiveness of a process, product, strategy, or practice that is able to serve a variety of communities within a State or multiple States, including rural and urban areas, as well as with different groups (e.g., economically disadvantaged, racial and ethnic groups, migrant populations, individuals with disabilities, English learners, and individuals of each gender). For an LEA-based project to be considered a regional level project, a process, product, strategy, or practice must serve students in more than one LEA, unless the process, product, strategy, or practice is implemented in a State in which the State educational agency is the sole educational agency for all schools.

Relevant outcome means the student outcome or outcomes (or the ultimate outcome if not related to students) that the proposed project is designed to

[6] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

[7] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

[8] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

[9] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

improve, consistent with the specific goals of the project and the i3 program.

Rural local educational agency means a local educational agency (LEA) that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Eligible applicants may determine whether a particular LEA is eligible for these programs by referring to information on the Department's Web site at *www2.ed.gov/nclb/freedom/local/reap.html.*

Strong evidence of effectiveness means that one of the following conditions is met:

(a) There is at least one study of the effectiveness of the process, product, strategy, or practice being proposed that: Meets the What Works Clearinghouse Evidence Standards without reservations;[10] found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant and overriding unfavorable impacts on that outcome for relevant populations in the study or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); includes a sample that overlaps with the populations and settings proposed to receive the process, product, strategy, or practice; and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice). (Note: multiple studies can cumulatively meet the large and multi-site sample requirements as long as each study meets the other requirements in this paragraph).

(b) There are at least two studies of the effectiveness of the process, product, strategy, or practice being proposed, each of which: meets the What Works Clearinghouse Evidence Standards with reservations;[11] found a statistically significant favorable impact on a relevant outcome (as defined in this notice) (with no statistically significant and overriding unfavorable impacts on that outcome for relevant populations in the studies or in other studies of the intervention reviewed by and reported on by the What Works Clearinghouse); includes a sample that overlaps with the populations and settings proposed to receive the process, product, strategy, or practice; and includes a large sample (as defined in this notice) and a multi-site sample (as defined in this notice).

Strong theory means a rationale for the proposed process, product, strategy, or practice that includes a logic model (as defined in this notice).

Student achievement means—

(a) For grades and subjects in which assessments are required under ESEA section 1111(b)(3): (1) A student's score on such assessments and may include (2) other measures of student learning, such as those described in paragraph (b), provided they are rigorous and comparable across schools within an LEA.

(b) For grades and subjects in which assessments are not required under ESEA section 1111(b)(3): alternative measures of student learning and performance such as student results on pre-tests, end-of-course tests, and objective performance-based assessments; student learning objectives; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across schools within an LEA.

Student growth means the change in student achievement (as defined in this notice) for an individual student between two or more points in time. An applicant may also include other measures that are rigorous and comparable across classrooms.

Program Authority: American Recovery and Reinvestment Act of 2009, Division A, Section 14007, Pub. L. 111–5.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department suspension and debarment regulations in 2 CFR part 3485. (c) The notice of final priorities, requirements, definitions, and selection criteria for this program, published in the **Federal Register** on March 27, 2013 (78 FR 18682).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Cooperative agreements or discretionary grant awards.

Estimated Available Funds: $134,500,000.

These estimated available funds are the total available for all three types of grants under the i3 program (i.e., Development, Validation, and Scale-up).

Contingent upon the availability of funds and the quality of the applications received, we may make additional awards in FY 2014 or later years from the list of unfunded applicants from this competition.

Estimated Range of Awards:
Scale-up grants: Up to $20,000,000.
Validation grants: Up to $12,000,000.
Development grants: Up to $3,000,000.

Estimated Average Size of Awards:
Scale-up grants: $19,000,000.
Validation grants: $11,500,000.
Development grants: $3,000,000.

Estimated Number of Awards:
Scale-up grants: 0–2 awards.
Validation grants: 4–8 awards.
Development grants: 10–20 awards.

Note: The Department is not bound by any estimates in this notice.

Project Period: 36–60 months.

III. Eligibility Information

1. *Innovations that Improve Achievement for High-Need Students:* All grantees must implement practices that are designed to improve student achievement (as defined in this notice) or student growth (as defined in this notice), close achievement gaps, decrease dropout rates, increase high school graduation rates (as defined in this notice), or increase college enrollment and completion rates for high-need students (as defined in this notice).

2. *Innovations that Serve Kindergarten-through-Grade-12 (K–12) Students:* All grantees must implement practices that serve students who are in grades K–12 at some point during the funding period. To meet this requirement, projects that serve early learners (i.e., infants, toddlers, or preschoolers) must provide services or supports that extend into kindergarten or later years, and projects that serve postsecondary students must provide services or supports during the secondary grades or earlier.

3. *Eligible Applicants:* Entities eligible to apply for i3 grants include either of the following:

(a) An LEA.

(b) A partnership between a nonprofit organization and—

(1) One or more LEAs; or

(2) A consortium of schools.

Statutory Eligibility Requirements: Except as specifically set forth in the *Note about Eligibility for an Eligible Applicant that Includes a Nonprofit Organization* that follows, to be eligible for an award, an eligible applicant must—

[10] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

[11] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

(a)(1) Have significantly closed the achievement gaps between groups of students described in section 1111(b)(2) of the ESEA (economically disadvantaged students, students from major racial and ethnic groups, students with limited English proficiency, students with disabilities); or

(2) Have demonstrated success in significantly increasing student academic achievement for all groups of students described in that section;

(b) Have made significant improvements in other areas, such as high school graduation rates (as defined in this notice) or increased recruitment and placement of high-quality teachers or principals, as demonstrated with meaningful data;

(c) Demonstrate that it has established one or more partnerships with the private sector, which may include philanthropic organizations, and that organizations in the private sector will provide matching funds in order to help bring results to scale; and

(d) In the case of an eligible applicant that includes a nonprofit organization, provide in the application the names of the LEAs with which the nonprofit organization will partner, or the names of the schools in the consortium with which it will partner. If an eligible applicant that includes a nonprofit organization intends to partner with additional LEAs or schools that are not named in the application, it must describe in the application the demographic and other characteristics of these LEAs and schools and the process it will use to select them.

Note: An entity submitting an application should provide, in Appendix C, under ''Other Attachments Form,'' of its application, information addressing the eligibility requirements described in this section. An applicant must provide, in its application, sufficient supporting data or other information to allow the Department to determine whether the applicant has met the eligibility requirements. If the Department determines that an applicant has provided insufficient information in its application, the applicant will not have an opportunity to provide additional information.

Note about LEA Eligibility: For purposes of this program, an LEA is an LEA located within one of the 50 States, the District of Columbia, or the Commonwealth of Puerto Rico.

Note about Eligibility for an Eligible Applicant that Includes a Nonprofit Organization: The authorizing statute specifies that an eligible applicant that includes a nonprofit organization meets the requirements in paragraphs (a) and (b) of the eligibility requirements for this program if the nonprofit organization has a record of significantly improving student achievement, attainment, or retention. For an eligible applicant that includes a nonprofit organization, the nonprofit organization must demonstrate that it has a record of significantly improving student achievement, attainment, or retention through its record of work with an LEA or schools. Therefore, an eligible applicant that includes a nonprofit organization does not necessarily need to include as a partner for its i3 grant an LEA or a consortium of schools that meets the requirements in paragraphs (a) and (b) of the eligibility requirements in this notice.

In addition, the authorizing statute specifies that an eligible applicant that includes a nonprofit organization meets the requirements of paragraph (c) of the eligibility requirements in this notice if the eligible applicant demonstrates that it will meet the requirement for private-sector matching.

4. *Cost Sharing or Matching:* To be eligible for an award, an applicant must demonstrate that one or more private-sector organizations, which may include philanthropic organizations, will provide matching funds in order to help bring project results to scale. An eligible applicant must obtain matching funds, or in-kind donations, equal to at least 10 percent of its Federal grant award. The highest-rated eligible applicants must submit evidence of 50 percent of the required private-sector matching funds following the peer review of applications. A Federal i3 award will not be made unless the applicant provides adequate evidence that the 50 percent of the required private-sector match has been committed or the Secretary approves the eligible applicant's request to reduce the matching-level requirement. An applicant must provide evidence of the remaining 50 percent of required private-sector match six months after the project start date.

The Secretary may consider decreasing the matching requirement on a case-by-case basis, and only in the most exceptional circumstances. An eligible applicant that anticipates being unable to meet the full amount of the private-sector matching requirement must include in its application a request that the Secretary reduce the matching-level requirement, along with a statement of the basis for the request.

Note: An applicant that does not provide a request for a reduction of the matching-level requirement in its application may not submit that request at a later time.

5. *Other:* The Secretary establishes the following requirements for the i3 program. These requirements are from the 2013 i3 NFP. We may apply these requirements in any year in which this program is in effect.

- *Evidence Standards:* To be eligible for an award, an application for a Validation grant must be supported by moderate evidence of effectiveness (as defined in this notice). (2013 i3 NFP)

Note: An applicant should identify up to two study citations to be reviewed against WWC Evidence Standards for the purposes of meeting the i3 evidence standard requirement. An applicant should clearly identify these citations in Appendix D, under the ''Other Attachments Form,'' of its application. The Department will not review a study citation that an applicant fails to clearly identify for review.

An applicant must either ensure that all evidence is available to the Department from publicly available sources and provide links or other guidance indicating where it is available; or, in the application, include copies of evidence in Appendix D. If the Department determines that an applicant has provided insufficient information, the applicant will not have an opportunity to provide additional information at a later time.

- *Funding Categories:* An applicant will be considered for an award only for the type of i3 grant (i.e., Development, Validation, and Scale-up grants) for which it applies. An applicant may not submit an application for the same proposed project under more than one type of grant. (2013 i3 NFP)
- *Limit on Grant Awards:* (a) No grantee may receive more than two new grant awards of any type under the i3 program in a single year; (b) in any two-year period, no grantee may receive more than one new Scale-up or Validation grant; and (c) no grantee may receive in a single year new i3 grant awards that total an amount greater than the sum of the maximum amount of funds for a Scale-up grant and the maximum amount of funds for a Development grant for that year. For example, in a year when the maximum award value for a Scale-up grant is $25 million and the maximum award value for a Development grant is $5 million, no grantee may receive in a single year new grants totaling more than $30 million. (2013 i3 NFP)
- *Subgrants:* In the case of an eligible applicant that is a partnership between a nonprofit organization and (1) one or more LEAs or (2) a consortium of schools, the partner serving as the applicant and, if funded, as the grantee, may make subgrants to one or more entities in the partnership. (2013 i3 NFP)
- *Evaluation:* The grantee must conduct an independent evaluation (as defined in this notice) of its project. This evaluation must estimate the impact of the i3-supported practice (as

implemented at the proposed level of scale) on a relevant outcome (as defined in this notice). The grantee must make broadly available digitally and free of charge, through formal (e.g., peer-reviewed journals) or informal (e.g., newsletters) mechanisms, the results of any evaluations it conducts of its funded activities.

In addition, the grantee and its independent evaluator must agree to cooperate with any technical assistance provided by the Department or its contractor and comply with the requirements of any evaluation of the program conducted by the Department. This includes providing to the Department, within 100 days of a grant award, an updated comprehensive evaluation plan in a format and using such tools as the Department may require. Grantees must update this evaluation plan at least annually to reflect any changes to the evaluation. All of these updates must be consistent with the scope and objectives of the approved application. (2013 i3 NFP)

• *Communities of Practice:* Grantees must participate in, organize, or facilitate, as appropriate, communities of practice for the i3 program. A community of practice is a group of grantees that agrees to interact regularly to solve a persistent problem or improve practice in an area that is important to them. (2013 i3 NFP)

• *Management Plan:* Within 100 days of a grant award, the grantee must provide an updated comprehensive management plan for the approved project in a format and using such tools as the Department may require. This management plan must include detailed information about implementation of the first year of the grant, including key milestones, staffing details, and other information that the Department may require. It must also include a complete list of performance metrics, including baseline measures and annual targets. The grantee must update this management plan at least annually to reflect implementation of subsequent years of the project. (2013 i3 NFP)

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: *http://www2.ed.gov/programs/innovation/index.html.* To obtain a copy from ED Pubs, write, fax, or call the following: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *www.EDPubs.gov* or at its email address: *edpubs@inet.ed.gov*.

If you request an application from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.411B.

2. a. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Deadline for Notice of Intent to Submit Application: May 23, 2013.

We will be able to develop a more efficient process for reviewing grant applications if we know the approximate number of applicants that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify us of the applicant's intent to submit an application by completing a web-based form. When completing this form, applicants will provide (1) the applicant organization's name and address and (2) the one absolute priority the applicant intends to address. Applicants may access this form online at *http://go.usa.gov/TrVG*. Applicants that do not complete this form may still submit an application.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Applicants should limit the application narrative [Part III] for a Validation application to no more than 35 pages. Applicants are also strongly encouraged not to include lengthy appendices that contain information that could not be included in the narrative. Applicants should use the following standards:

• A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions.

• Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

• Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The page limit for the application does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support of the application. However, the page limit does apply to all of the application narrative section [Part III] of the application.

b. *Submission of Proprietary Information:*

Given the types of projects that may be proposed in applications for the i3 program, some applications may include proprietary information as it relates to confidential commercial information. Confidential commercial information is defined as information the disclosure of which could reasonably be expected to cause substantial competitive harm. Upon submission, applicants should identify any information contained in their application that they consider to be confidential commercial information. Consistent with the process followed in the prior i3 competitions, we plan on posting the project narrative section of funded i3 applications on the Department's Web site. Identifying proprietary information in the submitted application will help facilitate this public disclosure process. Applicants are encouraged to identify only the specific information that the applicant considers to be proprietary and list the page numbers on which this information can be found in the appropriate Appendix section, under ''Other Attachments Form,'' of their applications. In addition to identifying the page number on which that information can be found, eligible applicants will assist the Department in making determinations on public release of the application by being as specific as possible in identifying the information they consider proprietary. Please note that, in many instances, identification of entire pages of documentation would not be appropriate.

3. *Submission Dates and Times:*

Deadline for Notice of Intent to Submit Application: May 23, 2013.

Informational Meetings: The i3 program intends to hold meetings designed to provide technical assistance to interested applicants for all three types of grants. Detailed information regarding these meetings will be provided on the i3 Web site at *www2.ed.gov/programs/innovation/index.html*.

Deadline for Transmittal of Applications: July 2, 2013.

Applications for grants under this competition must be submitted electronically using the Grants.gov

Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review of Applications: September 3, 2013.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, Central Contractor Registry, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR)—and, after July 24, 2012, with the System for Award Management (SAM),the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR or SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR or SAM registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days to complete. Information about SAM is available at SAM.gov.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp*.

7. *Other Submission Requirements:*

Applications for grants under the i3 program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for Validation grants under the i3 program, CFDA number 84.411B, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the i3 program at *www.Grants.gov*. You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.411, not 84.411B).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov*.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-

Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Carol Lyons, U.S. Department of Education, 400 Maryland Avenue SW., Room 4W203, Washington, DC 20202–5930. FAX: (202) 205–5631.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.411B), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (84.411B), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for the Validation competition are from the 2013 i3 NFP and are as follows:

The points assigned to each criterion are indicated in the parenthesis next to the criterion. An applicant may earn up to a total of 100 points based on the selection criteria for the application.

Note: In responding to the selection criteria, applicants should keep in mind that peer reviewers may consider only the information provided in the written application when scoring and commenting on the application. Therefore, applicants should structure their applications with the goal of helping peer reviewers understand:

- What the applicant is proposing to do, including the absolute priority (or, if the applicant has selected the absolute priority for Serving Rural Communities, the absolute priorities) under which the applicant intends the application to be reviewed;
- How the proposed project will reach a scale that the applicant was previously unable to reach, including further testing in order to overcome barriers to expansion;
- What the outcomes of the project will be if it is successful, including how those outcomes will be evaluated; and
- What procedures are in place for ensuring feedback and continuous improvement in the operation of the proposed project.

Selection Criteria for the Validation Grant Application:

A. *Significance (up to 20 points).*

In determining the significance of the project, the Secretary considers the following factors:

(1) The likelihood that the project will have the estimated impact, including the extent to which the applicant demonstrates that unmet demand for the proposed project or the proposed services will enable the applicant to reach the proposed level of scale.

(2) The feasibility of national expansion if favorable outcomes are achieved.

Note: In responding to this criterion, the Secretary encourages applicants to explain how the proposed project will address unmet demands and enable the applicant to reach the proposed level of scale. Applicants are also encouraged to explain how the applicant will ensure future scaling given positive results.

B. *Quality of the Project Design (up to 20 points).*

In determining the quality of the proposed project design, the Secretary considers the following factors:

(1) The extent to which the proposed project addresses the national need and priorities the applicant is seeking to meet.

(2) The extent to which the proposed project has a clear set of goals and an explicit plan or actions to achieve the goals, including identification of any elements of the project logic model that require further testing or development.

(3) The extent to which the applicant will use grant funds to address a particular barrier or barriers that prevented the applicant, in the past, from reaching the level of scale proposed in the application.

Note: In responding to this criterion, the Secretary encourages applicants to address the unmet needs within the context of the absolute priority. Additionally, the Secretary encourages applicants to identify barriers to scaling and how the proposed project will address and overcome these barriers.

C. *Quality of the Management Plan (up to 20 points).*

In determining the quality of the management plan and personnel for the proposed project, the Secretary considers the following factors:

(1) The extent to which the management plan articulates key responsibilities and well-defined objectives, including the timelines and milestones for completion of major project activities, the metrics that will be used to assess progress on an ongoing basis, and annual performance targets the applicant will use to monitor whether the project is achieving its goals.

(2) The clarity and coherence of the applicant's multi-year financial and operating model and accompanying plan to operate the project at a national or regional (as defined in this notice) during the project period.

Note: In responding to this criterion, the Secretary encourages applicants to address how the project team will evaluate the success or challenges of the project and use that feedback to make improvements to the project. Applicants are also encouraged to explain how they will achieve expanding the project to the national or regional level by the end of the grant.

D. *Personnel (up to 10 points).*

In determining the quality and personnel for the proposed project, the Secretary considers the following factor:

(1) The adequacy of the project's staffing plan, particularly for the first year of the project, including the identification of the project director and, in the case of projects with unfilled key personnel positions at the beginning of the project, that the staffing plan identifies how critical work will proceed.

(2) The qualifications and experience of the project director and other key project personnel and the extent to which they have the expertise to accomplish the proposed tasks.

Note: In responding to this criterion, the Secretary encourages applicants to address the staffing plan and key personnel positions for the project, especially for the first year. Applicants are also encouraged to address how the team's prior experiences have prepared them for implementing the proposed project successfully.

E. *Quality of Project Evaluation (up to 30 points).*

In determining the quality of the project evaluation to be conducted, the Secretary considers the following factors:

(1) The clarity and importance of the key questions to be addressed by the project evaluation, and the appropriateness of the methods for how each question will be addressed.

(2) The extent to which the methods of evaluation will, if well implemented, produce evidence about the project's effectiveness that would meet the What Works Clearinghouse Evidence Standards without reservations.[12]

(3) The extent to which the evaluation will study the project at the proposed level of scale, including, where appropriate, generating information about potential differential effectiveness of the project in diverse settings and for diverse student population groups.

(4) The extent to which the evaluation plan includes a clear and credible analysis plan, including a proposed sample size and minimum detectable effect size that aligns with the expected project impact, and an analytic approach for addressing the research questions.

(5) The extent to which the evaluation plan clearly articulates the key components and outcomes of the project, as well as a measureable threshold for acceptable implementation.

Note: In responding to this criterion, the Secretary encourages applicants to describe the key evaluation questions and address how the proposed evaluation methodologies will allow the project to answer those questions. These methods for evaluation should include whether the evaluation would meet What Works Clearinghouse Evidence Standards. Further, the Secretary encourages applicants to identify how the project will be evaluated at the proposed scale, including a description of the proposed sample size and project impacts as well as the key components of the proposed project for implementation.

We encourage eligible applicants to review the following technical assistance resources on evaluation:

(1) What Works Clearinghouse Procedures and Standards Handbook: *http://ies.ed.gov/ncee/wwc/references/*

[12] *See* What Works Clearinghouse Procedures and Standards Handbook (Version 2.1, September 2011), which is available at: *http://ies.ed.gov/ncee/wwc/DocumentSum.aspx?sid=19.*

idocviewer/doc.aspx?docid=19&tocid=1; and

(2) IES/NCEE Technical Methods papers: *http://ies.ed.gov/ncee/tech_methods/*.

2. *Review and Selection Process:* As described earlier in this notice, before making awards, we will screen applications submitted in accordance with the requirements in this notice to determine whether applications have met eligibility and other requirements. This screening process may occur at various stages of the process; applicants that are determined ineligible will not receive a grant, regardless of peer reviewer scores or comments.

We will use independent peer reviewers with varied backgrounds and professions, including pre-kindergarten-12 teachers and principals, college and university educators, researchers and evaluators, social entrepreneurs, strategy consultants, grant makers and managers, and others with education expertise for the peer review process. All reviewers will be thoroughly screened for conflicts of interest to ensure a fair and competitive review process.

Peer reviewers will read, prepare a written evaluation, and score the assigned applications, using the selection criteria provided in this notice. For Validation grant applications, the Department intends to conduct a single tier review. If an eligible applicant has chosen to address either of the first two competitive preference priorities (Improving Cost-Effectiveness and Productivity or Enabling Broad Adoption of Effective Practices) in order to earn competitive preference priority points, reviewers will review and score those competitive preference priorities. If competitive preference priority points are awarded, those points will be included in the eligible applicant's overall score. If an eligible applicant has chosen to address the last competitive preference priority (Supporting Novice i3 Applicants) to earn competitive preference priority points, the Department will review its list of previous i3 grantees in scoring this competitive preference priority.

We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

Finally, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The overall purpose of the i3 program is to expand the implementation of, and investment in, innovative practices that are demonstrated to have an impact on improving student achievement or student growth for high-need students. We have established several performance measures for the i3 Validation grants.

Short-term performance measures: (1) The percentage of grantees that reach their annual target number of students as specified in the application; (2) the percentage of programs, practices, or strategies supported by a Validation grant with ongoing well-designed and independent evaluations that will provide evidence of their effectiveness at improving student outcomes; (3) the percentage of programs, practices, or strategies supported by a Validation grant with ongoing evaluations that are providing high-quality implementation data and performance feedback that allow for periodic assessment of progress toward achieving intended outcomes; and (4) the cost per student actually served by the grant.

Long-term performance measures: (1) The percentage of grantees that reach the targeted number of students specified in the application; (2) the percentage of programs, practices, or strategies supported by a Validation grant that implement a completed well-designed, well-implemented and independent evaluation that provides evidence of their effectiveness at improving student outcomes; (3) the percentage of programs, practices, or strategies supported by a Validation grant with a completed well-designed, well-implemented and independent evaluation that provides information about the key elements and the approach of the project so as to facilitate replication or testing in other settings; and (4) the cost per student for programs, practices, or strategies that were proven to be effective at improving educational outcomes for students.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is

consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Carol Lyons, U.S. Department of Education, 400 Maryland Avenue SW., Room 4W203, Washington, DC 20202–5930. Telephone: (202) 453–7122. FAX: (202) 205–5631 or by email: *i3@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: April 30, 2013.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2013–10466 Filed 5–2–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Availability; Draft Environmental Impact Statement for the FutureGen 2.0 Project

AGENCY: U. S. Department of Energy.

ACTION: Notice of availability and public hearing.

SUMMARY: The U.S. Department of Energy (DOE) announces the availability of the *Draft Environmental Impact Statement for the FutureGen 2.0 Project* (DOE/EIS–0460D) for public review and comment, as well as the date, location, and time for a public hearing. The draft environmental impact statement (EIS) analyzes the potential impacts associated with the FutureGen 2.0 Project (FutureGen 2.0), which would be designed, constructed, operated, and partially funded by the FutureGen Industrial Alliance, Inc. (Alliance). In addition to Alliance funding, FutureGen 2.0 may receive approximately $1 billion in federal financial assistance under the American Recovery and Reinvestment Act (ARRA).

DOE prepared this draft EIS in accordance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.), the Council on Environmental Quality regulations that implement the procedural provisions of NEPA (40 CFR parts 1500–1508), DOE's procedures implementing NEPA (10 CFR part 1021), and DOE's procedures for compliance with floodplain and wetland review requirements (10 CFR part 1022).

DATES: DOE invites the public to comment on the draft EIS during the public comment period, which ends June 17, 2013. DOE will consider all comments postmarked or received during the public comment period when preparing the final EIS and will consider late comments to the extent practicable.

DOE will hold a public hearing on May 21, 2013, at Jacksonville High School, 1211 N. Diamond Street, Jacksonville, Illinois. An informational session will be held from 5:00 p.m. to 6:00 p.m., preceding the formal presentations and comment period from 6:00 p.m. to approximately 8:00 p.m. See the PUBLIC HEARING section for details on the hearing process.

ADDRESSES: Requests for information about this draft EIS or for a paper copy should be directed to: Mr. Cliff Whyte, M/S: I07, National Energy Technology Laboratory, 3610 Collins Ferry Road, P.O. Box 880, Morgantown, WV 26507–0880.

Additional information about the draft EIS may also be requested by electronic mail at *cliff.whyte@netl.doe.gov,* by telephone at (304) 285–2098, or by toll-free telephone at 1–800–432–8330, extension 2098. The draft EIS will be available at *http://energy.gov/nepa.* Copies of the draft EIS are also available for review at the locations listed in the AVAILABILITY OF THE DRAFT EIS section of this notice.

Written comments on the draft EIS can be mailed or sent electronically to Mr. Whyte at the addresses noted above. Written comments may also be submitted by fax to (304) 285–4403. Oral comments on the draft EIS will be accepted during the public hearing scheduled for the date and location provided in the **DATES** section of this notice.

FOR FURTHER INFORMATION CONTACT: For further information on the proposed project or the draft EIS, please contact: Mr. Cliff Whyte (see **ADDRESSES**). For general information regarding DOE's NEPA process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; Telephone: (202) 586–4600; Fax: (202) 586–7031. You may also call Ms. Borgstrom at (800) 472–2756.

SUPPLEMENTARY INFORMATION: DOE proposes to provide financial assistance (approximately $1 billion), through two cooperative agreements, to the Alliance for its proposed FutureGen 2.0 Project. FutureGen 2.0 is a public-private partnership formed for the purpose of developing and sharing the cost of the world's first commercial-scale oxy-combustion electricity generation plant integrated with carbon dioxide (CO_2) capture and storage. Babcock & Wilcox Power Generation Group, Inc. and Air Liquide Process and Construction, Inc., among others, would participate in the project by supplying technology, major components, and construction services.

The project would use oxy-combustion technology to generate electric power and would capture CO_2 for permanent storage underground. The plant would generate 168 megawatts (MW) (gross) of electricity. The Alliance would design and construct the plant to capture at least 90 percent of the CO_2 generated (up to 98 percent could be captured). Captured CO_2 would be transported through a 30-mile pipeline to a facility where it would be injected into the Mount Simon formation for permanent storage. This saline rock formation is approximately 4,000–4,500 feet below ground. The project would be designed to capture, transport, and inject approximately 1.1 million metric tons of CO_2 annually, or a total of approximately 33 million metric tons over 30 years of operation. The Alliance would also construct and operate a visitor and research center and training facilities related to carbon capture and

storage in the vicinity of Jacksonville, Illinois. The DOE-funded demonstration period would last for 56 months, from the start of operations (July 2017) through February 2022, but the plant is expected to continue commercial operations after this date.

The oxy-combustion plant would be built on a 263-acre existing power plant site in Morgan County, Illinois, approximately one mile south of the Village of Meredosia. Ameren Energy Resources (Ameren) has agreed to sell to the Alliance the assets at the Meredosia Energy Center that are necessary for the FutureGen 2.0 Project. These assets include Unit 4, which was constructed in 1975. The Unit 4 steam turbine, material and fuel handling facilities, process water sources, cooling systems, high-voltage interconnection lines, and certain other facilities would be used for the new plant. Ameren would continue to own the three other electricity generation units at the Meredosia Energy Center. Operation of these units has been suspended since 2011.

The CO_2 storage site would be located 30 miles east of the plant site, on the eastern side of Morgan County. A new 12-inch diameter pipeline would be sited and constructed using an 80-foot construction right-of-way and a 50-foot permanent right-of-way. The Alliance has identified two possible routes for the pipeline and has proposed to use the route that would minimize impacts to landowners and the environment. The Alliance has not identified a final location for the proposed injection wells, but has identified an approximately 5,300-acre site in which the wells would be located and under which the CO_2 would be permanently stored. Up to 25 acres of land would be used for the injection facilities, associated infrastructure and buildings, and access roads.

The draft EIS evaluates the potential impacts of the proposed project, connected actions, and reasonable alternatives. Because the proposed project may affect wetlands, the draft EIS includes an assessment of impacts to wetlands in accordance with DOE's regulations under Compliance with Floodplains and Wetlands Environmental Review Requirements (10 CFR part 1022).

DOE analyzed two alternatives in the draft EIS: the proposed action and the no action alternative. Under the proposed action, DOE would provide approximately $1 billion in cost-shared ARRA funding to the proposed project.

Under the no action alternative, DOE would not provide continued funding. Without DOE funding, it is unlikely that the Alliance, or the industry in general, would undertake the utility-scale integration of CO_2 capture and geologic storage with a coal-fueled power plant using oxy-combustion. Therefore, the no action alternative also represents a ''no-build'' alternative. Without DOE's investment in a utility-scale facility, the development of oxy-combustion repowered plants integrated with CO_2 capture and geologic storage would occur more slowly or not at all.

The draft EIS considers the environmental consequences that may result from the proposed project and describes additional mitigation that might be used to reduce various impacts.

Availability of the Draft EIS: Copies of the draft EIS have been distributed to members of Congress; Native American tribal governments; federal, state, and local officials; and agencies, organizations, and individuals who may be interested or affected. The draft EIS will be available on the Internet at: *http://energy.gov/nepa/nepa-documents*. Copies of the draft EIS are available for public review at the following locations: M–C River Public Library District, 304 Main Street, Meredosia, Illinois; Jacksonville Public Library, 201 West College Avenue, Jacksonville, Illinois; Taylorville Public Library, 121 West Vine Street, Taylorville, Illinois; Arcola Public Library, 407 East Main Street, Arcola, Illinois; and Tuscola Public Library, 112 Sale Street, Tuscola, Illinois. Additional copies also can be requested (see **ADDRESSES**).

Public Hearing: DOE will conduct a public hearing on May 21, 2013 at the Jacksonville High School, Jacksonville, Illinois to obtain comments on the draft EIS. Requests to speak at the public hearing can be made by calling or writing to Mr. Whyte (see **ADDRESSES**). Requests to speak not submitted prior to the hearing will be accepted in the order in which they are received during the hearing. Speakers are encouraged to provide a written version of their oral comments or supplementary materials for the record. Each speaker will be allowed approximately five minutes to present comments. Those speakers who want more than five minutes should indicate the length of time desired in their request. Depending on the number of speakers, DOE may need to limit all speakers to five minutes initially and provide additional opportunities as time permits. Comments will be recorded by a court reporter and will become part of the public record. Oral and written comments will be given equal consideration.

The public hearing will begin at 5:00 p.m. with an informational session. Formal presentations and a formal comment session will begin at approximately 6:00 p.m. DOE will begin the hearing's formal session with overviews of its clean coal program, proposed FutureGen 2.0 Project, and the NEPA process, followed by oral statements by pre-registered speakers. Speakers may be asked questions to help ensure that DOE fully understands their comments. A presiding officer will establish the order of speakers and provide any additional procedures necessary to conduct the hearing.

The public hearing will be accessible to people with disabilities. In addition, any individual needing specific assistance, such as a sign language interpreter or a translator, should contact Mr. Whyte (See **ADDRESSES**) at least 48 hours in advance of the hearing so that arrangements can be made.

Dated: May 1, 2013.

Mark J. Matarrese,

Director, Office of Environment, Security, Safety and Health, Office of Fossil Energy.

[FR Doc. 2013–10662 Filed 5–1–13; 4:15 pm]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Monday, May 20, 2013, 1:00 p.m.–5:15 p.m.; Tuesday, May 21, 2013, 8:30 a.m.–5:00 p.m.

ADDRESSES: North Augusta Community Center, 495 Brookside Avenue, North Augusta, SC 29841.

FOR FURTHER INFORMATION CONTACT: Gerri Flemming, Office of External Affairs, Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC, 29802; Phone: (803) 952–7886.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

Monday, May 20, 2013

1:00 p.m. Combined Committees Session

Order of Committees:

- Facilities Disposition and Site Remediation Committee
- Nuclear Materials Committee
- Waste Management Committee
- Strategic and Legacy Management Committee
- Administrative and Outreach Committee

5:00 p.m. Public Comment Session
5:15 p.m. Adjourn

Tuesday, May 21, 2013

8:30 a.m. Opening, Pledge, Approval of Minutes, Chair and Agency Updates
Public Comment Session
Waste Management Committee Report
Break
Facilities Disposition and Site Remediation Committee Report
Administrative and Outreach Committee Report
Public Comment Session
12:00 p.m. Lunch Break
1:30 p.m. Nuclear Materials Committee Report
Strategic and Legacy Management Committee Report
Public Comment Session
Public Comment Session
5:00 p.m. Adjourn

Public Participation: The EM SSAB, Savannah River Site, 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 Gerri Flemming at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Gerri Flemming's office at the address or telephone listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Gerri Flemming at the address or phone number listed above. Minutes will also be available at the following Web site: *http://cab.srs.gov/srs-cab.html.*

Issued at Washington, DC on April 29, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–10482 Filed 5–2–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CR–005]

Notice of Petition for Waiver of Felix Storch, Inc. (FSI) From the Department of Energy Commercial Refrigerator, Freezer and Refrigerator-Freezer Test Procedure, and Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, notice of grant of interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes a petition for waiver and application for interim waiver from Felix Storch, Inc. (FSI) (hereafter, ''petition'') from the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of commercial refrigerators, freezers and refrigerator-freezers. Today's notice also grants an interim waiver for specific basic models to FSI from portions of the DOE commercial refrigerator, freezer and refrigerator-freezer test procedure. Through this notice, DOE also solicits comments with respect to the FSI petition.

DATES: DOE will accept comments, data, and information with respect to the FSI petition until June 3, 2013.

ADDRESSES: You may submit comments, identified by case number CR–005, by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AS_Waiver_Requests@ee.doe.gov.* Include ''Case No. CR–005'' in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/ 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., Washington, DC, 20024; (202) 586–2945, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except on Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) DOE rulemakings and waivers regarding commercial refrigeration equipment. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 287–6111. Email: *mailto:Jennifer.Tiedeman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part C of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6311–17 (''sections 6311–6317'')), established the Energy Conservation Program for certain industrial equipment, which includes commercial refrigeration equipment, the focus of this notice.[1] Part C specifically includes definitions (42 U.S.C. 6311), energy conservation standards (42 U.S.C. 6313), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), and the authority to require information and reports from manufacturers (42 U.S.C. 6316). With respect to test procedures, Part C authorizes the Secretary of Energy (the Secretary) to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, and estimated annual operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

[1] For editorial reasons, upon codification in the U.S. Code, Part C was re-designated Part A–1.

6314(a)(6)(C) directs DOE to develop test procedures to establish the appropriate rating temperatures for products for which standards will be established under section 6313(c)(5), including (1) Ice-cream freezers; (2) commercial refrigerators, freezers, and refrigerator-freezers with a self-contained condensing unit without doors; and (3) commercial refrigerators, freezers, and refrigerator-freezers with a remote condensing unit. Provisions of section 6314(a)(6) provide DOE with additional authority to establish and amend test procedures for commercial refrigeration equipment. On December 8, 2006, DOE published a final rule adopting test procedures for commercial refrigeration equipment. 71 FR 71340. Title 10 of the Code of Federal Regulations (10 CFR) 431.64 directs manufacturers of commercial refrigerators, freezers and refrigerator-freezers to use certain sections of Air-Conditioning and Refrigeration Institute (ARI) Standard 1200–2006, ''Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets'' when measuring the energy consumption of this equipment. On January 9, 2009, DOE established energy conservation standards for certain classes of commercial refrigerators, effective January 1, 2012, and provided that the test procedures at 10 CFR 431.64 apply to that equipment. 74 FR 1092, 96. The basic models included in FSI's petition are subject to the applicable standards established in that rulemaking and are therefore required to be tested and rated according to the prescribed DOE test procedure as of January 1, 2012.

DOE's regulations for covered products and equipment permit a person to seek a waiver from the test procedure requirements for covered commercial equipment if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. 10 CFR 431.401(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 431.401(b)(1)(iii). The Assistant Secretary for Energy Efficiency and Renewable Energy (Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(4). Waivers remain in effect according to the provisions of 10 CFR 431.401(g).

The waiver process also permits parties submitting a petition for waiver to file an application for interim waiver of the applicable test procedure requirements. 10 CFR 431.401(a)(2). The Assistant Secretary will grant an interim waiver if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. 10 CFR 430.401(e)(3). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner. DOE may extend an interim waiver for an additional 180 days. 10 CFR 430.401(e)(4).

II. Application for Interim Waiver and Petition for Waiver

On January 31, 2013, FSI submitted a petition for waiver from the DOE test procedure applicable to commercial refrigerators, freezers and refrigerator-freezers set forth in 10 CFR 431.64, as well as an application for interim waiver. FSI requested the waiver for certain basic models of its commercial ice cream freezers. This equipment is classified as a commercial ice cream freezer (category (vii)) in the table listing some of the applicable test procedure requirements at 10 CFR 431.64(b)(3)). The applicable test procedure for this equipment is specified in 10 CFR 431.64(b), which incorporates by reference ARI Standard 1200–2006, section 3, ''Definitions,'' section 4, ''Test Requirements,'' section 7, ''Symbols and Subscripts,'' and, section 5, ''Rating Requirements for Remote Commercial Refrigerated Display Merchandisers and Storage Cabinets.''

FSI seeks a waiver and interim waiver from the applicable test procedure under 10 CFR 431.64 on the grounds that its commercial ice cream freezers contain design characteristics that prevent testing according to the current DOE test procedure. Specifically, FSI asserts that particular basic models of commercial ice cream freezers are not able to operate at the specified integrated average temperature of −15 °F, which is required for testing and rating purposes. Instead, FSI asserts that the equipment can only operate from 0 °F to −5 °F. Consequently, FSI requested that DOE grant a waiver from the applicable test procedure, allowing the specified products to be tested at an integrated average temperature of 0 °F, which FSI asserts is an acceptable temperature at which to test the specified basic models. FSI further asserts that these basic models of commercial ice cream freezers are designed to maintain the frozen state of an already frozen product, not to lower the temperature of non-frozen products to the 0 °F to −5 °F operating temperature.

In addition, FSI asserts that the commercial ice cream freezers subject to the petition also have significantly greater volumes per unit of total display area (TDA) than other commercial freezers of a similar type and function. FSI believes the current method of measurement for TDA in the DOE test procedure does not provide a fair and accurate representation of the display area and, therefore, the energy use of its products. FSI is requesting an adjustment or allowance for the measurement of TDA.

The Department articulated its position regarding basic models of commercial refrigeration equipment that are not capable of operating at the required integrated average temperature specified by the DOE test procedure in a test procedure final rule published on February 21, 2012. 77 FR 10292. Specifically, to qualify to use the lowest application product temperature for a certain piece of equipment, a manufacturer should be confident that any case tested under that provision could achieve the specified lowest application product temperature within ±2 °F and could not be tested at the rating temperature (i.e., integrated average temperature specified by the DOE test procedure) for the given equipment class. Further, in the final rule, DOE clarified that, for many pieces of equipment, the lowest application product temperature that should be used for testing will be the lowest temperature setting on the unit's thermostat. 77 FR 10292, 10303 (February 21, 2012).

DOE agrees with FSI's assertion that the basic models identified in its petition cannot be operated at the associated rating conditions currently specified for commercial ice cream freezers in the DOE test procedures given the available data. However, when the temperature knob is set to the coldest setting as described in the February 2012 final rule, DOE has confirmed that the corresponding integrated average temperature achieved during operation by these basic models is approximately −8 °F. In light of this and DOE's position in the February

2012 final rule, DOE has concluded that FSI's request to test these basic models of commercial ice cream freezers at an integrated average temperature of 0 °F is inappropriate. Instead, DOE has determined that the basic models of commercial ice cream freezers listed in FSI's petition should be tested at their lowest application product temperature as defined at 10 CFR 431.62, which corresponds to an integrated average temperature of −8 °F.

DOE rejects FSI's request regarding the use of an alternative calculation and use of the TDA metric to characterize the display area of the commercial ice cream freezer. During the previous rulemaking considering energy conservation standards for commercial refrigeration equipment, TDA was chosen as the display metric because DOE found through its own investigation and research and after receiving public comment on the issue that it is most representative of the heat loads that define the performance of transparent-door equipment—namely radiation and conduction through glass doors. 74 FR 1092 (Jan. 9, 2009). Additionally, since commercial ice cream freezers are used for merchandising in the retail environment, ''face area'' (or area of visible product), which is analogous to TDA, is often used by retailers as the metric of equipment capacity. In the ongoing rulemaking it was reconfirmed that TDA should be the metric of choice. Consequently, DOE is not swayed by FSI's argument and does not believe that the commercial ice cream freezers described in the petition contain design characteristics that make the methods of determination and the TDA metric unrepresentative and is denying this portion of the petition.

Last, FSI has raised two smaller testing issues, which DOE does not believe merit any consideration. First, FSI states that the packets used for testing purposes should be pre-chilled to 0 °F or −5 °F before the test is started, implying that the current test procedure incorporates some type of pull-down period. FSI's assertion is incorrect; the DOE test procedure does not incorporate a pull-down period during the energy consumption test. Instead, the DOE test procedure allows the commercial ice cream freezer to be loaded with room temperature product simulators and filler packages, and requires that the unit run until it has reached steady-state operation at the specified rating temperature for the required stabilization period as defined in sections 3 and 7.4 of ASHRAE 72–2005. The actual energy consumption test does not begin until the stabilized integrated average temperature is reached and maintained. Consequently, FSI's request is denied. Second, FSI asserts that the integrated average temperature must stabilize prior to starting the energy consumption test. DOE agrees with FSI on this point, however, stabilization is currently required by the DOE test procedure, as specified by ASHRAE 72–2005, ''Method of Testing Commercial Refrigerators and Freezers,'' which is incorporated by reference as part of the DOE test procedure. Thus, FSI's request is redundant and unnecessary.

DOE has determined that one portion FSI's petition likely will be granted, and that it is desirable for public policy reasons to grant FSI relief pending a determination on the petition. DOE believes that it is likely FSI's petition will be granted because the commercial ice cream freezers specified in FSI's petition are not able to operate at the specified integrated average temperature of −15 °F ± 2 °F. DOE previously granted interim waivers to Hill PHOENIX Inc. and Hussmann based on a similar issue pertaining to the ability to test certain of their products at the specified integrated average temperature in the DOE test procedure. (77 FR 5782, February 6, 2012, and 77 FR 4800, Jan. 31, 2012, respectively) In addition, DOE has determined that it is desirable that the energy efficiency of this equipment be tested and rated in a manner similar to other commercial refrigeration equipment while DOE considers the petition for waiver. As a result, DOE grants an interim waiver to FSI for the specified models of its commercial refrigerator products. Therefore, *it is ordered that:*

The application for interim waiver filed by FSI is hereby granted for the basic models of commercial ice cream freezer specified in FSI's application, subject to the provisions specified in section III below. FSI shall be required to test and rate the specified basic models according to the alternate test procedure as set forth in section III, ''Alternate test procedure.''

The interim waiver applies to the following basic models:

SCF694, SCF695S, SCF1094, SCF1095S, SCF1494, SCF1495S, SCF1694, SCF1695S, SCF1894, SCF1895S, SCF630, SCF940, SCF1310, and SF1710

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. FSI may submit a petition for waiver and application for interim waiver, as appropriate, for additional models of commercial refrigerators, freezers and refrigerator-freezers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

III. Alternate Test Procedure

As a condition for granting this interim waiver to FSI, DOE requires FSI to test the commercial ice cream freezers specified in its January 31, 2013 petition and listed above according to the test procedure specified at 10 CFR 431.64, except that instead of testing at the required integrated average temperature of −15 ± 2 °F, FSI shall test the specified basic models at an integrated average temperature of −8 ± 2 °F, which DOE confirmed is the lowest temperature at which those models can operate.

DOE notes that it has published an amended test procedure for commercial refrigeration equipment. (77 FR 10292, Feb. 21, 2012). The amended test procedure addresses the testing issue addressed in this waiver, requiring products to be tested at their lowest application product temperature. *Id.* Use of the amended test procedure will be required on the compliance date of any amended standards for this equipment.

IV. Summary and Request for Comments

Through today's notice, DOE announces receipt of FSI's petition for waiver from the test procedures that apply to commercial refrigerators, freezers and refrigerator-freezers. For the reasons articulated above, DOE also grants FSI an interim waiver from those procedures as described above. DOE is publishing FSI's petition for waiver in its entirety pursuant to 10 CFR 431.401(b)(1)(iv). Confidential business information has been redacted from the petition. Furthermore, today's notice includes an alternate test procedure that FSI is required to follow as a condition of its interim waiver.

DOE solicits comments from interested parties on all aspects of the petition. Pursuant to 10 CFR 431.401(d), any person submitting written comments must also send a copy of such comments to the petitioner. The contact information for the petitioner is: Paul Storch, President, Summit Appliance Div., Felix Storch, Inc., 770 Garrison Ave., Bronx, NY 10474. All submissions received must include the agency name and case number for this proceeding. Submit electronic

comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on April 29, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

BILLING CODE 6450–01–P

January 31, 2013

Dr. David Danielson
Assistant Secretary
Energy Efficiency and Renewable Energy
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

RE: ***Application for Interim Waiver pursuant to 10 C.F.R. § 431.401 for basic Summit models:*** SCF694, SCF695S, SCF1094, SCF1095S, SCF1494, SCF1495S, SCF1694, SCF1695S, SCF1894, SCF1895S, SCF630, SCF940, SCF1310, and SF1710

This application for interim waiver applies to the following models: SCF694, SCF695S, SCF1094, SCF1095S, SCF1494, SCF1495S, SCF1694, SCF1695S, SCF1894, SCF1895S, SCF630, SCF940, SCF1310, and SF1710. Jointly, these models are referred to throughout as "Freezers." Further information to support this application is contained in the Petition for Waiver filed simultaneously to this application.

FSI though this Application for Interim Waiver will demonstrate likely success of the Petition for Waiver and address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the Application for Interim Waiver.

CONFIDENTIAL BUSSINESS INFORMATION

Likelihood Success on the Merits

This action was initiated at the suggestion of DOE after discussing the design and operation of certain FSI commercial freezers. During those conversations, FSI and DOE discussed specific changes to the test procedures that would provide a more representative indicator of energy consumption for comparative purposes. It was agreed that FSI would submit this waiver request with an understanding that the waiver would be granted.

Economic Hardship

[redacted]

[redacted]

[redacted]

Ice-cream freezers are part of a suite of products that FSI offers its commercial customers; others include ice-makers, beverage refrigerators, compact commercial refrigerators, wine cellars, beer dispensers, juice mixers, etc.

[redacted]

[redacted]

Conclusion

FSI initiated this Application for Interim Waiver at the suggestion of DOE after the department learned of the unique design and operation of FSI's freezers, and it is FSI's understanding that DOE will grant it a waiver. [redacted] For these reasons, FSI respectfully requests that you grant an interim waiver of the test procedures of 10 C.F.R. § 431.64.

Respectfully submitted,

Paul Storch
Summit Appliance Div. Felix Storch, Inc.
770 Garrison Ave. Bronx, NY 10474 USA
PH. 718-893-3900
FAX: 718-842-3093

January 31, 2013

Building Technologies Program
U.S. Department of Energy
Test Procedure Waiver
1000 Independence Ave., SW
Mailstop EE-2J
Washington, DC 20585-0121

RE: ***Petition for Waiver of Test Procedures for Commercial Freezers pursuant to 10 C.F.R. § 431.401 for basic Summit models:*** SCF694, SCF695S, SCF1094, SCF1095S, SCF1494, SCF1495S, SCF1694, SCF1695S, SCF1894, SCF1895S, SCF630, SCF940, SCF1310, and SF1710

INTRODUCTION

Felix Storch, Inc. (FSI) is a small business engaged in importing, manufacturing, and distributing appliances to niche markets in household, commercial, and medical refrigeration, as well as household cooking and laundry. Located in the South Bronx, New York, [redacted]

[redacted]

This Petition for Waiver regards FSI's commercial ice-cream freezers that are designed to operate at significantly warmer temperatures than specified in the testing requirements for ice-cream freezers (-15 °F), as adopted by the Department of Energy (DOE) at 10 C.F.R. § 431.64. FSI Freezers also have significantly greater volumes per unit of total display area (TDA) than other commercial freezers. This factor, which can increase significantly the space/volume refrigerated, must be considered in any representative test procedures for energy standards. As such, the current regulatory test procedures do not provide a fair and accurate representation of the energy use of the products listed below. For this reason, FSI respectfully requests a waiver of the test procedures provided for commercial refrigeration in 10 C.F.R. § 431 (2012).

In the interim, until due process on the petition is carried out, FSI is filing an Application for Interim Waiver to avoid economic hardship that it might experience absent a favorable determination on its Application for Interim Waiver.

I. Models for which a wavier is requested.

This waiver request applies to the following models: SCF694, SCF695S, SCF1094, SCF1095S, SCF1494, SCF1495S, SCF1694, SCF1695S, SCF1894, SCF1895S, SCF630, SCF940, SCF1310, and SF1710. Jointly, these models are referred to throughout as "Freezers." These Freezers are designed to operate at significantly higher temperatures than the temperature specified in applicable testing temperatures for ice-cream freezers (-15 °F) as adopted by the Department of Energy (DOE) at 10 C.F.R. § 431.64. The Freezers also have significantly greater volumes per unit than other commercial freezers; this is not accounted for adequately by the total display area (TDA) approach. Because of these factors, the current regulatory test procedures do not provide a fair and accurate representation of the energy use of these models.

II. Manufacturers of other basic models marketed in the United States known by FSI to incorporate similar design characteristics.

The manufacturers of other basic models marketed in the United States and known to the FSI to incorporate similar design characteristic(s) are included in Attachment B.

III. The proscribed test procedures evaluate FSI's models in a manner so unrepresentative of their true energy consumption characteristics as to provide materially inaccurate comparative data.

The proscribed test procedures at 10 C.F.R. § 431.64 provide for an evaluation of the Freezers in a manner so unrepresentative of their true energy consumption characteristics as to provide materially inaccurate comparative data. FSI's Freezers are not designed, constructed, or capable of maintaining the -15 °F testing temperature required by DOE

test procedures. The TDA-based formula in the test procedures fails to account for the increased volume of certain freezers with variation in the depth of certain freezers.

A. FSI's Freezers are not designed to operate at -15 °F, and measuring the models' energy consumption while at this temperature would provide data unrepresentative of their true energy consumption.

The uniform test methods for measuring the energy consumption of commercial ice-cream freezers[2] require the measurement of daily energy consumption while operating at - 15 °F. 10 C.F.R. §431.64(b)(2)(vii). FSI's Freezers are not designed, constructed, or capable of maintaining a - 15 °F temperature. FSI's Freezers, as confirmed by the manufacturers, are designed to operate at 0 °F (-18 °C).[3]

Testing FSI's Freezers at – 15 ° F strains the compressor, forcing it to operate continuously in an uncharacteristic manner, leading to inaccurate energy consumption data of a Freezer intended to operate at 0 °F (-18 °C). Consequently, the current test procedures provide unrepresentative data by which to assess FSI's Freezers in a fair and comparative manner.

The Freezers are designed to maintain the frozen state of an already frozen product, not to lower the temperature of non-frozen products to the 0 °F to -5 °F operating temperature.

B. The TDA-based formula that DOE established to test commercial ice-cream freezers fails to account for a variance in freezer volume associated with depth.

The formula that DOE employs to determine the energy conservation standard for ice-cream freezers is based on the total display area (TDA) of the unit. 10 C.F.R. §§ 431.66(a)(3), (d)(1). This approach relies solely on the cross sectional area of the unit and fails to account for increased depth/volume of certain freezers, such as FSI's Freezers.[4] This additional capacity necessitates additional energy consumption to cool

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2 Technically, FSI's Freezers do not conform to DOE's definition of "ice-cream freezer." The regulations define "ice-cream freezer" as a "commercial freezer that is designed to operate at or below −5 °F (−21 °C) and that the manufacturer designs, markets, or intends for the storing, displaying, or dispensing of ice cream." 10 C.F.R. § 431.62. As mentioned above, FSI's Freezers are designed to operate at 0 °F (-18 °C). They do not meet the precise definition of ice-cream freezers and instead more closely resemble the standard for low temperature (freezers) that specifies a 0 °F temperature for testing. *See* Energy Conservation Program for Commercial and Industrial Equipment: Energy Conservation Standards for Commercial Ice-Cream Freezers; Self-Contained Commercial Refrigerators, Commercial Freezers, and Commercial Refrigerator-Freezers Without Doors; and Remote Condensing Commercial Refrigerators, Commercial Freezers, and Commercial Refrigerator Freezers, 74 Fed. Reg. 1,092, 1,104, Table IV-4 (Jan. 9, 2009) (to be codified at 10 C.F.R. pt. 431).

3 *See* Attachment A, certifications from the manufacturers that the Freezers are designed to operate at 0 °F (-18 °C).

4 *See* Attachment C, a schematic of FSI step bottom freezers with calculations.

the larger space. DOE's current approach, which is dependent on the TDA, penalizes freezers with greater depths by requiring them to meet the same efficiency requirements of lower volume models. The standards currently apply the same formula to freezers with different volumes. This results in such unrepresentative data of the Freezer's true energy consumption characteristics as to provide materially inaccurate comparative data.

Consequently, FSI requests that DOE grant a waiver from the test procedures for the measurement of energy consumption of commercial refrigerators, freezers, and refrigerator-freezers at 10 C.F.R. § 431, in accordance with the proposed test procedures outlined in section IV, below.

IV. Alternative procedures known to FSI to evaluate the characteristics of the Freezers in a manner representative of their energy consumption.

FSI has done extensive research and consultations with the manufacturer, including review of the ASHRAE and AHI standards. Based on information provided by the manufacturer, FSI recommends the following procedures to test the Freezers in a representative manner and in accordance with their design parameters:

1. The test should be conducted at an average temperature of 0 °F (-18 °C) pursuant to manufacturer design specifications.
2. The requirement that the volume of the freezer be filled 80% with product should be modified to specify that all fill products must be pre-frozen to 0 °F or colder.
3. To compensate for the depth and bottom contours of the freezer, the energy consumption measured should include an adjustment factor to account for added depth/volume not reflected in the TDA. For example, SCF1094 could be multiplied by 72% to account for increased volume over flat bottom freezers and correspondent smaller volumes despite the same TDA.
4. The freezer temperature should be stabilized to observe compressor cycling before the test is initiated.
5. Assure proper calculation of TDA by the laboratory conducting the test procedures.[5]

A. The test should be conducted at an average temperature of 0 °F (-18 °C) pursuant to manufacturer design specifications.

5 *See, e.g.*, Attachment D, a submittal on the TDA calculation from the manufacturer for model SCF1094.

DOE's use of -15 °F as a temperature test is not appropriate because the definition of "ice-cream freezer" is overly narrow. In its 2009 rulemaking adopting the energy conservation standards for commercial ice-cream freezers, DOE acknowledged that there are similar freezers for many different applications, including specific cabinets for the hardening of ice cream, which do need to operate at these colder temperatures.[6] DOE also acknowledged the differences between freezers intended to pull frozen products down to temperature and storage freezers, but chose -15 °F as the temperature for all testing. However, freestanding cabinets from most of the manufacturers of free-standing commercial freezers operate at temperatures warmer than -15 °F. Designing for -15 °F would result in freezers with thicker walls and larger compressors. These design changes would result in retailers purchasing freezers of a greater size (for a fixed amount of product), resulting in higher industry costs and overall greater use of energy.

Additionally, ARI Standard 1200, 2006, which DOE frequently references in its rulemaking process, further supports the use of a test temperature of 0 °F. In its definition of ice-cream applications in Section 3.14.1, ARI specifies that the product temperature for ice-cream applications is 0.0 °F ±2 °F.[7]

B. Assure all fill material is pre-frozen to 0 °F to - 5 °F.

The Freezers are designed for the storage of already frozen ice-cream at serving temperatures, primarily between 0 °F and -5 °F. None of these Freezers are designed to freeze products that are not already frozen. The use and care manual for the [redacted] freezers states that "[t]he appliance is not suitable for freezing products, but meant as a storage unit for pre-frozen products." As such, the requirement that the volume of the freezer be filled 80% with product should be modified to specify that all fill products must be pre-frozen to 0 °F or colder.

C. The formula, which relies solely on TDA, should be adjusted to account for variations in freezer depths/volumes.

The TDA-centric formula should be adjusted to account for varying freezer volumes. The formula used for setting maximum temperature usage for product class HCT-SC.I of 0.56 X TDA + 0.43 results in the same permissive usage of energy for any freezer with the same cross sectional display area, whether the freezers were shallow inside (as are some with flat bottoms) or extra deep (as are all of those in this waiver petition).

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6 74 Fed. Reg. at 1,103.

7 Air-Conditioning and Refrigeration Institute, STANDARD FOR PERFORMANCE OF COMMERCIAL REFRIGERATED DISPLAY MERCHANDISERS AND STORAGE CABINETS: STANDARD 1200 3 (2006) ("Commercial Refrigerated Display Merchandisers and Storage Cabinets intended for Ice Cream Application shall have an Integrated Average Temperature of all test package averages of 0.0 °F ± 2 °F .").

All self-contained horizontal storage freezers contain a compressor, which is generally mounted on one side of the freezer near the bottom. Some manufacturers place the inner "floor" of the freezer at a level flat across the top of the compressor housing. This is simpler and cheaper to manufacture because it requires only a rectangular inner cabinet. This construction has the same total display area as more expensive freezers that provide for a compressor step. Flat bottom freezers have a smaller volume, allowing for manufacture with smaller components, and thereby resulting in a lower price. All the FSI Freezers have a more expensive construction, which extends the interior to the floor (except for the compressor section).

Because energy usage is a function of overall volume, rather than top cross sectional area, it is reasonable to incorporate an adjustment factor to properly account for deeper, more voluminous freezers. While FSI, as a small business, is not in a position to survey the entire industry, FSI can document, for example, that 28% of the volume of the SCF1094 Freezer is below the compressor height step.[8] It would be justified to apply an adjustment factor to account for the 28% higher energy usage for that model as compared to a flat bottom freezer with the same TDAs. Under current regulation both freezers are subjected to the same allowed maximum energy usage because the TDAs are the same.

D. Before initiating the test, stabilize the temperature and assure proper TDA application.

The freezer temperature should be stabilized to observe compressor cycling before the test is initiated. All FSI Freezers are manually defrosted, and have no defrost cycle. Upon initial start-up, the Freezers will run continuously until the inner liner, components, air, and contents are at the design temperature. The freezer will then cycle on and off to maintain the set point temperature (default is 0 °F). Also, the test procedures should assure proper calculation of TDA by the laboratory conducting the test procedures.[9]

CONCLUSIONS

FSI respectfully requests DOE to waive the test procedures for commercial ice-cream freezers in lieu of a representative test as described above to provide a representative comparison of energy consumption. FSI's Freezers are not designed, constructed, or capable of maintaining the -15 °F testing temperature required by DOE in the energy test procedures for the measurement of energy consumption of commercial ice-cream freezers at 10 C.F.R. § 431.64. FSI's Freezers are also designed to operate at a temperature higher than the temperature used by DOE to define commercial ice-cream freezers. Additionally, the current test procedures do not account for the wide variance in freezer volume. It is materially inaccurate to compare the energy consumption of FSI's Freezers to other shallower models with the same TDA because FSI's models must refrigerate

8 The interior schematic and basis for the calculation is shown in Attachment C.
9 See, e.g., Attachment D, the TDA calculation from the manufacturer for model SCF1094.

28% more space. A more accurate test procedure would measure energy consumption in terms of the amount of energy used to refrigerate each cubic foot of interior space. For these reasons, FSI respectfully requests that DOE waive the test procedures at 10 C.F.R. § 431.64 for FSI's Freezers.

Respectfully submitted,

Paul Storch, President
Summit Appliance Div. Felix Storch, Inc.
770 Garrison Ave. Bronx, NY 10474 USA
PH. 718-893-3900
FAX: 718-842-3093

ATTACHMENT A

[redacted]

Mr. David Case
U.S. D.O.E.
Washington, DC

The following [redacted] models, built by us in [redacted] for Felix Storch, Inc all are designed to operate within the range of 0 degrees F to -5 degrees F and are designed only to display per-chilled contents:

SCF694 / SCF695S
SCF1094 / SCF1095S
SCF1494 / SCF1495S
SCF1694 / SCF1695S
SCF1894 / 1895S

Best regards
[redacted]

[redacted]

Mr. David Case
U.S. D.O.E.
Washington, DC

Date
31/01/13

SCF glass lid freezers

The following models, built by [redacted] for Felix Storch, Inc all are designed to operate within the range of +5 degrees F to -5 degrees F and are designed only to display per-chilled contents:

SCF630
SCF940
SCF1310
SCF1710

Yours faithfully
[redacted]

ATTACHMENT B

Manufacturers of Domestically Marketed Units of the Same Product Type

Turbo Air
1250 Victoria Street
Carson CA 90746

Model TGF-9

Delfield (division of Manitowoc)
980 S. Isabella Road
Mt. PLeasant, MI 48858

Model N227

Atlas Metal Products
1135 N.W. 159th Drive
Miami, FL 33169

Models WDG-2 and WDF-3

Kysor-Warren Division
Heatcraft Worldwide Refrigeration
5201 Transport Boulevard
Columbus, GA 31907

Model LD1DC

Electrolux Home Products
PO Box 212378
Augusta, GA 30917

Frigidaire FCCG Series glass lid commercial freezers

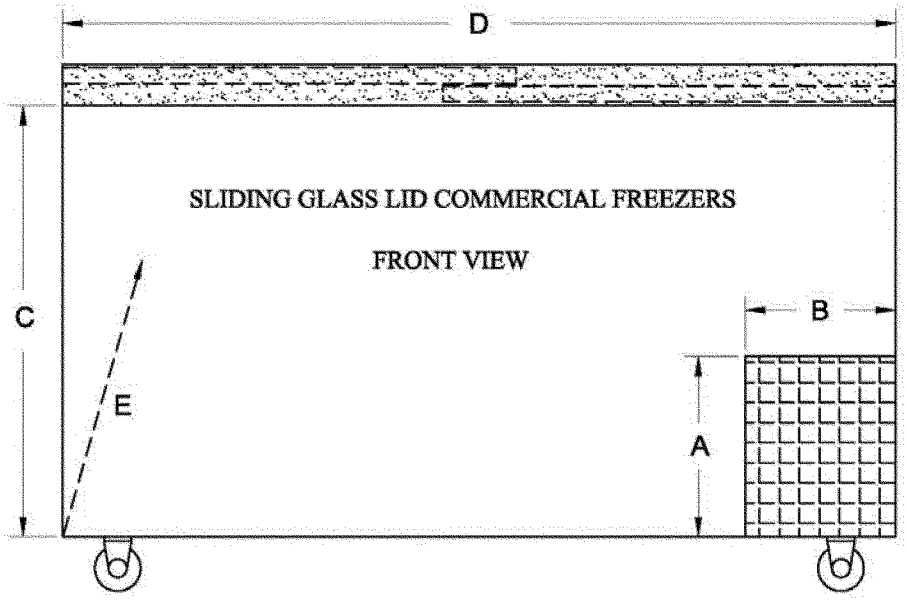
True Manufacturing
2001 East Terra Lane
O'Fallon, MO 63366

TFM series

Masterbilt
908 Highway 15 N.
New Albany, MS 38652

TDM8

ATTACHMENT C



A:	HEIGHT OF COMPRESSOR STEP:	9 7/8 INCHES
B:	WIDTH OF COMPRESSOR STEP:	8 1/4 INCHES
C:	HEIGHT TO LOAD LINE:	23 5/8 INCHES
D:	INTERIOR WIDTH	
	SCF630	24 1/2 INCHES
	SCF940	32 1/4 INCHES
	SCF1310	45 5/8 INCHES
	SCF1710	57 1/2 INCHES
E:	INTERIOR DEPTH OF ALL UNITS	19 7/8 INCHES
	EXTERIOR HEIGHT OF ALL MODELS	35 1/4 INCHES

MODEL NO.
SCF630 TO SCF1710

TYPE: SLIDING GLASS TOP FREEZER

SUMMIT SPECIALTY MAJOR APPLIANCES

FELIX STORCH INC
www.summitappliance.com
(718) 893-3900

DATE: JUNE/18/08

ATTACHMENT D

SCF1094 CALCULATION OF AREA
BELOW COMPRESSOR STEP
(REFER TO DIAGRAM)

OVERALL AREA

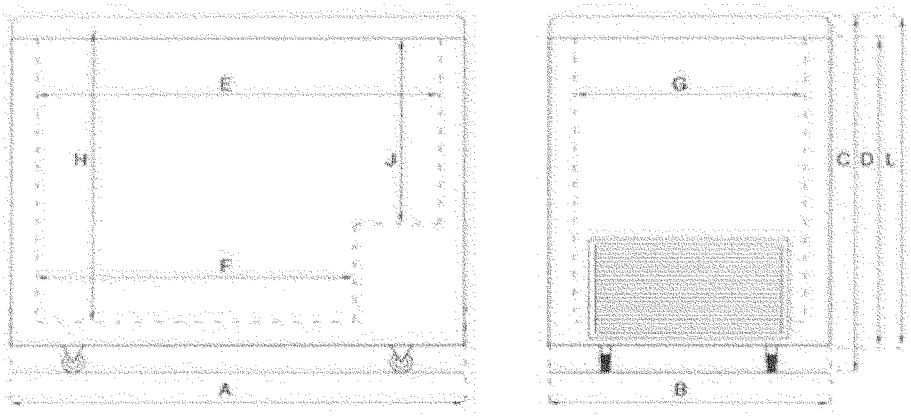
F x H x G + (E – F) x J x G
28.98 x 29.53 x 21.1 + 7.87 x 19.69 x 21.1
18,057 cubic inches + 3,270 cubic inches = 21,327/1728 = 12.3 cu ft

AREA UNDER STEP

F x (H – J) x G
28.98 x 9.84 x 21.1 = 6017 cubic inches = 3.482 cu ft

3.482/12.3 = 28.3 %

Summit Flat Glass Lid Freezer Series					
Model	SCF694	SCF1094	SCF1494	SCF1694	SCF1894
Capacity (cu ft.)	7.40	10.70	13.80	15.50	20.00
A (inch.)	28.50	41.50	51.34	59.21	67.09
B (inch.)	25.75	25.75	25.75	25.75	25.75
C (inch.)	36.06	36.06	36.06	36.06	36.06
D (inch.)	30.71	30.71	30.71	30.71	30.71
E (inch.)	23.86	36.85	46.69	54.57	62.44
F (inch.)	15.98	28.98	38.82	46.69	54.57
G (inch.)	21.10	21.10	21.10	21.10	21.10
H (inch.)	29.53	29.53	29.53	29.53	29.53
J (inch.)	19.69	19.69	19.69	19.69	19.69
L (inch.)	33.31	33.31	33.31	33.31	33.31
Castors	Yes	Yes	Yes	Yes	Yes
Lock	Yes	Yes	Yes	Yes	Yes
Baskets	1	1	2	2	2



[FR Doc. 2013–10480 Filed 5–2–13; 8:45 am]
BILLING CODE 6450–01–C

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1569–002; ER12–21–006; ER10–2783–004; ER10–2784–004; ER11–2855–006; ER10–2791–004; ER10–2792–004; ER10–1564–003; ER10–1565–003; ER10–2795–004; ER10–2798–004; ER10–1575–002; ER10–2799–004; ER10–2801–004; ER11–3727–003; ER10–1566–003; ER12–2413–002; ER11–2062–003; ER10–2812–003; ER10–1291–004; ER10–2843–002; ER11–4307–003; ER12–1711–003; ER10–2846–004; ER12–261–002; ER10–2871–002; ER13–1136–001; ER10–2875–004; ER10–1568–003; ER10–1581–005; ER10–2876–004; ER10–2878–004; ER10–2879–004; ER10–2880–004; ER10–2888–004; ER10–2896–004; ER10–2913–004; ER10–2914–004; ER10–2916–004; ER10–2915–004; ER12–1525–003; ER12–2019–002; ER12–2398–002; ER10–1582–002; ER11–3459–002; ER10–2931–004; ER10–2969–004; ER11–4308–003; ER10–1580–005; ER11–2856–006; ER11–2857–006; ER10–2947–004; ER11–2504–002; ER11–2505–002; ER11–2864–002; ER11–2506–002; ER11–2508–002; ER12–2137–002; ER11–2510–002; ER12–2545–002; ER11–2863–002; ER11–2854–002; ER11–2513–002; ER11–2515–002; ER11–2742–002; ER11–2784–002; ER11–2805–002; ER10–3143–004.

Applicants: NRG Power Marketing LLC, Agua Caliente Solar, LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Avenal Park LLC, Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, Conemaugh Power LLC, Connecticut Jet Power LLC, Cottonwood Energy Company, LP, Devon Power LLC, Dunkirk Power LLC, EL Segundo Energy Center LLC, El Segundo Power, LLC, Energy Alternatives Wholesale, LLC, Energy Plus Holdings LLC, GenCon Devon LLC, GenCon Energy LLC, GenCon Middletown LLC, Green Mountain Energy Company, High Plains Ranch II, LLC, Huntley Power LLC, Independence Energy Group LLC, Indian River Power LLC, Ivanpah Master Holdings, LLC, Keystone Power LLC, Long Beach Generation LLC, Long Beach Peakers LLC, Louisiana Generating LLC, Middletown Power LLC, Montville Power LLC, NEO Freehold-Gen LLC, Norwalk Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG New Jersey Energy Sales LLC, NRG Rockford LLC, NRG Rockford II LLC, NRG Solar Alpine LLC, NRG Solar Avra Valley LLC, NRG Solar Borrego I LLC, NRG Solar Blythe LLC, NRG Solar Roadrunner LLC, NRG Sterlington Power LLC, Oswego Harbor Power LLC, Reliant Energy Northeast LLC, Saguaro Power Company, A Limited Partnership, Sand Drag LLC, Sun City Project, Vienna Power LLC, GenOn Bowline, LLC, GenOn Canal, LLC, GenOn Chalk Point, LLC, GenOn Delta, LLC, GenOn Energy Management, LLC, GenOn Florida, LP, GenOn Kendall, LLC, GenOn Marsh Landing, LLC, GenOn Mid-Atlantic, LLC, GenOn Potomac River, LLC, GenOn Power Midwest, LP, GenOn REMA, LLC, GenOn West, LP, GenOn Wholesale Generation, LP, RRI Energy Services, LLC, Sabine Cogen, LP.

Description: Notice of Non-Material Change in Status of NRG Power Marketing LLC, et al.

Filed Date: 4/24/13.

Accession Number: 20130424–5186.

Comments Due: 5 p.m. ET 5/15/01.

Docket Numbers: ER13–388–002.

Applicants: Sky River LLC.

Description: Sky River LLC Amendment to Shared Facilities Agreement to Request Waiver to be effective 11/16/2012.

Filed Date: 4/24/13.

Accession Number: 20130424–5153.

Comments Due: 5 p.m. ET 5/15/13.

Docket Numbers: ER13–1143–001.

Applicants: Essential Power OPP, LLC.

Description: Amendment of March 21 Filing to be effective 4/25/2013.

Filed Date: 4/25/13.

Accession Number: 20130425–5082.

Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1144–001.

Applicants: Essential Power Rock Springs, LLC.

Description: Amendment of March 21 Filing to be effective 4/25/2013.

Filed Date: 4/25/13.

Accession Number: 20130425–5081.

Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1327–000.

Applicants: Public Service Company of Colorado.

Description: 2013–4–24_WestConnect_Remove_Term_Date to be effective 7/1/2013.

Filed Date: 4/24/13.

Accession Number: 20130424–5086.

Comments Due: 5 p.m. ET 5/15/13.

Docket Numbers: ER13–1328–000.

Applicants: Arizona Public Service Company.

Description: ANPP Hassayampa Switchyard Interconnection Agreement, Amendment 2 to be effective 2/28/2013.

Filed Date: 4/24/13.

Accession Number: 20130424–5097.

Comments Due: 5 p.m. ET 5/15/13.

Docket Numbers: ER13–1329–000.

Applicants: AEP Texas Central Company.

Description: TCC–LCRA Transmission Services IA Amend #5 to be effective 3/27/2013.

Filed Date: 4/24/13.

Accession Number: 20130424–5135.

Comments Due: 5 p.m. ET 5/15/13.

Docket Numbers: ER13–1330–000.

Applicants: AEP Texas Central Company.

Description: TCC-Pedernales Electric Cooperative IA Cancellation to be effective 2/20/2013.

Filed Date: 4/24/13.

Accession Number: 20130424–5154.

Comments Due: 5 p.m. ET 5/15/13.

Docket Numbers: ER13–1331–000.

Applicants: ALLETE, Inc.

Description: Filing of Facilities Construction Agreement to be effective 4/24/2013.

Filed Date: 4/24/13.

Accession Number: 20130424–5155.

Comments Due: 5 p.m. ET 5/15/13.

Docket Numbers: ER13–1332–000.

Applicants: Canadian Hills Wind, LLC.

Description: Canadian Hills Wind, LLC Rate Schedule FERC No. 2 to be effective 6/24/2013.

Filed Date: 4/25/13.

Accession Number: 20130425–5000.

Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1334–000.

Applicants: Power Network New Mexico, LLC.

Description: Power Network New Mexico MBRA Cancellation to be effective 4/26/2013.

Filed Date: 4/25/13.

Accession Number: 20130425–5015.

Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1335–000.

Applicants: PJM Interconnection, L.L.C.

Description: Original Service Agreement No. 3519; Queue No. X4–046 to be effective 3/28/2013.

Filed Date: 4/25/13.

Accession Number: 20130425–5046.

Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1336–000.

Applicants: Public Service Company of New Mexico.

Description: Concurrence with APS Service Agreement No. 193 to be effective 2/28/2013.

Filed Date: 4/25/13.
Accession Number: 20130425–5070.
Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1337–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3524; Queue No. X3–066 to be effective 3/27/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5073.
Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1338–000.
Applicants: PJM Interconnection, L.L.C.
Description: Notice of Cancellation of Original SA No. 3335 in Docket No. ER12–2152–000 to be effective 4/9/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5080.
Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1339–000.
Applicants: Alcan Power Marketing, Inc.
Description: Cancellation of MBR Tariff to be effective 4/26/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5093.
Comments Due: 5 p.m. ET 5/16/13.

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: April 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–10467 Filed 5–2–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–1340–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 2013–04–25 Schedule 2 LBA References to be effective 8/1/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5135.
Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1342–000.
Applicants: Central Hudson Gas & Electric Corporation.
Description: Amendment to Interconnection Agreement No. 260 to be effective 4/25/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5148.
Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1343–000.
Applicants: EDF Trading North America, LLC.
Description: Revised MBR Tariff to be effective 4/26/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5151.
Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1344–000.
Applicants: EDF Industrial Power Services (NY), LLC.
Description: Revised Rate Schedule to be effective 4/26/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5153.
Comments Due: 5 p.m. ET 5/16/13.

Docket Numbers: ER13–1345–000.
Applicants: EDF Industrial Power Services (IL), LLC.
Description: Revised Rate Schedule to be effective 4/26/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5156.
Comments Due: 5 p.m. ET 5/16/13.

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: April 25, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–10468 Filed 5–2–13; 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 corporate filings:

Docket Numbers: EC13–97–000.
Applicants: Calpine Construction Finance Company, L.P., Osprey Energy Center, LLC, CCFC Sutter Energy, LLC, Westbrook Energy Center, LLC.
Description: Joint Application For Approval under Section 203 of the Federal Power Act and Request for Expedited Action of Calpine Construction Finance Company, L.P., et al.
Filed Date: 4/25/13.
Accession Number: 20130425–5222.
Comments Due: 5 p.m. ET 5/16/13.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG13–30–000.
Applicants: Gainesville Renewable Energy Center.
Description: Self-Certification of Exempt Wholesale Generator Status of Gainesville Renewable Energy Center, LLC.
Filed Date: 4/25/13.
Accession Number: 20130425–5162.
Comments Due: 5 p.m. ET 5/16/13.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1894–005; ER10–1901–006; ER10–1882–002; ER10–3025–002; ER10–3036–002; ER10–3039–002; ER10–3042–002.
Applicants: Wisconsin Public Service Corporation, Upper Peninsula Power Company, Wisconsin River Power Company, Integrys Energy Services, Inc., WPS Power Development, LLC, Quest Energy, LLC, Combined Locks Energy Center, LLC.
Description: Notice of Change in Status of Wisconsin Public Service Corporation, et al.
Filed Date: 4/26/13.
Accession Number: 20130426–5156.
Comments Due: 5 p.m. ET 5/17/13.

Docket Numbers: ER11–4267–006; ER11–4270–006; ER11–4269–007; ER11–4268–006; ER11–113–007; ER10–2682–006; ER12–1680–004; ER11–4694–003.
Applicants: Algonquin Energy Services Inc., Algonquin Power Windsor Locks LLC, Algonquin Tinker Gen Co., Algonquin Northern Maine Gen Co., Sandy Ridge Wind, LLC, Granite State Electric Company, Minonk Wind, LLC, GSG 6, LLC.

Description: Notice of Change in Status of Algonquin Energy Services Inc., et al.
Filed Date: 4/26/13.
Accession Number: 20130426–5126.
Comments Due: 5 p.m. ET 5/17/13.

Docket Numbers: ER13–1341–000.
Applicants: Air Energy TCI, Inc.
Description: Air Energy TCI, Inc. submits Petition for Waiver of Tariff Requirements, and Request for Shortened Notice Period and Expedited Review.
Filed Date: 4/25/13.
Accession Number: 20130425–5143.
Comments Due: 5 p.m. ET 5/10/13.

Docket Numbers: ER13–1346–000
Applicants: Mesa Wind Power Corporation.
Description: MBR Tariff to be effective 4/29/2013.
Filed Date: 4/26/13.
Accession Number: 20130426–5001.
Comments Due: 5 p.m. ET 5/17/13.

Docket Numbers: ER13–1347–000.
Applicants: MeadWestvaco Coated Board, LLC.
Description: MeadWestvaco Coated Board, LLC submits tariff filing per 35.12: MeadWestvaco Coated Board, LLC MBR application package to be effective 9/1/2013.
Filed Date: 4/26/13.
Accession Number: 20130426–5079.
Comments Due: 5 p.m. ET 5/17/13.

Docket Numbers: ER13–1348–000.
Applicants: Gainesville Renewable Energy Center.
Description: Rate Schedule No. 1 to be effective 4/26/2013.
Filed Date: 4/26/13.
Accession Number: 20130426–5133.
Comments Due: 5 p.m. ET 5/17/13.

Docket Numbers: ER13–1349–000.
Applicants: WSPP Inc.
Description: WSPP Inc. submits tariff filing per 35.13(a)(2)(iii: Revisions to List of Members to be effective 5/9/2013.
Filed Date: 4/26/13.
Accession Number: 20130426–5154.
Comments Due: 5 p.m. ET 5/17/13.

Docket Numbers: ER13–1350–000.
Applicants: Southwest Power Pool, Inc.
Description: 2198R6 Kansas Power Pool NITSA and NOA to be effective 4/1/2013.
Filed Date: 4/26/13.
Accession Number: 20130426–5175.
Comments Due: 5 p.m. ET 5/17/13.

Docket Numbers: ER13–1351–000.
Applicants: Florida Power Development LLC.
Description: Florida Power Development LLC submits tariff filing per 35.12: Florida Power Development LLC Market-Based Rate Application to be effective 6/25/2013.
Filed Date: 4/26/13.
Accession Number: 20130426–5214.
Comments Due: 5 p.m. ET 5/17/13.

Take notice that the Commission received the following electric reliability filings:
Docket Numbers: RR13–5–000.
Applicants: North American Electric Reliability Corporation.
Description: Petition of the North American Electric Reliability Corporation for Approval of Amendments to Delegation Agreement with Midwest Reliability Organization—Amendments to the MRO Regional Reliability Standards Process Manual.
Filed Date: 4/26/13.
Accession Number: 20130426–5142.
Comments Due: 5 p.m. ET 5/17/13.

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: April 26, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–10469 Filed 5–2–13; 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: RP10–729–000.
Applicants: Portland Natural Gas Transmission System.
Description: Portland Natural Gas Transmission System submits Compliance Filing including pro forma tariff sections and all supporting workpapers.
Filed Date: 4/22/13.
Accession Number: 20130422–5213.
Comments Due: 5 p.m. ET 5/6/13.

Docket Numbers: RP13–817–000.
Applicants: Discovery Gas Transmission LLC.
Description: Discovery Gas Transmission LLC submits Imbalance Cash-out Report for 2012 Activity.
Filed Date: 4/25/13.
Accession Number: 20130425–5053.
Comments Due: 5 p.m. ET 5/7/13.

Docket Numbers: RP13–818–000.
Applicants: East Tennessee Natural Gas, LLC.
Description: ETNG 2013 Map Filing to be effective 6/1/2013.
Filed Date: 4/26/13.
Accession Number: 20130426–5036.
Comments Due: 5 p.m. ET 5/8/13.

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.

Filings in Existing Proceedings

Docket Numbers: RP12–805–001.
Applicants: Ryckman Creek Resources, LLC.
Description: Revised Tariff Records—Unredacted FSS Agreements to be effective 5/25/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5057.
Comments Due: 5 p.m. ET 5/7/13.

Docket Numbers: RP13–802–001.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: Non-Conforming TSAs and Minor Housekeeping Amendment to be effective 5/20/2013.
Filed Date: 4/25/13.
Accession Number: 20130425–5209.
Comments Due: 5 p.m. ET 5/7/13.

Docket Numbers: RP12–792–002.
Applicants: ANR Storage Company.
Description: Compliance to RP12–792 Phase II to be effective 6/1/2013.
Filed Date: 4/26/13.
Accession Number: 20130426–5043.
Comments Due: 5 p.m. ET 5/8/13.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

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: April 26, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–10470 Filed 5–2–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9808–5; Docket ID No. EPA–HQ–ORD–2013–0232]

Draft Plan for Development of the Integrated Science Assessment for Nitrogen Oxides—Health Criteria

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: The U.S. EPA is announcing the availability of the ''Draft Plan for Development of the Integrated Science Assessment for Nitrogen Oxides—Health Criteria.'' The draft document was prepared by the National Center for Environmental Assessment (NCEA) within EPA's Office of Research and Development as part of the review of the primary (health-based) national ambient air quality standards (NAAQS) for nitrogen dioxide (NO_2). The purpose of this draft document is to communicate the plan for the development of the Integrated Science Assessment (ISA) for the health effects of nitrogen oxides (NO_X), which will provide a comprehensive assessment of the current scientific literature pertaining to known and anticipated effects on public health associated with the NO_X in the ambient air.

EPA is releasing this draft document to seek consultation by the Clean Air Scientific Advisory Committee (CASAC) and the public (meeting date and time to be specified in a separate **Federal Register** notice). The draft document does not represent and should not be construed to represent any final EPA policy, viewpoint, or determination. EPA will consider any public comments submitted in response to this notice when revising the draft plan for development of the NO_X ISA.

DATES: The public comment period begins, May 3, 2013, and ends May 31, 2013. Comments must be received on or before May 31, 2013.

ADDRESSES: The ''Draft Plan for Development of the Integrated Science Assessment for Nitrogen Oxides—Health Criteria'' will be available primarily via the Internet on the NCEA home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea* or in the public docket at *http://www.regulations.gov* (Docket ID: EPA–HQ–ORD–2013–0232). A limited number of CD–ROM or paper copies will be available. Contact Ms. Marieka Boyd by phone (919–541–0031), fax (919–541–5078), or email (*boyd.marieka@epa.gov*) to request either of these, and please provide your name, your mailing address, and the document title, ''Draft Plan for Development of the Integrated Science Assessment for Nitrogen Oxides—Health Criteria'' to facilitate processing of your request.

FOR FURTHER INFORMATION CONTACT: For technical information, contact Dr. Molini Patel, NCEA; telephone: 919–541–1492; facsimile: 919–541–1818; or email: *patel.molini@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Information About the Document

Section 108(a) of the Clean Air Act directs the Administrator to identify certain pollutants, which among other things, ''cause or contribute to air pollution, which may reasonably be anticipated to endanger public health or welfare'' and to issue air quality criteria for them. These air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare, which may be expected from the presence of [the] pollutant in the ambient air . . . .'' Under section 109 of the Act, EPA is then to establish NAAQS for each pollutant for which EPA has issued criteria. Section 109(d) of the Act subsequently requires periodic review and, if appropriate, revision of existing air quality criteria to reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. EPA is also to revise the NAAQS, if appropriate, based on the revised air quality criteria.

NO_2 is one of six criteria pollutants for which EPA has established NAAQS. Periodically, EPA reviews the scientific basis for these standards by preparing an ISA (formerly called an Air Quality Criteria Document). The ISA, in conjunction with additional technical and policy assessments, provide the scientific basis for EPA decisions on the adequacy of the current NAAQS and the appropriateness of possible alternative standards. The CASAC, an independent science advisory committee whose review and advisory functions are mandated by Section 109(d)(2) of the Clean Air Act, is charged (among other things) with independent scientific review of EPA's air quality criteria.

On February 10, 2012 (77 FR 7149), EPA formally initiated its current review of the air quality criteria for the health effects of NO_X and the primary (health-based) NO_2 NAAQS, requesting the submission of recent scientific information on specified topics. EPA held a workshop February 29 to March 1, 2013, to discuss with invited scientific experts, key science and policy issues relevant to the review of the health effects of NO_X (77 FR 7149). NCEA has prepared a draft plan for development of the ISA for the health effects of NO_X, which communicates the scope, organization, methodology, and key policy-relevant issues for the ISA. EPA is planning to release the first external review draft of the health effects ISA for NO_X for review by CASAC and the public later on in 2013.

Development of the ISA is one phase of the NAAQS review, and a draft Integrated Review Plan (IRP) is being developed that will characterize all of the phases of the review of the primary NAAQS for NO_2, including the schedule for the entire review, the process for conducting the various phases of the review, and the key policy-relevant science issues that will guide the review. The draft IRP will be released for review by CASAC and the public later on in 2013 and after consideration of CASAC and public comments, a final IRP will be issued in early 2014. The IRP will incorporate a revised plan for ISA development after consideration of CASAC and public comments.

II. How To Submit Technical Comments to the Docket at *www.regulations.gov*

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2013–0232 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: Docket_ORD@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the

Public Reading Room is 202–566–1744. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide comments by mail or hand delivery, please submit three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2013–0232. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *www.regulations.gov*, including any personal information provided, unless a comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information through *www.regulations.gov* or email that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *www.epa.gov/epahome/dockets.htm*.

Docket: Documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

Dated: April 18, 2013.

Debra B. Walsh,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2013–10430 Filed 5–2–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9008–9]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/*.

Weekly receipt of Environmental Impact Statements

Filed 04/22/2013 Through 04/26/2013, Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html*.

SUPPLEMENTARY INFORMATION: Due to EPA's agency-wide furlough day on Friday, May 24th and the Federal holiday on Monday, May 27th, all EISs must be filed with EPA by Thursday, May 23rd by 5:00 pm eastern time for publication under a Notice of Availability in the **Federal Register** for Friday, May 31st.

EIS No. 20130109, Draft EIS, USFS, MT, Stonewall Vegetation Project, Comment Period Ends: 06/17/2013, Contact: Amber Kamps 406–362–7000.

EIS No. 20130110, Final EIS, USA, CA, Presidio of Monterey Real Property Master Plan, Review Period Ends: 06/02/2013, Contact: Lawrence Hirai 210–466–1594.

EIS No. 20130111, Final EIS, NPS, OH, Cuyahoga Valley National Park Trail Management Plan, Review Period Ends: 06/02/2013, Contact: Stan Austin 330–657–2752.

EIS No. 20130112, Draft EIS, FHWA, MO, South County Connector, Comment Period Ends: 07/19/2013, Contact: Raegan Ball 573–638–2752.

EIS No. 20130113, Final EIS, FHWA, OR, OR 62: I–5 to Dutton Road, Contact: Michelle Eraut 503–316–2559.

Under MAP–21 section 1319, FHWA has issued a single FEIS and ROD. Therefore, the 30-day wait/review period under NEPA does not apply to this action.

EIS No. 20130114, Draft EIS, FEMA, CA, East Bay Hills Hazardous Fire Risk Reduction, Comment Period Ends: 06/17/2013, Contact: Alessandro Amaglio 510–627–7027.

EIS No. 20130115, Draft EIS, DOE, IL, FutureGen 2.0 Project, Comment Period Ends: 06/17/2013, Contact: Cliff Whyte 304–285–2098.

EIS No. 20130116, Draft EIS, NPS, TX, Big Thicket National Preserve General Management Plan, Comment Period Ends: 07/01/2013, Contact: Erin Flanagan 303–969–2327.

EIS No. 20130117, Final EIS, USACE, FL, Central Florida Phosphate District Phosphate Mining, Review Period Ends: 06/03/2013, Contact: John Fellows 813–769–7070.

EIS No. 20130118, Draft EIS, BLM, ID, Jump Creek, Succor Creek, and Cow CreekWatersheds Grazing Permit Renewal, Comment Period Ends: 06/17/2013, Contact: Jake Vialpando 208–373–3814.

EIS No. 20130119, Draft EIS, USFS, OR, Mt. Hood Meadows Parking Improvements (Twilight Parking Lot and Sunrise Maintenance Shop), Comment Period Ends: 06/17/2013, Contact: Jennie O'Connor Card 541–352–1255.

EIS No. 20130120, Final EIS, USFS, AZ, Rim Lakes Forest Restoration Project, Amendment to the Apache-Sitgreaves National Forests Land and Resource Management Plan, Review Period Ends: 06/03/2013, Contact: Christopher James 928–535–7301.

EIS No. 20130121, Second Draft Supplement, NRC, NH, NUREG–1437, License Renewal of Nuclear Plants, Supplement 46, Regarding Seabrook Station, Comment Period Ends: 06/30/2013, Contact: Lois M. James 301–415–3306.

EIS No. 20130122, Final EIS, MARAD, AL, ADOPTION—Garrows Bend Intermodal Rail, portion of the Choctaw Point Terminal Project, Review Period Ends: 06/03/2013, Contact: Kris Gilson 202–492–0479.

The U.S. Department of Transportation's Maritime Administration (MARAD) has adopted the U.S. Army Corps of Engineers FEIS #20040381, filed 08/10/2004.The MARAD was not a cooperating agency. Therefore, recirculation is necessary under Section 1506.3(b) of the CEQ Regulations.

Amended Notices

EIS No. 20130045, Draft EIS, USACE, 00, Update of the Water Control Manual for the Alabama-Coosa-Tallapoosa River Basin in Georgia and Alabama, Comment Period Ends: 05/31/2013, Contact: Lewis Sumner 251–694–3857. Revision to FR Notice Published 03/01/2013; Extending Comment Period from 05/01/2013 to 5/31/2013.

EIS No. 20130072, Final EIS, FHWA, AR, River Valley Intermodal Facilities, Review Period Ends: 05/13/2013, Contact: Randal Looney 501–324–6430.

The U.S. Department of the Army's Corps of Engineers has adopted the U.S. Department of Transportation's Federal Highway Administration's FEIS #20130072, filed 03/21/2013. The U.S. Army Corps of Engineers was a cooperating agency to the project. Recirculation of the document is not necessary under 1506.3(c) of the CEQ Regulations.

Dated: April 30, 2013.

Cliff Rader,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2013–10537 Filed 5–2–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9808–8]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA''), notice is hereby given of a proposed consent decree, to address a lawsuit filed by Sierra Club in the United States District Court for the District of Columbia: *Sierra Club* v. *Jackson,* No. 12–cv–00347 (D.D.C.). On May 24, 2012, Plaintiff filed a second amended complaint alleging that EPA failed to take final action on specific state implementation plan (''SIP'') submissions or portions of submissions intended to meet applicable infrastructure SIP requirements of CAA section 110(a)(2) for Colorado, Kansas, Missouri, Montana, New Jersey, New York, North Dakota, and Utah with regard to the 2006 $PM_{2.5}$ National Ambient Air Quality Standard (''NAAQS''). The proposed consent decree establishes new deadlines for EPA to take action on the SIP submissions at issue in the lawsuit.

DATES: Written comments on the proposed consent decree must be received by June 3, 2013.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2013–0359, online at *www.regulations.gov* (EPA's preferred method); by email to *oei.docket@epa.gov;* mailed to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, between 8:30 a.m. and 4:30 P.M. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Geoffrey L. Wilcox, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–5601; fax number (202) 564–5603; email address: *wilcox.geoffrey@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The proposed consent decree would resolve a lawsuit filed by the Sierra Club seeking to compel the Administrator to take final action under sections 110(k)(2), (3) and/or (4) of the CAA, 42 U.S.C. 7410(k)(2), (3) and/or (4), to approve or disapprove, in whole or in part, specific ''infrastructure'' SIP submissions for the 2006 $PM_{2.5}$ NAAQS submitted by Colorado, Kansas, Missouri, Montana, New Jersey, New York, North Dakota, and Utah which are identified in Attachment A to the proposed consent decree. By statute, EPA must take action on such a SIP submission within 12 months after EPA determines the submission to be complete, or within 12 months after the submission is deemed complete by operation of law. Because EPA had not taken action on the SIP submissions at issue in this litigation by the statutorily required dates, EPA determined that it was preferable to enter into a consent decree to specify the new date by which EPA would take these actions, rather than have a date imposed by a court.

The proposed consent decree provides that no later than June 13, 2013, EPA shall sign one or more final rules to approve or disapprove, in whole or in part, pursuant to CAA section 110(k)(2), (3) and/or (4), the specific infrastructure SIP submissions for the 2006 $PM_{2.5}$ NAAQS submitted by Colorado, Kansas, Missouri, Montana, New Jersey, New York, North Dakota, and Utah identified in Attachment A to the proposed consent decree. The proposed consent decree also identifies the specific section 110(a)(2) infrastructure SIP elements that EPA must address in the required action for each state.

Within 15 business days following signature of each final rule described in the proposed consent decree, EPA is also required to send the signed notice to the Office of the Federal Register for review and publication in the **Federal Register**. After EPA fulfills all of its obligations under the consent decree, the proposed consent decree provides that this case shall be dismissed with prejudice.

The proposed consent decree also states that the consent decree can be modified by the parties, or by the court following a motion by a party and a response thereto. In addition, the parties agree to seek to resolve informally Sierra Club's claim for litigation costs pursuant to 42 U.S.C. 7604(d), but the court would retain jurisdiction to resolve that claim.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this consent decree should be withdrawn, the terms of the decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2013–0359) contains a copy of the proposed consent decree (including Attachment A). The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334,

1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use the *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2013–10557 Filed 5–2–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9808–6; Docket ID No. EPA–HQ–ORD–2009–0398]

Toxicological Review of Methanol (Non-Cancer): In Support of Summary Information on the Integrated Risk Information System (IRIS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of a public comment period and peer review on the draft non-cancer toxicological review of methanol.

SUMMARY: EPA is announcing a 45-day public comment period and peer review on the draft toxicological review titled ''Toxicological Review of Methanol (Non-Cancer): In Support of Summary Information on the Integrated Risk Information System (IRIS)'' (EPA/635/R–11/001Ba). The public comment period begins on or about May 3, 2013, and ends June 17, 2013. EPA will announce the date, time, and procedures for public participation in the peer review in a separate **Federal Register** Notice, or in an announcement on the IRIS Web site. EPA is releasing this draft assessment for the purpose of public comment and peer review. This draft assessment is not final, as described in EPA's information quality guidelines, and it does not represent and should not be construed to represent Agency policy or views.

DATES: The public comment period on the draft Toxicological Review of Methanol (Non-Cancer) begins on or about May 3, 2013, and ends June 17, 2013. The draft review is posted to the IRIS Web site at *http://www.epa.gov/IRIS.* Comments should be in writing and received by EPA by June 17, 2013. Comments received by June 17, 2013, will be provided to the peer reviewers for their consideration.

ADDRESSES: The draft toxicological review titled ''Toxicological Review of Methanol (Non-Cancer): In Support of Summary Information on the Integrated Risk Information System (IRIS)'' is available primarily via the Internet on the IRIS Web site at *http://www.epa.gov/IRIS.* A limited number of paper copies are available from the Information Management Team (Address: Information Management Team, National Center for Environmental Assessment [Mail Code: 8601P], U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone: 703–347–8561; facsimile: 703–347–8691). If you request a paper copy, please provide your name, mailing address, and the draft assessment title. Comments may be submitted electronically via *http://www.regulations.gov*, by email, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of this notice.

Additional Information: For information on the draft assessment, please contact Jeffrey Gift, Ph.D., U.S. Environmental Protection Agency, National Center for Environmental Assessment, Mail Code B243–01, 109 T.W. Alexander Drive, Durham, NC 27711; telephone: 919–541–4828; facsimile: 919–541–0245; or email: *gift.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The draft toxicological review was prepared by the National Center for Environmental Assessment (NCEA) within the EPA Office of Research and Development (ORD). The public has been provided an opportunity to comment on previous external review drafts of the IRIS toxicological review of methanol. In January 12, 2010, EPA released an external review draft (EPA/635/R–09/013), containing both cancer

and non-cancer analyses, for public comment. EPA later placed this external review on hold pending resolution of issues concerning a specific set of data used in the cancer analysis. On April 18, 2011, EPA released for public comment another external review draft (EPA/635/R–11/001) which contained only a non-cancer analysis. The data and studies used in the non-cancer analysis are unrelated to the issues concerning the cancer analysis. On June 22, 2011, EPA released an addendum to the April 18, 2011, non-cancer external review draft to provide the public an opportunity to comment on the incorporation of several new studies into the analysis. On July 22, 2011, Eastern Research Group (ERG), an EPA contractor for external scientific peer review, convened an independent panel of experts to conduct a public peer review meeting on the non-cancer external review draft of the toxicological review of methanol released on April 18, 2011, (EPA/635/R–11/001) and the addendum released on June 22, 2011.

The current draft toxicological review titled ''Toxicological Review of Methanol (Non-Cancer): In Support of Summary Information on the Integrated Risk Information System (IRIS)'' (EPA/635/R–11/001Ba), which will be posted on NCEA's Web site, has been revised in response to the peer review and public comments received on the external review draft released on April 18, 2011, and the June 22, 2011, addendum. This notice announces a new public comment period on the current revised draft toxicological review in advance of an upcoming peer review and in accordance with applicable information quality guidelines. The external peer review comments and EPA responses on the previous draft assessment are summarized in Appendix A of the draft. EPA is releasing this draft assessment for the purpose of public comment and peer review. This draft assessment is not final, as described in EPA's information quality guidelines, and it does not represent and should not be construed to represent Agency policy or views.

In addition to a second opportunity for public comment announced in this notice, EPA will also schedule a follow-up external letter peer review of the draft toxicological review of methanol and will announce the details of the peer review in an additional **Federal Register** notice or on the IRIS Web site. To the extent possible, the Agency intends the follow-up peer review to be conducted by the same experts that served on the July 22, 2011, peer review panel. The public comments received during the comment period announced in this notice will be provided to the experts that will conduct the follow-up letter peer review. The peer reviewers will be asked whether EPA adequately responded to the comments from the July 22, 2011, peer review panel. The letter peer review will include a public teleconference with a limited opportunity for the public to address the peer reviewers. EPA will announce the date, time and procedures for public participation in the teleconference in a separate **Federal Register** Notice or in an announcement on the IRIS Web site.

II. Information About IRIS

EPA's IRIS is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to chemical substances found in the environment. Through the IRIS Program, EPA provides the highest quality science-based human health assessments to support the Agency's regulatory activities. The IRIS database contains information for more than 540 chemical substances that can be used to support the first two steps (hazard identification and dose-response evaluation) of the risk assessment process. When supported by available data, IRIS provides oral reference doses (RfDs) and inhalation reference concentrations (RfCs) for chronic noncancer health effects and cancer assessments. Combined with specific exposure information, government and private entities use IRIS to help characterize public health risks of chemical substances and thereby support risk management decisions designed to protect public health.

III. How To Submit Comments to the Docket at *http://www.regulations.gov*

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2009–0398, by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *Email: ORD.Docket@epa.gov*.
- *Facsimile:* 202–566–9744.
- *Mail:* Office of Environmental Information (OEI) Docket (Mail Code: 28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460. The telephone number is 202–566–1752. If you provide comments by mail, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide comments by hand delivery, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2009–0398. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless comments include information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comments. If you send email comments directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comments that are placed in the public docket and made available on the Internet. If you submit electronic comments, EPA recommends that you include your name and other contact information in the body of your comments and with any disk or CD–ROM you submit. If EPA cannot read your comments due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comments. Electronic files should avoid the use of special characters and any form of encryption and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA

Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the OEI Docket in the EPA Headquarters Docket Center.

Dated: April 26, 2013.

Cheryl G. Itkin,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2013–10434 Filed 5–2–13; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Notice

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission

DATE AND TIME: Wednesday, May 8, 2013, 9:00 a.m. Eastern Time.

PLACE: Commission Meeting Room on the First Floor of the EEOC Office Building, 131 ''M'' Street NE., Washington, DC 20507.

STATUS: The meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Votes, and
2. Wellness Programs Under Federal Equal Employment Opportunity Laws.

Note: In accordance with the Sunshine Act, the meeting will be open to public observation of the Commission's deliberations and voting. Seating is limited and it is suggested that visitors arrive 30 minutes before the meeting in order to be processed through security and escorted to the meeting room. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides information about Commission meetings on its Web site, eeoc.gov., and provides a recorded announcement a week in advance on future Commission sessions.)

Please telephone (202) 663–7100 (voice) and (202) 663–4074 (TTY) at any time for information on these meetings. The EEOC provides sign language interpretation and Communication Access Realtime Translation (CART) services at Commission meetings for the hearing impaired. Requests for other reasonable accommodations may be made by using the voice and TTY numbers listed above.

CONTACT PERSON FOR MORE INFORMATION: Bernadette B. Wilson, Acting Executive Officer on (202) 663–4077.

Dated: May 1, 2013.

Bernadette B. Wilson,

Acting Executive Officer, Executive Secretariat.

[FR Doc. 2013–10679 Filed 5–1–13; 4:15 pm]

BILLING CODE 6570–01–P

EXPORT-IMPORT BANK

Notice of Open Special Meeting of the Sub-Saharan Africa Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

SUMMARY: The Sub-Saharan Africa Advisory Committee was established by Public Law 105–121, November 26, 1997, to advise the Board of Directors on the development and implementation of policies and programs designed to support the expansion of the Bank's financial commitments in Sub-Saharan Africa under the loan, guarantee, and insurance programs of the Bank. Further, the Committee shall make recommendations on how the Bank can facilitate greater support by U.S. commercial banks for trade with Sub-Saharan Africa.

TIME AND PLACE: Wednesday, May 15, 2013, between 11:00 a.m. and 3:00 p.m. A break for lunch will be at the expense of the attendee. Security processing will be necessary for reentry into the building. The meeting will be held at Ex-Im Bank in the Main Conference Room 327, 811 Vermont Avenue NW., Washington, DC 20571.

Agenda: Presentation on recent developments in Sub-Saharan Africa markets by Ex-Im Bank staff; an update on the Bank's on-going business development initiatives in the region; and Committee discussion of current challenges and opportunities for U.S. exporters.

Public Participation: The meeting will be open to public participation and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If you plan to attend, a photo ID must be presented at the guard's desk as part of the clearance process into the building and you may contact Exa Richards to be placed on an attendee list. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to May 6, 2013, Exa Richards, 811 Vermont Avenue NW., Washington, DC 20571, (202) 565–3455.

FOR FURTHER INFORMATION CONTACT: For further information, contact Exa Richards, 811 Vermont Avenue NW., Washington, DC 20571, (202) 565–3455.

Sharon Whitt,

Director, Information Quality and Records Management.

[FR Doc. 2013–10454 Filed 5–2–13; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: April 29, 2013.

Federal Deposit Insurance Corporation.

Pamela Johnson,

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10476	Douglas County Bank	Douglasville	GA	4/26/2013
10477	Parkway Bank	Lenoir	NC	4/26/2013

[FR Doc. 2013–10478 Filed 5–2–13; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than May 20, 2013.

A. Federal Reserve Bank of Philadelphia (William Lang, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

1. *Gregory M. Shepard,* Bradenton, Florida; to acquire voting shares of Donegal Group Inc., Marietta, Pennsylvania, and thereby indirectly acquire voting shares of Union Community Bank FSB, Lancaster, Pennsylvania.

B. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *Frank Brown Holding, Jr.,* Raleigh, North Carolina, individually and together with Olivia Britton Holding, Raleigh, North Carolina; Frank B. Holding, Sr., Smithfield, North Carolina; Ella Ann Holding, Smithfield, North Carolina; Hope Holding Connell, Raleigh, North Carolina; Carson Holding Brice, Raleigh, North Carolina; and Claire Holding Bristow, Columbia, South Carolina, as a group acting in concert, to retain voting shares of First Citizens BancShares, Inc., and thereby indirectly retain voting shares of First-Citizens Bank & Trust, both in Raleigh, North Carolina.

2. *Hope Holding Connell,* Raleigh, North Carolina, individually and together with Olivia Britton Holding, Raleigh, North Carolina; Frank B. Holding, Sr., Smithfield, North Carolina; Ella Ann Holding, Smithfield, North Carolina; Frank Brown Holding, Jr., Raleigh, North Carolina; Carson Holding Brice, Raleigh, North Carolina; and Claire Holding Bristow, Columbia, South Carolina, as a group acting in concert, to retain voting shares of Southern BancShares (N.C.), Inc., and thereby indirectly retain voting shares of Southern Bank and Trust Company, both in Mount Olive, North Carolina.

3. *Olivia Britton Holding,* Raleigh, North Carolina, individually and together with Frank Brown Holding, Jr., Raleigh, North Carolina; Frank B. Holding, Sr., Smithfield, North Carolina; Ella Ann Holding, Smithfield, North Carolina; Hope Holding Connell, Raleigh, North Carolina; Carson Holding Brice, Raleigh, North Carolina; and Claire Holding Bristow, Columbia, South Carolina, as a group acting in concert, to retain voting shares of First Citizens BancShares, Inc., and thereby indirectly retain voting shares of First-Citizens Bank & Trust Company, both in Raleigh, North Carolina.

Board of Governors of the Federal Reserve System, April 30, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–10490 Filed 5–2–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 20, 2013.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Southwest Bancshares, Inc.,* San Antonio, Texas; to acquire 100 percent of the voting shares of San Antonio Capital & Trust Holdings, LLC, and indirectly acquire San Antonio Capital and Trust Company, LLC, San Antonio Trust Company, LTA, and San Antonio Capital Management, LLC, all in San Antonio, Texas, and thereby engage in trust company functions, pursuant to section 225.28(b)(5), and financial and investment advisory activities, pursuant to section 225.28(b)(6).

Board of Governors of the Federal Reserve System, April 30, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–10488 Filed 5–2–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–0822]

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

National Intimate Partner and Sexual Violence Survey (OMB No. 0920–0822, exp. 11/30/2013)—Revision—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The health burden of Intimate Partner Violence (IPV), Sexual Violence (SV) and stalking are substantial. To address this important public health problem, in 2010, CDC implemented the National Intimate Partner and Sexual Violence Survey (NISVS) which produces national and state level estimates of Intimate Partner Violence (IPV), Sexual Violence (SV) and stalking on an annual basis.

The National Intimate Partner and Sexual Violence Survey (NISVS) is an ongoing, nationally representative survey that assesses experiences of intimate partner violence, sexual violence and stalking among adult women and men in the United States. It measures lifetime victimization for these types of violence as well as victimization in the 12 months prior to taking the survey.

CDC proposes an additional 3 years of data collection for this revision request, which is currently approved under OMB# 0920–0822—expiration date: 11/30/2013. The proposed revision to the National Intimate Partner and Sexual Violence Survey (NISVS) involves testing a newly revised data collection instrument during the calendar year of 2013. The changes to the instrument are twofold: first, the current NISVS survey instrument has been shortened in efforts to decrease the burden on respondents and to develop a core instrument that will be administered on an annual basis. Second, topic specific modules contain questions to produce data that are needed on a regular basis but are not needed annually. The overarching purpose of the information collected has not changed.

A total of 44,896 eligible households will be screened annually; out of the households screened, approximately 35,696 will not consent or agree to participate and 9,200 will complete the survey each year. The survey will be conducted among English and/or Spanish speaking male and female adults (18 years and older) living in the United States.

There are no costs to respondents other than their time. The total estimated annual burden hours are 6,078.

Type of respondent	Form name	Number of responses	Number of responses per respondent	Average burden per response (in hours)
Households	Screened	44,896	1	3/60
	Surveyed	9,200	1	25/60

Ron A. Otten,

Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–10424 Filed 5–2–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–13PX]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery—NEW—Epidemiology and Analysis Program Office, Office of Surveillance and Laboratory Services, Centers for Disease Control and Prevention (CDC).

As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, the CDC has submitted a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et. seq.).

To request additional information, please contact Kimberly S. Lane, Centers for Disease Control and Prevention, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program

performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The Agency received no comments in response to the 60-day notice published in the **Federal Register** on December 22, 2010 (75 FR 80542, pages 80542–80543).

This is a new collection of information. Respondents will be screened and selected from Individuals and Households, Businesses, Organizations, and/or State, Local or Tribal Government. Below we provide CDC's projected annualized estimate for the next three years. There is no cost to respondents other than their time. The estimated annualized burden hours for this data collection activity are 13,933.

Type of collection	Number of respondents	Annual frequency per response	Average number of activities	Hours per response
Online surveys	20,000	1	2	20/60
In person interviews	120	1	2	60/60
Focus groups	120	1	2	90/60

Ron A. Otten,

Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–10435 Filed 5–2–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–276, CMS–339, and CMS–R–282]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title:* Prepaid Health Plan Cost Report; *Use:* Health Maintenance Organizations and Competitive Medical Plans contracting with the Secretary under section 1876 of the Social Security Act are required to submit a budget and enrollment forecast, semi-annual interim report, interim final cost report, and a final certified cost report in accordance with 42 CFR 417.572 through 417.576. Health Care Prepayment Plans contracting with the Secretary under section 1833 of the Social Security Act are required to submit a budget and enrollment forecast, semi-annual interim report, and final cost report in accordance with 42 CFR 417.808 and 417.810. CMS is requesting approval for the reinstatement with change of form CMS–276. The Cost Report outlines the provisions for implementing sections 1876(h) and 1833(a)(1)(A) of the Act. The purposes of the revisions are to implement certain changes associated with the Affordable Care Act, clarify instructions, and update outdated issues within the Cost Report and the Budget Report. *Form Number:* CMS–276 (OCN 0938–0165); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits and not-for-profit institutions; *Number of Respondents:* 77; *Total Annual Responses:* 106; *Total Annual Hours:* 4,372. (For policy questions regarding this collection contact Temeshia Johnson at 410–786–8692. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Medicare Provider Cost Report Reimbursement Questionnaire; *Use:* The purpose of form CMS–339 is to assist the provider in preparing an acceptable cost report and to minimize subsequent contact between the provider and its Medicare Administrative Contractor (MAC). The form provides the basic data necessary to support the information in the cost report.

Exhibit 1 of form CMS–339 contains a series of reimbursement-oriented questions which serve to update information on the operations of the provider. It is arranged topically regarding financial activities such as independent audits, provider organization and operation, etc. The MAC is responsible for the settlement of the Medicare cost report and must determine the reasonableness and the accuracy of the reimbursement claimed. This process includes performing both a desk review of the cost report and an analysis leading to a decision to settle the cost report with or without further audit. The form provides essential information to enable the MAC to make the audit or no audit decision, scope of the audit if one is necessary, and to update the provider documentation (i.e., documentation to support the financial profile of the provider). If the information is not collected, the MAC will have to go onsite to each provider to get this information. Consequently, it is far less burdensome and extremely cost effective to capture this information through the form CMS–339.

Exhibit 2 of form CMS–339 is a listing of bad debts pertaining to uncollectible Medicare deductible and coinsurance amounts. Preparation of the listing is a convenient way for providers to supply the MAC with information needed to determine the allowability of the bad debts for reimbursement. Some items required to determine allowability that are included on this exhibit are patient's

name, dates of service, date first bill sent to beneficiary, and date the collection effort ceased. Supplying the MAC with this information may be all that is required for the MAC to determine whether or not the bad debt is allowable. This too may eliminate a visit to the provider to gather this needed data. *Form Number:* CMS–339 (OCN 0938–0301); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits and not-for-profit institutions; *Number of Respondents:* 23,391; *Total Annual Responses:* 23,391; *Total Annual Hours:* 75,625. (For policy questions regarding this collection contact Christine Dobrzycki at 410–786–3389. For all other issues call 410–786–1326.)

3. *Type of Information Collection Request:* Extension. *Title of Information Collection:* Medicare Advantage Appeals and Grievance Data Disclosure Requirements (42 CFR 422.111). *Use:* Section 1852(c)(2)(C) of the Social Security Act and 42 CFR 422.111(c)(3) require that Medicare Advantage (MA) organizations and demonstrations disclose information pertaining to the number of disputes, and their disposition in the aggregate, with the categories of grievances and appeals to any individual eligible to elect an MA organization who requests this information. MA organizations and demonstrations remain under a requirement to collect and provide this information to individuals eligible to elect an MA organization, we continue to need the same format and form for reporting. *Form Number:* CMS–R–282 (OCN 0938–0778). *Frequency:* Annually and semi-annually. *Affected Public:* Private Sector (business or other for-profit and not-for-profit institutions). *Number of Respondents:* 51,370. *Total Annual Responses:* 52,260. *Total Annual Hours:* 5,414. (For policy questions regarding this collection contact Stephanie Simons at 206–615–2420. 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 June 3, 2013. OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, Email: *OIRA_submission@omb.eop.gov.*

Dated: April 30, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–10530 Filed 5–2–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10146, CMS–10286, CMS–10308, and CMS–10339]

Agency Information Collection Activities: Proposed Collection; 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:* Revision of a currently approved collection. *Title of Information Collection:* Notice of Denial of Medicare Prescription Drug Coverage. *Use:* Section 1860D–4(g)(1) of the Social Security Act, requires that Part D plan sponsors who deny prescription drug coverage must provide a written notice of the denial to the enrollee. The written notice must include a statement, in understandable language, of the reasons for the denial and a description of the appeals process. The Part D denial notice has been revised for clarity and includes new optional language for Part D plan sponsors to use when explaining their denial rationale. Specifically, CMS has added optional language in the denial rationale section of the notice to allow plans to populate text explaining that a drug denied under Part D may be (or is) covered under a different benefit, such as Part B. The instructions have also been changed to guide plans on when to use this optional text. CMS solicits feedback on this new addition as well as other situations where another benefit may cover a drug (i.e. employer group benefits) and what changes to the denial notice may be helpful in addressing those situations. CMS also seeks comment regarding the potential viability and usefulness of developing a combined notice for Part C and Part D, which would allow MA–PD plans that deny a drug under Part D to simultaneously issue an approval letter under Part B. *Form Number:* CMS–10146 (OCN 0938–0976). *Frequency:* Occasionally. *Affected Public:* Private sector (business or other for-profits). *Number of Respondents:* 596. *Total Annual Responses:* 1,497,929. *Total Annual Hours:* 374,482. (For policy questions regarding this collection contact Caroline L Baker at 410–786–0116. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Reinstatement with change of a previously approved information collection; *Title of Information Collection:* Notice of Research Exception under the Genetic Information Nondiscrimination Act; *Use:* Under the Genetic Information Nondiscrimination Act of 2008 (GINA), a plan or issuer may request (but not require) a genetic test in connection with certain research activities so long as such activities comply with specific requirements, including: (i) The research complies with 45 CFR part 46 or equivalent federal regulations and applicable state or local law or regulations for the protection of human subjects in research; (ii) the request for the participant or beneficiary (or in the case of a minor child, the legal guardian of such beneficiary) is made in writing and clearly indicates that compliance with the request is voluntary and that non-compliance will have no effect on eligibility for benefits or premium or contribution amounts; and (iii) no genetic information collected or acquired will be used for underwriting purposes. The Secretary of Labor or the Secretary of Health and Human Services is required to be notified if a group health plan or health insurance issuer intends to claim the research exception permitted under Title I of GINA. Nonfederal governmental group health plans and issuers solely in the

individual health insurance market or Medigap market will be required to file with the Centers for Medicare & Medicaid Services (CMS). The Notice of Research Exception under the Genetic Information Nondiscrimination Act is a model notice that can be completed by group health plans and health insurance issuers and filed with either the Department of Labor or CMS to comply with the notification requirement. *Form Number:* CMS–10286 (OCN: 0938–1077); *Frequency:* On Occasion; *Affected Public:* state, Local, or Tribal Governments, Private Sector; *Number of Respondents:* 2; *Number of Responses:* 2; *Total Annual Hours:* 0.5. (For policy questions regarding this collection, contact Usree Bandyopadhyay at 410–786–6650. For all other issues call (410) 786–1326.)

3. *Type of Information Collection Request:* Revision of a currently approved collection. *Title of Information Collection:* Parts C and D Complaints Resolution Performance Measures. *Use:* CMS seeks to conduct a survey as part of the Part C and D Complaints Resolution Performance Measure project. The purpose of the project is to develop and support implementation of internal monitoring tools for the Medicare Advantage (Part C) and Prescription Drug (Part D) program that represents, from the beneficiary's perspective, the way in which plans handle complaints. The data collection is necessary because a survey is the only way to collect information about the resolution process from the beneficiary's perspective. Currently, there is no other data source that collects such information for Part C and Part D Medicare plans. *Form Number:* CMS–10308 (OCN 0938–1107). *Frequency:* Yearly. *Affected Public:* Individuals or households. *Number of Respondents:* 18,210. *Total Annual Responses:* 18,210. *Total Annual Hours:* 3,035. (For policy questions regarding this collection contact Carolyn Scott at 410–786–1190. For all other issues call 410–786–1326.)

4. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Pre-Existing Health Insurance Plan and Supporting Regulations; *Use:* On March 23, 2010, the President signed into law H.R. 3590, the Patient Protection and Affordable Care Act (Affordable Care Act), Public Law 111–148. Section 1101 of the law establishes a ''temporary high risk health insurance pool program'' (which has been named the Pre-Existing Condition Insurance Plan, or PCIP) to provide health insurance coverage to currently uninsured individuals with pre-existing conditions. The law authorizes HHS to carry out the program directly or through contracts with states or private, non-profit entities.

We are requesting an extension of this package because this information is needed to assure that PCIP programs are established timely and effectively. This request is being made based on regulations and guidance that have been issued and contracts which have been executed by HHS with states or an entity on their behalf participating in the PCIP program. PCIP is also referred to as the temporary qualified high risk insurance pool program, as it is called in the Affordable Care Act, but we have adopted the term PCIP to better describe the program and avoid confusion with the existing state high risk pool programs. *Form Number:* CMS–10339 (OMB#: 0938–1100); *Frequency:* Reporting—On occasion; *Affected Public:* state governments; *Number of Respondents:* 51; *Total Annual Responses:* 2,652; *Total Annual Hours:* 36,924. (For policy questions regarding this collection contact Laura Dash at 410–786–8623. 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.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *July 2, 2013:*

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development Attention: Document Identifier/OMB Control Number ___ Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: April 30, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–10522 Filed 5–2–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3110–PN]

Medicare and Medicaid Programs: Application From the Accreditation Commission for Health Care for Continued CMS-Approval of Its Hospice Accreditation Program

AGENCY: Centers for Medicare and Medicaid Services, HHS.

ACTION: Proposed notice.

SUMMARY: This proposed notice acknowledges the receipt of an application from the Accreditation Commission for Health Care (ACHC) for continued recognition as a national accrediting organization for hospices that wish to participate in the Medicare or Medicaid programs.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 3, 2013.

ADDRESSES: In commenting, please refer to file code CMS–3110–PN. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways:

1. *Electronically.* You may submit electronic comments on specific issues in this regulation to *http://www.regulations.gov..* Follow the ''submit a comment'' instructions.

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3110–PN, P.O. Box 8016, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3110–PN, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments to the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT:

Valarie Lazerowich, (410) 786–4750.
Cindy Melanson, (410) 786–0310.
Patricia Chmielewski, (410) 786–6899.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in a hospice, provided certain requirements are met by the hospice. Section 1861(dd) of the Social Security Act (the Act), establishes distinct criteria for facilities seeking designation as a hospice. Regulations concerning provider agreements are located at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are located at 42 CFR part 488. The regulations at 42 CFR part 418, specify the conditions that a hospice must meet to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for hospices.

Generally, to enter into an agreement, a hospice must first be certified by a state survey agency as complying with the conditions or requirements set forth in part 418. Thereafter, the hospice is subject to regular surveys by a state survey agency to determine whether it continues to meet these requirements.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by an approved national accrediting organization that all applicable Medicare conditions are met or exceeded, we will deem those provider entities as having met the requirements. Accreditation by an accrediting organization is voluntary and is not required for Medicare participation.

If an accrediting organization is recognized by the Secretary as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program would be deemed to meet the Medicare conditions. A national accrediting organization applying for approval of its accreditation program under part 488, subpart A, must provide us with reasonable assurance that the accrediting organization requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of accrediting organizations are set forth at § 488.4 and § 488.8(d)(3). The regulations at § 488.8(d)(3) require an accrediting organization to reapply for continued approval of its accreditation program every 6 years or as determined by CMS. The Accreditation Commission for Health Care's (ACHC's) current term of approval for its hospice accreditation program expires November 27, 2013.

II. Approval of Deeming Organizations

Section 1865(a)(2) of the Act and our regulations at § 488.8(a) require that our findings concerning review and approval of a national accrediting organization's requirements consider, among other factors, the applying accrediting organization's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide CMS with the necessary data for validation.

Section 1865(a)(3)(A) of the Act further requires that we publish, within 60 days of receipt of an organization's complete application, a notice identifying the national accrediting body making the request, describing the nature of the request, and providing at least a 30-day public comment period. We have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

The purpose of this proposed notice is to inform the public of ACHC's request for continued CMS approval of its hospice accreditation program. This notice also solicits public comment on whether ACHC's requirements meet or exceed the Medicare conditions of participation for hospices.

III. Evaluation of Deeming Authority Request

ACHC submitted all of the necessary materials to enable us to make a determination concerning its request for continued approval of its hospice accreditation program. This application was determined to be complete on April 26, 2013. Under section 1865(a)(2) of the Act and our regulations at § 488.8 (Federal review of accrediting organizations), our review and evaluation of ACHC will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of ACHC's standards for hospices as compared with CMS' hospice conditions of participation.
- ACHC's survey process to determine the following:

++ ACHC's composition of the survey team, surveyor qualifications, and the ability of the organization to provide continued surveyor training.

++ ACHC's processes compared to those of State agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

++ ACHC's processes and procedures for monitoring a hospice found out of

compliance with ACHC's program requirements. These monitoring procedures are used only when ACHC identifies noncompliance. If noncompliance is identified through validation reviews or complaint surveys, the State survey agency monitors corrections as specified at § 488.7(d).

++ ACHC's capacity to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

++ ACHC's capacity to provide CMS with electronic data and reports necessary for effective validation and assessment of the organization's survey process.

++ ACHC's staff adequacy and other resources, and its financial viability.

++ ACHC's capacity to adequately fund required surveys.

++ ACHC's policies with respect to whether surveys are announced or unannounced, to assure that surveys are unannounced.

++ ACHC's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as CMS may require (including corrective action plans).

IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

Upon completion of our evaluation, including evaluation of comments received as a result of this notice, we will publish a final notice in the **Federal Register** announcing the result of our evaluation.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program; No. 93.773, Medicare—Hospital Insurance Program; and No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 19, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–10421 Filed 5–2–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–9079–N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances—January Through March 2013

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This quarterly notice lists CMS manual instructions, substantive and interpretive regulations, and other **Federal Register** notices that were published from January through March 2013, relating to the Medicare and Medicaid programs and other programs administered by CMS.

FOR FURTHER INFORMATION CONTACT: It is possible that an interested party may need specific information and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing contact persons to answer general questions concerning each of the addenda published in this notice.

Addenda	Contact	Phone Number
I CMS Manual Instructions	Ismael Torres	(410) 786-1864
II Regulation Documents Published in the **Federal Register**	Terri Plumb	(410) 786-4481
III CMS Rulings	Tiffany Lafferty	(410)786-7548
IV Medicare National Coverage Determinations	Wanda Belle	(410) 786-7491
V FDA-Approved Category B IDEs	John Manlove	(410) 786-6877
VI Collections of Information	Mitch Bryman	(410) 786-5258
VII Medicare –Approved Carotid Stent Facilities	Lori Ashby	(410) 786-6322
VIII American College of Cardiology-National Cardiovascular Data Registry Sites	Marie Casey, BSN, MPH	(410) 786-7861
IX Medicare's Active Coverage-Related Guidance Documents	Lori Ashby	(410) 786-6322
X One-time Notices Regarding National Coverage Provisions	Lori Ashby	(410) 786-6322
XI National Oncologic Positron Emission Tomography Registry Sites	Stuart Caplan, RN, MAS	(410) 786-8564
XII Medicare-Approved Ventricular Assist Device (Destination Therapy) Facilities	Marie Casey, BSN, MPH	(410) 786-7861
XIII Medicare-Approved Lung Volume Reduction Surgery Facilities	Marie Casey, BSN, MPH	(410) 786-7861
XIV Medicare-Approved Bariatric Surgery Facilities	Kate Tillman, RN, MAS	(410) 786-9252
XV Fluorodeoxyglucose Positron Emission Tomography for Dementia Trials	Stuart Caplan, RN, MAS	(410) 786-8564
All Other Information	Annette Brewer	(410) 786-6580

I. Background

The Centers for Medicare & Medicaid Services (CMS) is responsible for administering the Medicare and Medicaid programs and coordination and oversight of private health insurance. Administration and oversight of these programs involves the following: (1) Furnishing information to Medicare and Medicaid beneficiaries, health care providers, and the public; and (2) maintaining effective communications with CMS regional offices, state governments, state Medicaid agencies, state survey agencies, various providers of health care, all Medicare contractors that process claims and pay bills, National Association of Insurance Commissioners (NAIC), health insurers, and other stakeholders. To implement the various statutes on which the programs are based, we issue regulations under the authority granted to the Secretary of the Department of Health and Human Services under sections 1102, 1871, 1902, and related provisions of the Social Security Act (the Act) and Public Health Service Act. We also issue various manuals, memoranda, and statements necessary to administer and oversee the programs efficiently.

Section 1871(c) of the Act requires that we publish a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations at least every 3 months in the **Federal Register**.

II. Revised Format for the Quarterly Issuance Notices

While we are publishing the quarterly notice required by section 1871(c) of the Act, we will no longer republish duplicative information that is available to the public elsewhere. We believe this approach is in alignment with CMS' commitment to the general principles of the President's Executive Order 13563 released January 2011 entitled ''Improving Regulation and Regulatory Review,'' which promotes modifying and streamlining an agency's regulatory program to be more effective in achieving regulatory objectives. Section 6 of Executive Order 13563 requires agencies to identify regulations that may be ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand or repeal them in accordance with what has been learned.'' This approach is also in alignment with the President's Open Government and Transparency Initiative that establishes a system of transparency, public participation, and collaboration.

Therefore, this quarterly notice provides only the specific updates that have occurred in the 3-month period along with a hyperlink to the full listing that is available on the CMS Web site or the appropriate data registries that are used as our resources. This information is the most current up-to-date information and will be available earlier than we publish our quarterly notice. We believe the Web site list provides more timely access for beneficiaries, providers, and suppliers. We also believe the Web site offers a more convenient tool for the public to find the full list of qualified providers for these specific services and offers more flexibility and ''real time'' accessibility. In addition, many of the Web sites have listservs; that is, the public can subscribe and receive immediate notification of any updates to the Web site. These listservs avoid the need to check the Web site, as notification of updates is automatic and sent to the subscriber as they occur. If assessing a Web site proves to be difficult, the contact person listed can provide information.

III. How To Use the Notice

This notice is organized into 15 addenda so that a reader may access the subjects published during the quarter covered by the notice to determine whether any are of particular interest. We expect this notice to be used in concert with previously published notices. Those unfamiliar with a description of our Medicare manuals should view the manuals at *http://www.cms.gov/manuals*.

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance, Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.714, Medical Assistance Program).

Dated: April 24, 2013.

Kathleen Cantwell,

Director, Office of Strategic Operations and Regulatory Affairs.

BILLING CODE 4120–01–P

Publication Dates for the Previous Four Quarterly Notices

We publish this notice at the end of each quarter reflecting information released by CMS during the previous quarter. The publication dates of the previous four Quarterly Listing of Program Issuances notices are: February 21, 2012 (77 FR 9931), May 18, 2012 (77 FR 29648), August 17, 2012 (77 FR 49799) and November 9, 2012 (77 FR 67368). For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period along with a hyperlink to the website to access this information and a contact person for questions or additional information.

Addendum I: Medicare and Medicaid Manual Instructions (January through March 2013)

The CMS Manual System is used by CMS program components, partners, providers, contractors, Medicare Advantage organizations, and State Survey Agencies to administer CMS programs. It offers day-to-day operating instructions, policies, and procedures based on statutes and regulations, guidelines, models, and directives. In 2003, we transformed the CMS Program Manuals into a web user-friendly presentation and renamed it the CMS Online Manual System.

How to Obtain Manuals

The Internet-only Manuals (IOMs) are a replica of the Agency's official record copy. Paper-based manuals are CMS manuals that were officially released in hardcopy. The majority of these manuals were transferred into the Internet-only manual (IOM) or retired. Pub 15-1, Pub 15-2 and Pub 45 are exceptions to this rule and are still active paper-based manuals. The remaining paper-based manuals are for reference purposes only. If you notice policy contained in the paper-based manuals that was not transferred to the IOM, send a message via the CMS Feedback tool.

Those wishing to subscribe to old versions of CMS manuals should contact the National Technical Information Service, Department of Commerce, 5301 Shawnee Road, Alexandria, VA 22312 Telephone (703-605-6050). You can download copies of the listed material free of charge at: http://cms.gov/manuals.

How to Review Transmittals or Program Memoranda

Those wishing to review transmittals and program memoranda can access this information at a local Federal Depository Library (FDL). Under the FDL program, government publications are sent to approximately 1,400 designated libraries throughout the United States. Some FDLs may have arrangements to transfer material to a local library not designated as an FDL. Contact any library to locate the nearest FDL. This information is available at http://www.gpo.gov/libraries/

In addition, individuals may contact regional depository libraries that receive and retain at least one copy of most federal government publications, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library. CMS publication and transmittal numbers are shown in the listing entitled Medicare and Medicaid Manual Instructions. To help FDLs locate the materials, use the CMS publication and transmittal numbers. For example, to find the Medicare National Coverage Determination publication titled Transcutaneous Electrical Nerve Stimulation (TENS) for Chronic Low Back Pain (CLBP) use CMS-Pub. 100-03, Transmittal No. 149.

Addendum I lists a unique CMS transmittal number for each instruction in our manuals or program memoranda and its subject number. A transmittal may consist of a single or multiple instruction(s). Often, it is necessary to use information in a transmittal in conjunction with information currently in the manual. For the purposes of this quarterly notice, we list only the specific updates to the list of manual instructions that have occurred in the 3-month period. This information is available on our website at www.cms.gov/Manuals.

Transmittal Number	Manual/Subject/Publication Number
	Medicare General Information (CMS-Pub. 100-01)
00	None
	Medicare Benefit Policy (CMS-Pub. 100-02)
166	Chapter 13 of the Benefit Policy Manual has been reorganized and updated Rural Health Clinic (RHC) and Federally Qualified Health Center (FQHC) Services
167	Expansion of Medicare Telehealth Services for CY 2013 List of Medicare Telehealth Services
169	April 2013 Update of the Hospital Outpatient Prospective Payment System (OPPS) Coverage of Outpatient Therapeutic Services Incident to a Physician's Service Furnished on or after January 1, 2010 Non-Surgical Extended Duration Therapeutic Services

Medicare National Coverage Determination (CMS-Pub. 100-03)	
150	Bariatric Surgery for the Treatment of Morbid Obesity National Coverage Determination, Addition of Laparoscopic Sleeve Gastrostomy (LSG) Bariatric Surgery for Treatment of Morbid Obesity
151	Change of Address for Percutaneous Transluminal Angioplasty (PTA) of the Carotid Artery Concurrent with Stenting Facility Approval and Recertification Letter Submission Percutaneous Transluminal Angioplasty (PTA)
152	Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Blood-Derived Products for Chronic Non-Healing Wounds
Medicare Claims Processing (CMS-Pub. 100-04)	
2627	Fiscal Year (FY) 2013 Inpatient Prospective Payment System (IPPS), Long Term Care Hospital (LTCH) PPS Changes Medicare Code Editor (MCE) Disproportionate Share Hospital (DSH) Policy Changes Effective for Cost Reporting Periods beginning on or after October 1, 2009 Disproportionate Share Hospital (DSH) Policy Changes Effective for Cost Reporting Periods Beginning on or after October 1, 2012
2628	NCD: Transcatheter Aortic Valve Replacement (TAVR) Coding Coding Requirements for TAVR Services Furnished On or After January 2013 Update/Policy Clarification Claims Processing Requirements for TAVR Services on Professional Claims Claims Processing Requirements for TAVR Services for Medicare Advantage (MA) Plan Participants
2629	Updating the VMAP/4D Table with B5 Ocularist Specialty Code Billing for Durable Medical Equipment (DME) and Orthotic/ Prosthetic Devices Provider Billing for Prosthetics and Orthotic Devices
2630	Calendar Year (CY) 2013 Annual Update for Clinical Laboratory Fee Schedule and Laboratory Services Subject to Reasonable Charge Payment
2631	Summary of Policies in the CY 2013 Medicare Physician Fee Schedule (MPFS) Final Rule and the Telehealth Originating Site Facility Fee Payment Amount
2632	CY 2013 Update for Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Fee Schedule Gap-filling DMEPOS Fees
2633	Common Edits and Enhancements Modules (CEM) Code Set Update
2634	Qualified Nonphysician Anesthetist Services Qualified Nonphysician Anesthetist Services Qualified Nonphysician Anesthetists Issuances of UPINs Annual Review of CRNA Certifications Entity or Individual to Whom Fee Schedule is Payable for Qualified Nonphysician anesthetists Anesthesia Fee Schedule Payment for Qualified Nonphysician Anesthetists Conversion Factors Used on or After January 1, 1997 for Qualified Nonphysician Anesthetists Anesthesia Time and Calculation of Anesthesia Time Units Billing Modifiers General Billing Instructions Qualified Nonphysician Anesthetist Special Billing and Paymnet Situations Qualified Nonphysician Anesthetist and an Anesthesiologist in a Single Anesthesia Procedure Payment for Medical or Surgical Services Furnished by CRNAs Conversion Factors for Anesthesia Services of Qualified Nonphysician Anesthetists Furnished on or After January 1, 1992
2635	Emergency Update to the CY 2013 Medicare Physician Fee Schedule Database (MPFSDB)
2636	National Correct Coding Initiative (NCCI) Add-On Codes Replacement of Identical Letter, Dated December 19, 1996 with Subject Line, Correct Coding Initiative Add-On (ZZZ) Codes- ACTION
2637	2013 Durable Medical Equipment Prosthetics, Orthotics, and Supplies Healthcare Common Procedure Coding System (HCPCS) Code Jurisdiction List
2638	Manual Updates to Clarify IRF Claims Processing Inpatient Rehabilitation Facility Prospective Payment System (IRF PPS) Medicare IRF Classification Requirements Criteria That Must Be Met By Inpatient Rehabilitation Facilities Additional Criteria That Must Be Met By Inpatient Rehabilitation Units Verification Process Used to Determine if the Inpatient Rehabilitation Facility Met the New IRFs Classification Criteria Changes in the Status of an IRF Unit New IRF Beds Change of Ownership or Leasing Mergers Retroactive Adjustments For Provisionally Excluded IRFs or IRF Beds Payment Provisions Under IRF PPS Phase-In Implementation Payment Adjustment Factors and Rates Case-Mix Groups Case-Level Adjustments Facility-Level Adjustments Area Wage Adjustments Rural Adjustment Low-Income Patient (LIP) Adjustment: The Supplemental Security Income (SSI) Medicare Beneficiary Data for Inpatient Rehabilitation Facilities (IRFs) Paid Under the Prospective Payment System (PPS) FTE Resident Cap Outliers
2639	Healthcare Common Procedure Coding System (HCPCS) Codes Subject to and Excluded from Clinical Laboratory Improvement Amendments (CLIA) Edits
2640	Issued to a specific audience not posted to Internet/Intranet due to Confidential of Instruction
2641	Bariatric Surgery for the Treatment of Morbid Obesity National Coverage Determination, Addition of Laparoscopic Sleeve Gastrectomy (LSG) General HCPCS Procedure Codes for Bariatric Surgery ICD-9 Procedure Codes for Bariatric Surgery (FIs only)

	ICD-9 Diagnosis Codes for BMI≥35 Claims Guidance for Payment
2642	Hospice Monthly Billing Requirement Frequency of Billing and Same Day Billing
2643	Streamlining the Process for Updating the Abstract Files Used to Price Institutional Claims Optional Method for Outpatient Services: Cost-Based Facility Services Plus 115 Percent Fee Schedule Payment for Professional Services RESERVED Clinical Diagnostic Laboratory Fee Schedule Access to Clinical Diagnostic Lab Fee Schedule Files Institutional Claim Record Layout for Clinical Laboratory Fee Schedule Fee Schedules Used by Medicare Contractors Processing Institutional Claims Institutional Claim Record Layout for the Durable Medical Equipment, Prosthetic, Orthotic and Supply Fee Schedule Institutional Claim Record Layout for Hospice, Radiology and Other Diagnostic Prices and Local HCPCS Codes Institutional Claim Record Layout for the Outpatient Rehabilitation and CORF Services Fee Schedule Institutional Claim Record Layout for the Skilled Nursing Facility Fee Schedule RESERVED Physician Fee Schedule Payment Policy Indicator File Record Layout Institutional Claim Record Layout for the Mammography Fee Schedule Institutional Claim Record Layout for the Ambulance Fee Schedule
2644	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
2645	Issued to a specific audience, not posted to Internet/Intranet/ due to Sensitivity of Instruction
2646	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2647	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
2648	Adjustment to Fiscal Intermediary Shared System (FISS) Consistency Edit to Validate Attending Physician NPI.
2649	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2650	Data Reporting on Home Health Prospective Payment System (HH PPS) Claims HH PPS Claims Input/output Record Layout
2651	Emergency Update to the CY 2013 Medicare Physician Fee Schedule Database (MPFSDB)
2652	Expansion of Medicare Telehealth Services for CY 2013
2653	Summary of Policies in the CY 2013 Medicare Physician Fee Schedule (MPFS) Final Rule and the Telehealth Originating Site Facility Fee Payment Amount
2654	Updates to Claims Processing Instructions Regarding Religious Nonmedical Health Care Instructions (RNHCI) Requirement for RNHCI Election Revocation of RNHCI Election Completion of the Notice of Election for RNHCI Common Working File (CWF) Processing of Elections, Revocations and Cancelled Elections When to Bill for RNHCI Services Required Data Elements on Claims for RNHCI Services RNHCI Claims Processing By the Medicare Contractor with RNCHI Specialty Workload RNHCI Claims Not Billed to Original Medicare Informing Beneficiaries of the Results of RNHCI Claims Processing Billing and Payment of RNHCI Item and Services Furnished in the Home Processing Claims For Beneficiaries With RNHCI Elections by Contractors Without RNHCI Specialty Workloads Recording Determinations of Excepted/Nonexcepted Care on Claim Records Informing Beneficiaries of the Results of Excepted/Nonexcepted Care Determinations by the Non-specialty Contractor
2655	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
2656	Update To Publication 100-04, Claims Processing Instructions For Chapter 12, Non-Physician Practitioners (NPPs) Assistant-at-Surgery Services Physician Assistant (PA) Services Payment Methodology Global Surgical Payments Limitations for Assistant-at-Surgery Services Furnished by Physician Assistants Outpatient Mental Health Treatment Limitation
2657	Expansion of Medicare Telehealth Services for CY 2013 List of Medicare Telehealth Services
2658	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
2659	Instructions for Downloading the Medicare ZIP Code File for July 2013
2660	Healthcare Provider Taxonomy Codes (HPTC) Update, April 2013
2661	April Quarterly Update for 2013 Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Fee Schedule
2662	April 2013 Update of the Ambulatory Surgical Center (ASC) Payment System
2663	April Update to the CY 2013 Medicare Physician Fee Schedule Database (MPFSDB)
2664	April 2013 Update of the Hospital Outpatient Prospective Payment System (OPPS)
2665	Issued to a specific audience not posted to Internet/Intranet due to Confidentiality of Instruction
2666	Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Policy Healthcare Common Procedure Coding System (HCPCS) Codes and Diagnosis Coding Payment Method Place of Service (POS) Professional Claims Medicare Summary Notices (MSNs), Remittance Advice Remark Codes

	(RARCs), Claim Adjustment Reason Codes (CARCS), and Group Codes
2667	April 2013 Integrated Outpatient Code Editor (I/OCE) Specifications Version 14.1
2668	Internet Only Manual (IOM) Update to Payment for Medical or Surgical Services Furnished by CRNAs. This CR rescinds and fully replaces CR 8027. Qualified Nonphysician Anesthetists Services Qualified Nonphysician Anesthetists Issuance of UPINs Annual Review of CRNA Certificates Entity or Individual to Whom Fee Schedule is Payable for Qualified Nonphysician anesthetists Anesthesia Fee Schedule Payment for Qualified Nonphysician Anesthetists Conversion Factors Used on or After January 1, 1997 for Qualified Nonphysician Anesthetists Anesthesia Time and Calculation of Anesthesia Time Units Billing Modifiers General Billing Instructions An Anesthesiologist and Qualified Nonphysician Anesthetist Work Together Qualified Nonphysician Anesthetist Special Billing and Payment Situations Qualified Nonphysician Anesthetist and an Anesthesiologist in a Single Anesthesia Procedure Payment for Medical or Surgical Services Furnished by CRNAs Conversion Factors for Anesthesia Services of Qualified Nonphysician Anesthetists Furnished on or After January 1, 1992.
2669	Quarterly Update to the Correct Coding Initiative (CCI) Edits, Version 19.1, Effective April 1, 2013
2670	Modification to CWF, FISS, MCS and VMS to Return Submitted Information when there is a CWF Name and HIC Number Mismatch
2671	New Waived Tests
2672	Quarterly Update of HCPCS Codes Used for Home Health Consolidated Billing Enforcement
2673	Manual Updates to Clarify IRF Claims Processing Inpatient Rehabilitation Facility Prospective Payment System (IRF PPS) Medicare IRF Classification Requirements Criteria That Must Be Met By Inpatient Rehabilitation Facilities Additional Criteria That Must Be Met By Inpatient Rehabilitation Units Verification Process Used to Determine if the Inpatient Rehabilitation Facility Met the C/New IRFs Classification Criteria Changes in the Status of an IRF Unit New IRF Beds Change of Ownership or Leasing Mergers Retroactive Adjustments For Provisionally Excluded IRFs or IRF Beds Payment Provisions Under IRF PPS Phase-In Implementation Case-Mix Groups Case-Level Adjustments Facility-Level Adjustments Area Wage Adjustments Rural Adjustment Low-Income Patient (LIP) Adjustment: The Supplemental Security Income (SSI)/Medicare Beneficiary Data for Inpatient Rehabilitation Facilities (IRFs) Paid Under the Prospective Payment System (PPS) Teaching Status Adjustment FTE Resident Cap Outliers
2674	Changes to Contractor Designation in Processing Foreign, Emergency and Shipboard Claims Contractors Designated to Process Foreign Claims Source of Part B Claims Designated Contractors
2675	Clinical Laboratory Fee Schedule – Medicare Travel Allowance Fees for Collection of Specimens
Medicare Secondary Payer (CMS-Pub. 100-05)	
90	Inpatient Hospital Claims and Medicare Secondary Payer (MSP) Claims with Medicare Coinsurance Days and/or Medicare Lifetime Reserve Days Occurring in the Third or More Calendar Years Return Codes Installation Part A Processing Requirements Error Resolution Payment Calculation For Inpatient Bills (MSPPAYAI Module)
Medicare Financial Management (CMS-Pub. 100-06)	
215	Update MCS HVSRPARC- Participating Physicians/Suppliers Report- Group Codes
216	Modification/Addition of Group Codes/Specialty Codes Non-Physician Practitioner/Supplier Specialty Codes
217	Notice of New Interest Rate for Medicare Overpayments and Underpayments--2nd qtr. Notification for FY 2013
Medicare State Operations Manual (CMS-Pub. 100-07)	
83	Revisions to Appendix E and Chapter 2 sections 2290-2308 of the State Operations Manual (SOM)
Medicare Program Integrity (CMS-Pub. 100-08)	
447	Medical Review Timeliness Requirements Complex Medical Review
448	Deletion of MR Operations mailbox Contractor Medical Director (CMD)
449	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
450	Update to Chapter 15 of the Program Integrity Manual (PIM) Provider and Supplier Types/Services Mammography Screening Centers Owning and Managing Organizations Owning and Managing Individuals Processing Form CMS-855R Applications Special Program Integrity Procedures Intervening Change of Ownership (CHOW) Returns Rejections

	Non-Certified Suppliers and Individual Practitioners Changes of Information-General Procedures Electronic Fund Transfers (EFT) Application Fees Corrective Action Plans (CAPs) HHA Ownership Changes Deactivations and Reactivations Zone Program Integrity Contractor (ZPIC) Identified Revocations
451	Minor changes to Chapter 1 of the Program Integrity Manual The Affiliated Contractor (AC) and MAC Medical Review Program Provider Self Audits
Medicare Contractor Beneficiary and Provider Communications (CMS-Pub. 100-09)	
00	None
Medicare Quality Improvement Organization (CMS-Pub. 100-10)	
00	None
Medicare End Stage Renal Disease Network Organizations (CMS Pub 100-14)	
00	None
Medicare Managed Care (CMS-Pub. 100-16)	
00	None
Medicare Business Partners Systems Security (CMS-Pub. 100-17)	
00	None
Demonstrations (CMS-Pub. 100-19)	
87	Implementation Support and Payment Processing for the Multi-payer Advanced Primary Care Practice (MAPCP) Demonstration- Processing of Shared Savings Payments for Practices in Pennsylvania
One Time Notification (CMS-Pub. 100-20)	
1162	International Classification of Diseases (ICD)-10 Conversion from ICD-9 and Related Code Infrastructure of the Medicare Shared Systems as They Relate to CMS National Coverage Determinations (NCDs) (CR
1163	Medicare Remit Easy Print (MREP) Enhancement
1164	Implementation of New and Revised Medicare Summary Notice (MSN) Messages and Discontinuation of Obsolete MSN Messages
1165	International Classification of Diseases (ICD)-10 Conversion from ICD-9 and Related Code Infrastructure of the Medicare Shared Systems as They Relate to CMS National Coverage Determinations (NCDs) (CR
1166	Issued to specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
1167	Correction to Common Working File (CWF) A/B Crossover Edit 7272 for Transfer to Home for Home Health Services
1168	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
1169	Modification of Payment Window Edit in the Common Working File (CWF) to Modify Diagnostic Service List
1170	Common Working File (CWF) Informational Unsolicited Response (IUR) or Reject for place of service billed by physician office and either ambulatory surgical center or inpatient hospital, for the same beneficiary, same date of service, and same procedure, based on sequence received of the Part B claim.
1171	Instructions to Contractors for Implementing Section 5506 of the Affordable Care Act (ACA)-Preservation of Resident Cap Positions from Closed Teaching Hospitals-Round 1 and Round 2 Only
1172	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1173	Durable Medical Equipment, Prosthetics, Orthotics, and Supplies Competitive Bidding Program: Correction to the Medicare Summary Notice Message for PEN Items Furnished to Traveling Beneficiaries
1174	Changes to the Laboratory National Coverage Determination (NCD) Software for ICD-10
1175	Issued to specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
1176	Health Insurance Portability and Accountability Act (HIPAA) EDI Front End Updates for July 2013
1177	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1178	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1179	Issued to a specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
1180	Issued to a specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
1181	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1182	Incentive Payment Related to Prior Authorization for Power Mobility Devices (PMD).
1183	Revision to CWF and VMS: Reject or Informational Unsolicited Response (IUR) Edit for Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Provided During an Inpatient Stay
1184	Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) National Competitive Bidding (NCB): Using the "KY" Modifier to Bill for Accessories for Non-NCB Wheelchair Base Units
1185	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1186	FISS Prepayment Review Report
1187	Standardizing the standard - Operating Rules for code usage in Remittance Advice
1188	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1189	Bundled Payments for Care Improvement Model 4 - HI and SMI Payment Attribution and Outlier Payments
1190	Recovery of Annual Wellness Visit (AWV) Overpayments
1191	ICD-10 CR--Updates to National Coverage Determination/Local Coverage
1192	The Inclusion of Veterans Administration (VA) Skilled Nursing Facility (SNF) claims to the VA Medicare Remittance Advice (eMRA) Process-Implementation
1193	Standardizing the Standard - Phase I
1194	Multiple Procedure Payment Reduction (MPPR) for Selected Therapy Services
1195	Inpatient Prospective Payment System (IPPS) Hospital Extensions per the

	American Taxpayer Relief Act of 2012
1196	Outpatient Therapy Functional Reporting Non-Compliance Alerts
1197	Implementation of the Award for Jurisdiction 6 Part A/Part B Medicare Administrative Contractor (J6 A/B MAC
1198	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1199	International Classification of Diseases (ICD)-10 Conversion from ICD-9 and Related Code Infrastructure of the Medicare Shared Systems as they relate to CMS National Coverage Determinations (NCDs)
1200	The Supplemental Security Income (SSI)/Medicare Beneficiary Data for Fiscal Year 2010 for Inpatient Prospective Payment System (IPPS) Hospitals, Inpatient Rehabilitation Facilities (IRFs), and Long Term Care Hospitals (LTCHs)
1201	Implementation of the Award for Jurisdiction E Part A/Part B Medicare Administrative Contractor (JE A/B MAC).
1202	Transition to New Centers for Medicare and Medicaid Services (CMS) Identity Mark
1203	CMS Administrator's Ruling: Part A to Part B Rebilling of Denied Hospital Inpatient Claims
1204	Issued to a specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction

Addendum II: Regulation Documents Published in the Federal Register (January through March 2013)

Regulations and Notices

Regulations and notices are published in the daily **Federal Register**. To purchase individual copies or subscribe to the **Federal Register,** contact GPO at www.gpo.gov/fdsys. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

The **Federal Register** is available as an online database through GPO Access. The online database is updated by 6 a.m. each day the **Federal Register** is published. The database includes both text and graphics from Volume 59, Number 1 (January 2, 1994) through the present date and can be accessed at http://www.gpoaccess.gov/fr/index.html. The following website http://www.archives.gov/federal-register/ provides information on how to access electronic editions, printed editions, and reference copies.

This information is available on our website at: http://www.cms.gov/quarterlyproviderupdates/downloads/Regs-1Q13QPU.pdf

For questions or additional information, contact Terri Plumb (410-786-4481).

Addendum III: CMS Rulings

CMS Rulings are decisions of the Administrator that serve as precedent final opinions and orders and statements of policy and interpretation. They provide clarification and interpretation of complex or ambiguous provisions of the law or regulations relating to Medicare, Medicaid, Utilization and Quality Control Peer Review, private health insurance, and related matters.

The rulings can be accessed at http://www.cms.gov/Rulings/CMSR/list.asp#TopOfPage. For questions or additional information, contact Tiffany Lafferty (410-786-7548).

Addendum IV: Medicare National Coverage Determinations (January through March 2013)

Addendum IV includes completed national coverage determinations (NCDs), or reconsiderations of completed NCDs, from the quarter covered by this notice. Completed decisions are identified by the section of the NCD Manual (NCDM) in which the decision appears, the title, the date the publication was issued, and the effective date of the decision. An NCD is a determination by the Secretary for whether or not a particular item or service is covered nationally under the Medicare Program (title XVIII of the Act), but does not include a determination of the code, if any, that is assigned to a particular covered item or service, or payment determination for a particular covered item or service. The entries below include information concerning completed decisions, as well as sections on program and decision memoranda, which also announce decisions or, in some cases, explain why it was not appropriate to issue an NCD. Information on completed decisions as well as pending decisions has also been posted on the CMS website. For the purposes of this quarterly notice, we list only the specific updates that have occurred in the 3-month period. This information is available at: www.cms.gov/medicare-coverage-database/. For questions or additional information, contact Wanda Belle (410-786-7491).

Title	NCDM Section	Transmittal Number	Issue Date	Effective Date
International Classification of Diseases (ICD)-10 Conversion from ICD-9 and Related Code Infrastructure of the Medicare Shared Systems as They Relate to CMS National Coverage Determinations (NCDs)	100.14 110.4 110.8.1 150.10 180.1 190.1 190.11 190.3 190.5 190.8 20.31 20.32 20.16 20.30 20.31 20.4 20.7 210.10 210.2 210.4 210.41 210.7 220.6 220.4 220.6.16 260.9 260.1 40.1 40.7 50.3	R119OTN	03/15/2013	7/1/2013 and 10/1/14
Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds	270.3	R152NCD	03/08/2013	08/02/2012

Addendum V: FDA-Approved Category B Investigational Device Exemptions (IDEs) (January through March 2013)

Addendum V includes listings of the FDA-approved investigational device exemption (IDE) numbers that the FDA assigns. The listings are organized according to the categories to which the devices are assigned (that is, Category A or Category B), and identified by the IDE number. For the purposes of this quarterly notice, we list only the specific updates to the Category B IDEs as of the ending date of the period covered by this notice and a contact person for questions or additional information. For questions or additional information, contact John Manlove (410-786-6877).

Under the Food, Drug, and Cosmetic Act (21 U.S.C. 360c) devices fall into one of three classes. To assist CMS under this categorization process, the FDA assigns one of two categories to each FDA-approved investigational device exemption (IDE). Category A refers to experimental IDEs, and Category B refers to non-experimental IDEs. To obtain more information about the classes or categories, please refer to the notice published in the April 21, 1997 **Federal Register** (62 FR 19328).

IDE	Device	Start Date
G120280	Strattice Tissue Matrix	01/02/2013
G120286	The Vysis Cll CDX FISH Kit	01/04/2013
G120287	Neural Communication System (NCS)	01/09/2013
G120289	NMARQ Multi-Electrode Pulmonary Vein Isolation Ablation System	01/11/2013
G120291	Transcatheter Valve Therapy (TVT) Registry Assessment of Alternative Access Approaches For Transcatheter Aortic Valve	01/17/2013
G120296	NonInvasive Electrical Stimulation of Acupuncture Points (NESAP)	01/18/2013
G120301	Precision Bead	01/25/2013
G120193	Envista One-Piece Hydrophobic Acrylic Toric Intraocular Lens	01/25/2013
G130003	Gunther Tulip Vena Cava Filter	02/06/2013
G120298	Constellation Catheter	02/08/2013
G120093	The Paradym RF Sonr Cardiac Resynchronization Therapy With Difibrillation Device (Model 9770)	02/13/2013
G130020	Neuro-Thrombectomy Devices	02/21/2013
G130011	Renal Artery Irradiation For Sympathetic Renal Denervation	02/22/2013
G130016	Pediatric Gene Target Analysis Platform	02/22/2013
G120039	Circulite Synergy Circulatory Assist Device	02/22/2013
G120270	Pclitaxel-Coated Percutaneous Transluminal Angioplasty Balloon Catheter	02/22/2013
BB15363	Celution System	02/22/2013
G120228	JUVE'DERM Volift XC	02/26/2013
G120276	Medeor Matrix	02/26/2013
G120239	Nectar HF Feasibility Study	02/26/2013
G130026	SIDUS Stem-Free Shoulder	03/01/2013
G130027	Valiant Mona LSA Thoracic Stent Graft System	03/01/2013
G130030	Cook Zenith Fenestrated Endovascular Graft	03/05/2013
G130028	InnFocus Microshunt Glaucoma Drainage System	03/08/2013
G120115	ON-X Prosthetic Heart Valve	03/08/2013
G120250	Laduscope	03/08/2013
G130032	A Randomized Trial of Routine Aspiraiton Thrombectomy With PCI Versus PCI Alone in Patients with Stemi Undergoing	03/14/2013
G130031	Eon Mini Or Eon Neurostimulation System	03/14/2013
G130035	Wearable Artificial Kidney	03/15/2013
G130041	MRI Guided High Intensity Focused Ultrasound System	03/18/2013
G130043	Liposonix System Model 2	03/21/2013
G130038	Gore Excluder Iliac Branch Endoprosthesis	03/27/2013

G130053	Abbott Realtime Prame	03/27/2013
G120187	Desyne NX Novolimus Eluting Coronary Stent System	03/28/2013
G130051	Evolution Biliary Stent System-Fully Covered	03/28/2013
G130052	Evolution Biliary Stent System-Partially Covered	03/28/2013
G130044	Precision SCS System Adapted For High Rate Spinal Cord Stimulation	03/29/2013

Addendum VI: Approval Numbers for Collections of Information (January through March 2013)

All approval numbers are available to the public at Reginfo.gov. Under the review process, approved information collection requests are assigned OMB control numbers. A single control number may apply to several related information collections. This information is available at www.reginfo.gov/public/do/PRAMain. For questions or additional information, contact Mitch Bryman (410-786-5258).

Addendum VII: Medicare-Approved Carotid Stent Facilities, (January through March 2013)

Addendum VII includes listings of Medicare-approved carotid stent facilities. All facilities listed meet CMS standards for performing carotid artery stenting for high risk patients. On March 17, 2005, we issued our decision memorandum on carotid artery stenting. We determined that carotid artery stenting with embolic protection is reasonable and necessary only if performed in facilities that have been determined to be competent in performing the evaluation, procedure, and follow-up necessary to ensure optimal patient outcomes. We have created a list of minimum standards for facilities modeled in part on professional society statements on competency. All facilities must at least meet our standards in order to receive coverage for carotid artery stenting for high risk patients. For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period. This information is available at: http://www.cms.gov/MedicareApprovedFacilitie/CASF/list.asp#TopOfPage For questions or additional information, contact Lori Ashby (410-786-6322).

Facility	Provider Number	Effective Date	State
The following facilities are new listings for this quarter.			
Providence Memorial Hospital 1625 Medical Center Drive El Paso, TX 79902	450002	02/14/2013	TX
Guadalupe Regional Medical Center 1215 E. Court Street Seguin, TX 78155	450104	02/14/2013	TX
South Bay Hospital 4016 Sun City Boulevard Sun City Center, FL 33573-5256	100259	03/05/2013	FL
McLaren Bay Region 1900 Columbus Avenue Bay City, MI 48708	230041	03/14/2013	MI
Trumbull Memorial Hospital 1350 E. Market Street P.O. Box 1269 Warren, OH 44482-1269	1043526023	03/14/2013	OH
St. Francis Hospital 2122 Manchester Expressway P.O. Box 7000 Columbus, GA 31908-7000	1033228168	03/14/2013	GA
Georgia Regents Medical Center 1120 15th Street Augusta, GA 30912	110034	03/14/2013	GA
Editorial changes (shown in bold) were made to the facilities listed below.			
Mercy Hospital 3663 South Miami Avenue Miami, FL 33133	**100167**	08/26/2005	FL
From: St. Luke's Community Medical **To: St. Luke's The Woodlands Hospital** 71200 St. Luke's Way The Woodlands, TX 77384	450862	02/24/2006	TX
From: Baptist Hospital West **To: Tennova Healthcare-Turkey Creek Medical Center** 10820 Parkside Drive Knoxville, TN 37934	440226	10/06/2006	TN

Addendum VIII: American College of Cardiology's National Cardiovascular Data Registry Sites (January through March 2013)

Addendum VIII includes a list of the American College of Cardiology's National Cardiovascular Data Registry Sites. We cover implantable cardioverter defibrillators (ICDs) for certain clinical indications, as long as information about the procedures is reported to a central registry. Detailed descriptions of the covered indications are available in the NCD. In January 2005, CMS established the ICD Abstraction Tool through the Quality Network Exchange (QNet) as a temporary data collection mechanism. On October 27, 2005, CMS announced that the American College of Cardiology's National Cardiovascular Data Registry (ACC-NCDR) ICD Registry satisfies the data reporting requirements in the NCD. Hospitals needed to transition to the ACC-NCDR ICD Registry by April 2006.

Effective January 27, 2005, to obtain reimbursement, Medicare NCD policy requires that providers implanting ICDs for primary prevention clinical indications (that is, patients without a history of cardiac arrest or spontaneous arrhythmia) report data on each primary prevention ICD

procedure. Details of the clinical indications that are covered by Medicare and their respective data reporting requirements are available in the Medicare NCD Manual, which is on the CMS website at http://www.cms.hhs.gov/Manuals/IOM/itemdetail.asp?filterType=none&filterByDID=99&sortByDID=1&sortOrder=ascending&itemID=CMS014961

A provider can use either of two mechanisms to satisfy the data reporting requirement. Patients may be enrolled either in an Investigational Device Exemption trial studying ICDs as identified by the FDA or in the ACC-NCDR ICD registry. Therefore, for a beneficiary to receive a Medicare-covered ICD implantation for primary prevention, the beneficiary must receive the scan in a facility that participates in the ACC-NCDR ICD registry. The entire list of facilities that participate in the ACC-NCDR ICD registry can be found at www.ncdr.com/webncdr/common

For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period. This information is available by accessing our website and clicking on the link for the American College of Cardiology's National Cardiovascular Data Registry at: www.ncdr.com/webncdr/common. For questions or additional information, contact Marie Casey, BSN, MPH (410-786-7861).

Facility	City	State
The following facilities are new listings for this quarter.		
Cedar Park Regional Medical Center	Cedar Park	TX
Intermountain Primary Children's Medical Center	Salt Lake City	UT
Putnam Community Medical Center	Palatka	FL
Kentucky River Medical Center	Jackson	KY
Southern Hills Medical Center	Nashville	TN
Beverly Hospital - CA	Montebello	CA
Bellevue Medical Center	Bellevue	NE
Via Christi Hospital - Pittsburgh KS	Pittsburg	KS
Platte Valley Medical Center	Brighton	CO
Mercy Hospital Washington East Community	Washington	MO
Laughlin Memorial Hospital	Greeneville	TN
Medical Center of Lewisville	Lewisville	TX
The Western Pennsylvania Hospital	Pittsburgh	PA
Cardiovascular Specialty Care Center	Baton Rouge	LA
Jennings American Legion Hospital	Jennings	LA
The Kingston Hospital	Kingston	NY
Texas Children's Hospital	Houston	TX
Florida Hospital Wesley Chapel	Wesley Chapel	FL
Euclid Hospital	Euclid	OH
California Hospital Medical Center	Los Angeles	CA
McAlester Regional Health Center	McAlester	OK
Lakeway Regional Medical Center	Lakeway	TX
The following facilities are new listings for this quarter.		
Halifax Regional Medical Center	Roanoke Rapids	NC
Henry Ford Health System West Bloomfield	West Bloomfield	MI
Northwest Texas Surgery Center	Amarillo	TX
North Okaloosa Medical Center (CHS)	Crestview	FL
Citizens Memorial Hospital	Bolivar	MO
Integris Grove Hospital	Grove	OK
The following facilities are terminated as of this quarter.		
Sisters of Charity Hospital	Buffalo	NY
Aurora West Allis Memorial Hospital	West Allis	WI
Greene Memorial Hospital	Xenia	OH

Addendum IX: Active CMS Coverage-Related Guidance Documents (January through March 2013)

There are no CMS coverage-related guidance documents published in the January through March 2013 quarter. To obtain the document, visit the CMS coverage website at http://www.cms.gov/medicare-coverage-database/details/medicare-coverage-document-details.aspx?MCDId=23. For questions or additional information, contact Lori Ashby (410-786-6322).

Addendum X: List of Special One-Time Notices Regarding National Coverage Provisions (October through December 2012)

There were no special one-time notices regarding national coverage provisions published in the January through March 2013 quarter. This information is available at www.cms.hhs.gov/coverage. For questions or additional information, contact Lori Ashby (410-786-6322).

Addendum XI: National Oncologic PET Registry (NOPR) (January through March 2013)

Addendum XI includes a listing of National Oncologic Positron Emission Tomography Registry (NOPR) sites. We cover positron emission tomography (PET) scans for particular oncologic indications when they are performed in a facility that participates in the NOPR.

In January 2005, we issued our decision memorandum on **positron emission tomography** (PET) scans, which stated that CMS would cover PET scans for particular oncologic indications, as long as they were performed in the context of a clinical study. We have since recognized the National Oncologic PET Registry as one of these clinical studies. Therefore, in order for a beneficiary to receive a Medicare-covered PET

scan, the beneficiary must receive the scan in a facility that participates in the registry. There were no updates to the listing of National Oncologic Positron Emission Tomography Registry (NOPR) in the January through March 2013 quarter. This information is available at http://www.cms.gov/MedicareApprovedFacilitie/NOPR/list.asp#TopOfPage. For questions or additional information, contact Stuart Caplan, RN, MAS (410-786-8564)

Facility	Provider Number	Effective Date	State
Editorial changes (shown in bold) were made to the facilities listed below.			
Old name: Hematology Oncology Associates of Baton Rouge **New name: OLOL Hospital Inc,.** 4950 Essen Lane Baton Rouge LA 70809	**Old Medicare Prov#: 1861590234** **New Medicare Prov#: 190064**	05/31/2011	LA
Old Name: Rochester Radiology Associates, PC **New Name: Rochester General Imaging Center-No Heights** 1277 Portland Avenue Rochester NY 14621	**Old Med#:19** **New Med#: J100058113**	08/07/2006	NY

Addendum XII: Medicare-Approved Ventricular Assist Device (Destination Therapy) Facilities (January through March 2013)

Addendum XII includes a listing of Medicare-approved facilities that receive coverage for ventricular assist devices (VADs) used as destination therapy. All facilities were required to meet our standards in order to receive coverage for VADs implanted as destination therapy. On October 1, 2003, we issued our decision memorandum on VADs for the clinical indication of destination therapy. We determined that VADs used as destination therapy are reasonable and necessary only if performed in facilities that have been determined to have the experience and infrastructure to ensure optimal patient outcomes. We established facility standards and an application process. All facilities were required to meet our standards in order to receive coverage for VADs implanted as destination therapy.

For the purposes of this quarterly notice, we are providing only the specific updates that have occurred to the list of Medicare-approved facilities that meet our standards in the 3-month period. This information is available at http://www.cms.gov/MedicareApprovedFacilitie/VAD/list.asp#TopOfPage. For questions or additional information, contact Marie Casey, BSN, MPH (410-786-7861).

Facility	Provider Number	Date Approved	State
The following facilities are new listings for this quarter.			
Bryan Medical Center 1600 South 48th Street Lincoln NE 68506	280003	03/06/2013	NE
Palmetto Health Richland 5 Richland Medical Park Drive Columbia SC 29203	420018	03/07/2013	SC

Addendum XIII: Lung Volume Reduction Surgery (LVRS) (January through March 2013)

Addendum XIII includes a listing of Medicare-approved facilities that are eligible to receive coverage for lung volume reduction surgery. Until May 17, 2007, facilities that participated in the National Emphysema Treatment Trial were also eligible to receive coverage. The following three types of facilities are eligible for reimbursement for Lung Volume Reduction Surgery (LVRS):

- National Emphysema Treatment Trial (NETT) approved (Beginning 05/07/2007, these will no longer automatically qualify and can qualify only with the other programs);
- Credentialed by the Joint Commission (formerly, the Joint Commision on Accreditation of Healthcare Organizations (JCAHO)) under their Disease Specific Certification Program for LVRS; and
- Medicare approved for lung transplants.

Only the first two types are in the list. There were no additions to the listing of facilities for lung volume reduction surgery published in the January through March 2013 quarter. This information is available at www.cms.gov/MedicareApprovedFacilitie/LVRS/list.asp#TopOfPage. For questions or additional information, contact Marie Casey, BSN, MPH (410-786-7861).

Facility	Provider Number	Date Approved	State
Editorial changes (shown in bold) were made to the facility listed below.			
The Ohio State University Hospital **410 W. 10th Avenue, DN 168** Columbus, OH 43210	N/A	N/A	OH
The following facility was removed as of this quarter.			
Ohio State University Medical Center 410 W 10th Avenue Columbus, OH 43210	N/A	N/A	OH

Addendum XIV: Medicare-Approved Bariatric Surgery Facilities (January through March 2013)

Addendum XIV includes a listing of Medicare-approved facilities that meet minimum standards for facilities modeled in part on professional society statements on competency. All facilities must meet our standards in order to receive coverage for bariatric surgery procedures. On February 21, 2006, we issued our decision memorandum on bariatric surgery procedures. We determined that bariatric surgical procedures are reasonable and necessary for Medicare beneficiaries who have a body-mass index (BMI) greater than or equal to 35, have at least one co-morbidity related to obesity and have been previously unsuccessful with medical treatment for obesity. This decision also stipulated that covered bariatric surgery procedures are reasonable and necessary only when performed at facilities that are: (1) certified by the American College of Surgeons (ACS) as a Level 1 Bariatric Surgery Center (program standards and requirements in effect on February 15, 2006); or (2) certified by the American Society for Bariatric Surgery (ASBS) as a Bariatric Surgery Center of Excellence (BSCOE) (program standards and requirements in effect on February 15, 2006).

For the purposes of this quarterly notice, we list only the specific updates to Medicare-approved facilities that meet CMS's minimum facility standards for bariatric surgery and have been certified by ACS and/or ASMBS in the 3-month period. This information is available at www.cms.gov/MedicareApprovedFacilitie/BSF/list.asp#TopOfPage. For questions or additional information, contact Kate Tillman, RN, MAS (410-786-9252).

Facility	Provider Number	Date Approved	State
The following facilities are new listings for this quarter.			
Conway Medical Center 300 Singleton Ridge Road Conway, SC 29526	1134172000	09/27/2012	SC
Excela Health Westmoreland Hospital 501 West Otterman Street Greensburg, PA 15601	390145	10/18/2012	PA
West Georgia Health System 1514 Vernon Road LaGrange, GA 30240	1356664247	10/23//2012	GA
Turkey Creek Medical Center 10820 Parkside Drive Knoxville, TN 37934	1043292899	01/04/2013	TN
Christus St. Frances Cabrini Hospital 3330 Masonic Drive Alexandria, LA 71301	1639160799	11/27/2012	LA
Christus Hospital St. Elizabeth 2830 Calder Avenue Beaumont, TX 77702	1679557888	11/28/2012	TX
Doctors Hospital of Laredo 10700 McPherson Road Laredo, TX 78045	1396731105	12/07/2012	TX
St. Mary Medical Center 1400 S. Lake Park Avenue Hobart, IN 46342	1558463745	12/07/2012	IN
Mercy Hospital and Medical Center 2600 S Michigan Avenue Chicago, IL 60616	1730166224	01/15//2013	IL
Lancaster General Hospital 2150 Harrisburg Pike Suite 300 Lancaster, PA 17604	390100	01/31/2013	PA
Akron General Medical Center 400 Wabash Avenue Akron, OH 44307	360027	01/14/2013	OH
Pikeville Medical Center 911 S Bypass Road Pikeville, KY 4150	1285621623	01/25/2013	KY
The Western Pennsylvania Hospital 4727 Friendship Avenue, Suite 140 Pittsburgh, PA 15224	028672	10/17/2012	PA
Editorial changes (shown in bold) were made to the facilities listed below.			
St. John Hospital and Medical Center **22101 Moross Road** Detroit, MI 48236	230165	05/14/2011	MI
Shawnee Mission Medical Center **23401 Prairie Star Parkway Lenexa, KS 66227**	170104	01/22/2007	KS
Saint Luke's Hospital of Kansas City 4401 Wornall Road Kansas City, MO 64111	**26-0138**	01/02/2010	MO
From: The Reading Hospital and Medical Center **To: Reading Hospital** 2603 Keiser Boulevard Wyomissing, PA 19610	390044	03/25/2008	PA
Upstate Medical University 750 E. Adams Street, University Hospital Syracuse, NY 13210	1578554630	**03/27/2012**	NY
New York-Presbyterian Hospital/Weill Cornell Medical Center **627 West 165th Street New York, NY 10032**	330101	**08/04/2012**	NY
University of Washington Medical Center 1957 NE Pacific Street, PO Box 356165 Seattle, WA 98195-6151	1326002049	**12/05/2012**	WA
Massachusetts General Hospital **MGH Weight Center 50 Staniford St, 4th Floor** **Boston, MA 02114-2696**	220071	**10/24/2012**	MA
Harford Memorial Hospital 421 South Union Avenue, Suite 201 Havre de Grace, MD 21078	1770589533	**12/22/2012**	MD
North Shore University Health System 2650 Ridge Avenue Evanston, IL 60201	1497701882	**01/26/2012**	IL
St. Luke's-Roosevelt Hospital Center **1111 Amsterdam Avenue New York, NY 10025**	330046, 1104982917	10/11/2012	NY
Methodist Healthcare System **8026 Floyd Curl Drive San Antonio, TX 78229**	450388	02/24/2006	TX
University of Virginia Health System **P.O. Box 800809 UVA HSC** **Charlottesville, VA 22908-0809**	490009	**07/12/2012**	VA
University Hospitals Case Medical Center 11100 Euclid Avenue Cleveland OH 44106	**360137**	08/28/2006	OH

Addendum XV: FDG-PET for Dementia and Neurodegenerative Diseases Clinical Trials (January through March 2013)

There were no FDG-PET for Dementia and Neurodegenerative Diseases Clinical Trials published in the January through March 2013 quarter.

This information is available on our website at www.cms.gov/MedicareApprovedFacilitie/PETDT/list.asp#TopOfPage. For questions or additional information, contact Stuart Caplan, RN, MAS (410-786-8564).

[FR Doc. 2013–10106 Filed 5–2–13; 8:45 am]

BILLING CODE 4120–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Statement of Organization, Functions, and Delegations of Authority

Part F of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS), (last amended at **Federal Register**, Vol. 76, No. 75, p. 21909, dated April 19, 2011) is amended to revise the functions of the Office of Communications (OC).

Under Part F., Section FC. 20 (Functions) for OC is revised as follows:

- Serves as CMS' focal point for internal and external strategic and tactical communications providing leadership for CMS in the areas of customer service; Web site operations; traditional and new media including web initiatives such as social media supported by innovative, increasingly mobile technologies; media relations; call center operations; consumer materials; public information campaigns; and public engagement.
- Serves as senior advisor to the Administrator in all activities related to the media. Provides consultation, advice, and training to CMS' senior staff with respect to relations with the news media.
- Coordinates with external partners including the Department of Health and Human Services (HHS) and the White House on key communication and public engagement initiatives, leveraging CMS resources to strategically support these activities.
- Contributes to the formulation of policies, programs, and systems as related to strategic and tactical communications.
- Coordinates with the Office of Legislation on the development and advancement of new legislative initiatives and improvements.
- Oversees communications research, design and development, evaluation and continuous improvement activities for improving internal and external communication tools, including but not limited to brochures, public information campaigns, handbooks, Web sites, reports, presentations/briefings.
- Identifies communication best practices for the benefit of CMS beneficiaries (i.e., of the Medicare and Medicaid programs) and other CMS customers.
- Formulates and implements a customer service plan that serves as a roadmap for the effective treatment and advocacy of customers and the quality of information provided to them.
- Oversees beneficiary and consumer call centers and provides leadership for CMS in the area of call center operations.
- Oversees all CMS interactions and collaborations with key stakeholders (external advocacy groups, contractors, local and State governments, HHS, the White House, other CMS components, and other Federal entities) related to the Medicare and Medicaid and other Agency programs.
- Coordinates stakeholder relations, community outreach, and public engagement with the CMS Regional Offices.

Authority: 44 U.S.C 3101.

Dated: April 25, 2013.

Marilyn B. Tavenner,

Acting Administrator and Chief Operating Officer, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–10426 Filed 5–2–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Notice of Interstate Lien.

OMB No.: 0970–0153.

Description: Section 452(a)(11) of the Social Security Act requires the Secretary of Health and Human Services to promulgate a form for imposition of liens to be used by the State child support enforcement (Title IV–D) agencies in interstate cases. Section 454(9)(E) of the Social Security Act requires each State to cooperate with any other State in using the Federal form for imposition of liens in interstate child support cases. Tribal IV–D agencies are not required to use this form but may choose to do so. OMB approval of this form is expiring in May 2014 and the Administration for Children and Families is requesting an extension of this form.

Respondents: State, local or Tribal agencies administering a child support enforcement program under title IV–D of the Social Security Act.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Notice of Lien	1,876,922	1	0.25	469,231

Estimated Total Annual Burden Hours: 469,231.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2013–10491 Filed 5–2–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: OCSE–75 Tribal Child Support Enforcement Program Annual Data Report.

OMB No.: 0970–0320.

Description: The data collected by form OCSE–75 are used to prepare the OCSE preliminary and annual data reports. In addition, Tribes administering CSE programs under Title IV–D of the Social Security Act are required to report program status and accomplishments in an annual narrative report and submit the OCSE–75 report annually.

Respondents: Tribal Child Support Enforcement Organizations or the Department/Agency/Bureau responsible for Child Support Enforcement in each tribe.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
OCSE–75	60	1	60	3,600

Estimated Total Annual Burden Hours: 3,600.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2013–10484 Filed 5–2–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Interstate Administrative Subpoena.

OMB No.: 0970–0152.

Description: Section 452(a)(11) of the Social Security Act requires the Secretary of the Department of Health and Human Services to promulgate a form for administrative subpoenas to be used in State child support enforcement programs to collect information for use in the establishment, modification and enforcement of child support orders in interstate cases. Section 454(9)(E) of the Social Security Act requires each State to cooperate with any other State in using the federal form for issuance of administrative subpoenas in interstate child support cases. Tribal IV–D agencies are not required to use this form but may choose to do so. OMB approval of this form is expiring in February 2014 and the Administration for Children and Families is requesting an extension of this form.

Respondents: State, local or Tribal agencies administering a child support enforcement program under title IV–D of the Social Security Act.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Administrative Subpoena	53,488	1	0.50	26,744

Estimated Total Annual Burden Hours: 26,744.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2013–10494 Filed 5–2–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Service Administration

Advisory Committee on Training in Primary Care Medicine and Dentistry; Notice of Meeting

In accordance with section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD).

Dates and Times: May 20, 2013 (8:30 a.m.–5:00 p.m.); May 21, 2013 (8:30 a.m.–5:00 p.m.).

Place: Health Resources and Services Administration, U.S. Department of Health and Human Services, 5600 Fishers Lane, Rockville, Maryland 20852, Room 10–65.

Status: The meeting will be open to the public.

Purpose: The Advisory Committee provides advice and recommendations on a broad range of issues relating to grant programs authorized by sections 222 and 749 of the Public Health Service Act, as amended by section 5103(d) and re-designated by section 5303 of the Patient Protection and Affordable Care Act of 2010. The Committee has invited Dr. Donald Weaver, Chief Medical Officer for the National Association of Community Health Centers, to speak on interprofessional education integration into community health centers.

At this meeting the Advisory Committee will finalize work on their 10th Report to Congress pertaining to interprofessional education of primary care providers. The Committee will then begin discussions pertaining to their next Report to Congress. The Committee's reports are submitted to the Secretary of the Department of Health and Human Services; the Committee on Health, Education, Labor and Pensions of the Senate; and the Committee on Energy and Commerce of the House of Representatives.

Agenda: The meeting on Monday, May 20, 2013, will begin with opening comments from HRSA senior officials. The ACTPCMD agenda includes an overview of the Committee's general business activities, presentations by and dialogue with expert(s), and discussions pertinent to finalizing work on the committee's 10th Report on Interprofessional Education. The ACTPCMD will begin discussions pertaining to their 11th Report and break into small working groups.

The meeting on Tuesday, May 21, 2013, will continue with the small working groups. The full ACTPCMD will then convene and review work completed by the small workgroups and discuss next steps pertaining to the 11th Report.

The agenda will be available 14 days prior to the meeting on the HRSA Web site (*http://www.hrsa.gov/advisorycommittees/bhpradvisory/actpcmd/index.html*). Agenda items are subject to change as priorities dictate.

SUPPLEMENTARY INFORMATION: Members of the public and interested parties may request to participate in the meeting by emailing their first name, last name, and full email address to *BHPrAdvisoryCommittee@hrsa.gov* or by contacting the Designated Federal Official for this committee, Mr. Shane Rogers, at 301–443–5260 or *srogers@hrsa.gov.*

Due to the fact this meeting will be held within a government building and public entrance to such facilities require prior planning, access will be granted upon request only and will be on a first come, first served basis. Space is limited.

FOR FURTHER INFORMATION CONTACT: Anyone requesting information

regarding the ACTPCMD should contact Mr. Shane Rogers, Designated Federal Official within the Bureau of Health Professions, Health Resources and Services Administration, in one of three ways: (1) send a request to the following address: Shane Rogers, Designated Federal Official, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 9A–27, 5600 Fishers Lane, Rockville, Maryland 20857; (2) call 301–443–5260; or 3) send an email to *srogers@hrsa.gov*.

Dated: April 29, 2013.

Bahar Niakan,

Director, Division of Policy and Information Coordination.

[FR Doc. 2013–10538 Filed 5–2–13; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental and Craniofacial Research; 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 Dental and Craniofacial Research Special Emphasis Panel.

Date: May 28, 2013.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIDCR Offices, 6701 Democracy Blvd., Room 602, Bethesda, MD 20892.

Contact Person: Jayalakshmi Raman, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, One Democracy Plaza, Room 670, Bethesda, MD 20892–4878, 301–594–2904, *ramanj@mail.nih.gov*.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel.

Date: May 31, 2013.

Time: 12:30 p.m. to 3:30 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: Marilyn Moore-Hoon, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, 6701 Democracy Blvd., Rm. 676, Bethesda, MD 20892–4878, 301–594–4861, *mooremar@nidcr.nih.gov*.

Name of Committee: NIDCR Special Grants Review Committee.

Date: June 13–14, 2013.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree by Hilton Chicago Magnificant Mile, 300 E. Ohio Street, Chicago, IL 60611.

Contact Person: Rebecca Wagenaar Miller, Ph.D., Scientific Review Officer, 6701 Democracy Blvd., Room 666, Bethesda, MD 20892, 301–594–0652, *rwagenaa@mail.nih.gov*.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel; Review of R01 (RFA–DE–13–002) & R21 (RFA–DE–13–003), Epigenomics of Virus-Associated Oral Diseases.

Date: June 18–19, 2013.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, Washington DC, 20037.

Contact Person: Raj K. Krishnaraju, Ph.D., MS, Scientific Review Officer, Scientific Review Branch, National Institute of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr. Room 4AN 32J, BETHESDA, MD 20892, 301–594–4864, *kkrishna@nidcr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: April 29, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–10448 Filed 5–2–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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 on Aging Initial Review Group; Clinical Aging Review Committee, NIA–C.

Date: June 12–13, 2013.

Time: 3:00 p.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Long Beach Downtown, 500 East First Street, Long Beach, CA 90802.

Contact Person: Alicja L. Markowska, Ph.D., D.Sc., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666 *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group; Biological Aging Review Committee, NIA–B.

Date: June 12–13, 2013.

Time: 3:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Long Beach Downtown, 500 East First Street, Long Beach, CA 90802.

Contact Person: Bita Nakhai, Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7701, *nakhaib@nia.nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group; Neuroscience of Aging Review Committee, NIA–N.

Date: June 13–14, 2013.

Time: 3:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Long Beach Downtown, 500 East First Street, Long Beach, CA 90802.

Contact Person: William Cruce, Ph.D., Scientific Review Branch National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7704, *crucew@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 29, 2013

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–10452 Filed 5–2–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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 on Aging Special Emphasis Panel; Epigenetics of Aging.

Date: May 29, 2013.

Time: 1:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Alicja L. Markowska, Ph.D., D.Sc. Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Healthy Aging and the Life Course.

Date: June 3, 2013.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Alicja L. Markowska, Ph.D., D.Sc., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Proteinopathies of the Aging CNS.

Date: June 11, 2013.

Time: 2:10 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Alexander Parsadanian, Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *PARSADANIANA@NIA.NIH.GOV.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Age Simulated Injury.

Date: June 12, 2013.

Time: 7:00 p.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Long Beach Downtown, 500 East First Street, Long Beach, CA 90802.

Contact Person: Bita Nakhai, Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7701, *nakhaib@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Degenerative and Dementing Diseases.

Date: June 17, 2013.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892.

Contact Person: Ramesh Vemuri, Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7700, *rv23r@nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Identification and Validation of Novel Targets for Alzheimer's Disease.

Date: June 25, 2013.

Time: 11:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alexander Parsadanian, Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *PARSADANIANA@NIA.NIH.GOV.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Drug Development for Alzheimer's Disease.

Date: July 23, 2013.

Time: 10:30 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Alexander Parsadanian, Ph.D., Scientific Review Branch, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *PARSADANIANA@NIA.NIH.GOV.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated:April 29, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–10453 Filed 5–2–13; 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 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 Cancer Institute Special Emphasis Panel; Early-Stage Development of Informatics Technology (U01).

Date: June 25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites-Old Town Alexandria, 1900 Diagonal Road, Alexandria, VA 22314.

Contact Person: Marvin L. Salin, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W–236, Bethesda, MD 20892–8329, 240–276–6369, *msalin@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: April 29, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–10449 Filed 5–2–13; 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; Development of Anticancer Agents.

Date: May 23, 2013.

Time: 11:30 a.m. to 3:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute, Shady Grove West Tower, 9609 Medical Center Drive, Room 7W032, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Joyce C. Pegues, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Dr., Room 7W248, Bethesda, MD 20892–975, 240–276–6375, *peguesj@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: April 29, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–10451 Filed 5–2–13; 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 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 Cancer Institute Special Emphasis Panel; NCI Omnibus Review.

Date: May 29, 2013.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute, Shady Grove West Tower, 9609 Medical Center Drive, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Shamala K. Srinivas, Ph.D., Scientific Review Officer, National Cancer Institute, Division of Extramural Activities, Research Programs Review Branch, 9609 Medical Center Dr., Room 7W530, Bethesda, MD 20892–975, 240–276–6442, *ss537t@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: April 29, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–10450 Filed 5–2–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2013–0232]

Waterway Suitability Assessment for Expansion of Liquefied Gas Terminals; Nederland, TX

AGENCY: Coast Guard, DHS.

ACTION: Notice and request for comments.

SUMMARY: In accordance with Coast Guard regulations, Sunoco Partners Marketing and Terminals has submitted a Letter of Intent and a Waterway Suitability Assessment to the Coast Guard Captain of the Port, Port Arthur regarding the company's proposed expansion of its Liquefied Hazardous Gas (LHG) facility in Nederland, Texas, and increased LHG marine traffic in the associated waterway. The Coast Guard is notifying the public of this action to solicit public comments on the proposed increase in LHG marine traffic in Nederland, Texas.

DATES: Comments and related material must be received on or before June 3, 2013.

ADDRESSES: You may submit comments identified by docket number USCG–2013–0232 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these three methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Mr. Scott Whalen, U.S. Coast Guard; telephone 409–719–5083, email *scott.k.whalen@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to submit comments and related material in response to this notice. All comments received will be posted without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments: If you submit a comment, please include the docket number for this notice (USCG–2013–0232), and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comments. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your

document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number (USCG–2013–0232) in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this notice.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing comments and documents: To view comments, go to *http://www.regulations.gov,* type the docket number (USCG–2013–0125) in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Open Docket Folder'' on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public meeting: We do not now plan to hold a public meeting, but you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Basis and Purpose: Under 33 CFR 127.007(a), an owner or operator planning new construction to expand or modify marine terminal operations in an existing facility handling Liquefied Natural Gas (LNG) or Liquefied Hazardous Gas (LHG), where the construction, expansion, or modification would result in an increase in the size and/or frequency of LNG or LHG marine traffic on the waterway associated with the facility, must submit a Letter of Intent (LOI) to the COTP of the zone in which the facility is located. Under 33 CFR 127.007(e), an owner or operator planning such an expansion must also file or update a Waterway Suitability Assessment (WSA) that addresses the proposed increase in LNG or LHG marine traffic in the associated waterway. Sunoco Partners Marketing and Terminals in Nederland, Texas submitted an LOI on March 11, 2013, and a WSA on March 11, 2013, regarding the company's proposed expansion of its LHG facility in Nederland, Texas.

Under 33 CR 127.009, after receiving an LOI, the COTP issues a Letter of Recommendation (LOR) as to the suitability of the waterway for LNG or LHG marine traffic to the appropriate jurisdictional authorities. The LOR is based on a series of factors outlined in 33 CFR 127.009 that related to the physical nature of the affected waterway and issues of safety and security associated with LNG or LHG marine traffic on the affected waterway.

The purpose of this notice is to solicit public comments on the proposed increase in LHG marine traffic in Beaumont, Texas. The Coast Guard believes that input from the public may be useful to the COTP with respect to development of the LOR. Additionally, the Coast Guard asked the Area Maritime Security Committee, Port Arthur, Texas and the Southeast Texas Waterways Advisor Committee (SETWAC) to form a subcommittee comprised of affected port users and stakeholders. The goal of these subcommittees will be to gather information to help the COTP assess the suitability of the associated waterway for increased LHG marine traffic as it relates to navigational safety and security.

On January 24, 2011, the Coast Guard published Navigation and Vessel Inspection Circular (NVIC) 01–2011, ''Guidance Related to Waterfront Liquefied Natural Gas (LNG) Facilities.'' NVIC 01–2011 provides guidance for owners and operators seeking approval to build and operate LNG facilities. While NVIC 01–2011 is specific to LNG, it provides useful process information and guidance for owners and operators seeking approval to build and operate LHG facilities as well. The Coast Guard will refer to NVIC 01–2011 for process information and guidance in evaluating Sunoco Partners Marketing and Terminal's WSA. A copy of NVIC 01–2011 is available for viewing in the public docket for this notice and also on the Coast Guard's Web site at *http://www.uscg.mil/hq/cg5/nvic/2010s.asp*.

This notice is issued under authority of 33 U.S.C. 1223–1225, Department of Homeland Security Delegation Number 0170.1(70), 33 CFR 127.009, and 33 CFR 103.205.

Dated: April 8, 2013.

G.J. Paitl,

Captain, U.S. Coast Guard, Captain of the Port, Port Arthur.

[FR Doc. 2013–10456 Filed 5–2–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Extension of Agency Information Collection Activity Under OMB Review: Pipeline Corporate Security Review

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-day Notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0056, abstracted below to OMB for review and approval of an extension of the currently approved collection under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on February 26, 2013, 78 FR 13075. The collection encompasses interviews and site visits with pipeline operators regarding company security planning and implementation.

DATES: Send your comments by June 3, 2013. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Susan L. Perkins, TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–3398; email *TSAPRA@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: Pipeline Corporate Security Review (PCSR).

Type of Request: Extension of a currently approved collection.

OMB Control Number: 1652–0056.

Forms(s): Pipeline Corporate Security Review (PCSR) Protocol Form.

Affected Public: Hazardous Liquids and Natural Gas Pipeline Industry.

Abstract: Under the Aviation and Transportation Security Act (ATSA) and delegated authority from the Secretary of Homeland Security, TSA is tasked with developing policies, strategies and plans for dealing with transportation security. To carry out this responsibility regarding pipelines, TSA assesses current industry security practices through its Pipeline Corporate Security Review (PCSR) program. The PCSR is a voluntary, face-to-face visit with a pipeline operator during which TSA discusses an operator's corporate security planning and also completes the PCSR Form. The PCSR Form includes 218 questions concerning the operator's corporate level security planning, covering security topics such as physical security, vulnerability assessments, training, and emergency communications. TSA uses the information collected during the PCSR process to determine baseline security standards and areas of security weakness in the pipeline mode.

Number of Respondents: 2,200 potential respondents; likely 15 annual respondents.

Estimated Annual Burden Hours: An estimated 120 hours annually, based on TSA conducting 15 PCSR visits a year, each lasting 8 hours.

Dated: April 30, 2013.

Susan L. Perkins,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2013–10524 Filed 5–2–13; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Generation II Military Energizer Flashlights

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (''CBP'') has issued a final determination concerning the country of origin of the Generation II military Energizer flashlight, with light-emitting diodes. Based upon the facts presented, CBP has concluded in the final determination that China is the country of origin of the Generation II military Energizer flashlight, for purposes of U.S. Government procurement.

DATES: The final determination was issued on April 29, 2013. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within June 3, 2013.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202–325–0132).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on April 29, 2013, pursuant to subpart B of part 177, Customs and Border Protection (CBP) Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of the Generation II military Energizer flashlights which may be offered to the United States Government under an undesignated government procurement contract. This final determination, in HQ H215657, was issued at the request of Energizer Battery Inc. under procedures set forth at 19 CFR Part 177, Subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that the Generation II military Energizer flashlights assembled in the United States from foreign made parts and programmed with U.S. origin software in the United States are products of China for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: April 29, 2013.

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade.

HQ H215657

April 29, 2013

MAR–02 OT:RR:CTF:VS H215657 RSD

CATEGORY: MARKING

M. Jason Cunningham, Esq.
30 South Wacker Drive
Suite 2200 No. 41
Chicago, Illinois 60606

RE: Final Determination of U.S. Government Procurement: Country of Origin of Military Energizer Flashlight

Dear Mr. Cunningham:

This is in response to your letter dated March 28, 2012, requesting a final determination on behalf of Energizer Battery, Inc. (Energizer), pursuant to subpart B Part 177 Customs and Border Protection (''CBP'') Regulations (19 CFR § 177.21 et. seq.). Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (codified at 19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government. This final determination concerns the country of origin of a Generation II flashlight. You have provided additional information regarding the processing operations performed on the flashlight in the United States in submissions made through email and a DVD on July 13, 2012, November 8, 2012, and February 14, 2013. We note that Energizer is a party-at-interest within the meaning of 19 CFR § 177.22(d)(1) and is entitled to request this final determination. We regret the delay in our response

FACTS:

The product at issue is a finished second generation military flashlight (Generation II)

produced by Energizer Battery Inc. On January 3, 2012, our office issued an advisory ruling, H195536, to Energizer, concerning the Generation II flashlight, in which we stated that the assembly of the various foreign parts and the foreign LED into the Generation II flashlight was not sufficiently complex and significant to constitute a substantial transformation. In the advisory ruling, we indicated that the origin of the LED would determine the origin of the finished flashlight, and because the LED was of Chinese origin, the country of origin of the finished flashlight would also be China. You have subsequently requested that we reconsider our determination in the advisory ruling by requesting this final determination. You have presented additional information regarding the production of the energizer flashlight, photographs of the Generation II flashlight at various stages of manufacture, and a DVD showing the final assembly process of the flashlight.

You advise that Energizer intends to sell the Generation II flashlight to the U.S. military. The Generation II flashlight is designed to be extremely rugged so that it can withstand forceful impacts without compromising its performance or its waterproof operation. It also provides long-lasting LED and infrared lighting, which is invisible to the naked eye, but useful for signaling in military situations. The previous versions of the generation flashlights relied more upon mechanical switches, while the Generation II flashlight uses a microprocessor and programming control, which requires more sophisticated hardware and software programming.

The Generation II flashlight also incorporates two additional innovations. The IFF Mode for the infrared light is an infrared strobe mode used to ''Identify Friend or Foe.'' Although the flashlight is designed to be used with two AA batteries in the field, it can actually operate with a single AA battery while maintaining the same features, but with a shorter battery life.

The production process is as follows:

1. The LED wafer is ''grown'' in the U.S. and exported to China. In China, the LED wafer is mounted and coated with resin and then shipped to the Energizer facility in Vermont.
2. A third party in the U.S. mounts the Chinese LED wafer onto a Chinese-origin ''hex board'' and coats it with resin.
3. In Vermont, the LED is combined with various imported subcomponents from China including the main PCBA, switch PCBA, head cover, pivot locks, washers, switch levers, springs, lens rings, screws, buttons, etc., to create the lens head subassembly.
4. The lens head subassembly's wiring, soldering, and physical connections are inspected.
5. At the second work station, the following Chinese-origin flashlight body components are combined with the lens head subassembly to make the Generation II flashlight: body seal ring, end cap top plate, end cap bottom plate, end cap PCBA and switch assembly, body bracket, spring holders, battery cartridge, screws, body with overmold, hinge ring, end cap with overmold, lock wheel with screw and nut insert, belt clip, clip retainer, and clip screws. During the assembly process, one of the more important operations that must be precisely performed is the spot soldering of the wires, switches and other various components to the LED. The assembly process of the flashlight takes approximately seven minutes to complete under actual production conditions with fully trained qualified operators.

According to the information presented in a November 8, 2012, email, Energizer provides all the technical and quality control training necessary for the operators to be designated as qualified to produce the flashlights. The DVD submitted, demonstrates the assembly process involves putting together more than fifty parts and components in a multi-step process. The DVD shows the two work stations at the Energizer facility in St. Albans, Vermont. As explained above, at the first workstation, the operators combine various subcomponents of the lens head subassembly. After the lens heads subassembly is created, it is transferred to a second separate workstation, where the Energizer operators combine the lens head subassembly with approximately 30 other imported components to create the end product, the Generation II military flashlight.

We also note that in producing the flashlights, Energizer installs U.S. origin software that Energizer created in house. The programming allows for battery type detection; battery quantity alternative operation levels; lighting levels; and the control of power, not for the light output, but for the purposes of controlling heat and the protection of the sensitive LEDs. The code writing for the software programing was developed and completed in the United States, but the programming is transmitted to China for flashing the program to the circuitry for the lights. Along with the main white LED light, the flashlight also has four smaller LED's that emit red, blue, green, or infrared light. A modification that Energizer has made to this model is that each of the LEDs that emit visible light, i.e. white, red, blue, and green, can shine at high, medium, or low intensity. The original programming for this feature, like all of the programming for the flashlight, occurs in the United States and will use a proprietary source code. It is stated that Energizer has expended significant resources in connection with the redesign and development of this product in the United States. You have enclosed a spreadsheet that identifies all of the costs and country of origin data of all subcomponents used in the lens head subassembly and all the other components used in the production of the Generation II military flashlight.

ISSUE:

What is the country of origin of the Energizer military Generation II flashlight for purposes of U.S. government procurement?

LAW AND ANALYSIS:

Pursuant to subpart B of part 177, 19 C.F.R. § 177.21 *et seq.,* which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. government procurement, CBP applies the provisions of subpart B of part 177 consistent with the Federal Acquisition Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 C.F.R. § 25.403(c)(1). The Federal Acquisition Regulations define ''U.S.-made end product'' as:

> . . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

48 C.F.R. § 25.003.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. No one factor is decisive, the key issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens* v. *United States,* 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. Additionally, factors such as the resources expended on product design and development, extent and nature of post-assembly inspection and testing procedures, and the degree of skill required during the actual manufacturing process may be relevant when determining whether a substantial transformation has occurred.

In C.S.D. 85–25, 19 Cust. Bull. 844 (1985), U.S. Customs Service (legacy agency to CBP) (hereinafter, incorporated with the reference to ''CBP'') held that for purposes of the Generalized System of Preferences (''GSP''), the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill resulted in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled. Whether an operation is complex and meaningful depends on the nature of the operation, including the number of components assembled, number of different operations, time, skill level required, attention to detail, quality control, the value added to the article, and the overall employment generated by the manufacturing process.

CBP has held in a number of cases that complex and meaningful assembly operations involving a large number of components result in a substantial transformation. For example, in HQ H047362, dated March 26, 2009, CBP found that 61 components manufactured in China and assembled into ground fault circuit interrupters (GCFIs) in Mexico in a two-phase process by skilled workers using sophisticated equipment were substantially transformed in Mexico. In particular, we took into consideration that the first phase involved the assembly of a PCB in a 42-step technically complex process that took 12 minutes and that the completed PCB had the entire major components necessary for the GCFI to fulfill its function. We also took into consideration that in the second phase the PCB would be assembled with 29 other components to form the GCFIs in a 43-step process taking approximately 10 minutes, after which the components lost their individual identities and become an integral part of the interrupters with a new name, character and use.

In HQ 962528 dated February 18, 2000, CBP considered the eligibility of a rechargeable power failure light for duty free treatment under the Generalized System of Preferences (GSP). In that case, the power failure light was assembled in Thailand from various Thai and foreign origin components including a PCB assembled in Thailand. CBP found that the process of assembling various components into a PCB resulted in a substantial transformation of the imported components. Moreover, CBP found that the assembly of the PCB with a bulb holder assembly, a plug blade assembly and an upper and lower housing assembly to make the finished power failure light substantially transformed the PCB.

By contrast, assembly operations that are minimal or simple will generally not result in a substantial transformation. For instance, in HQ 734050, dated June 17, 1991, CBP held that Japanese-origin components were not substantially transformed in China when assembled in that country to form finished printers. The printers consisted of five main components identified as the ''head'', ''mechanism'', ''circuit'', ''power source'', and ''outer case.'' The circuit, power source and outer case units were entirely assembled or molded in Japan. The head and mechanical units were made in Japan, but exported to China in an unassembled state. All five units were exported to China where the head and mechanical units were assembled with screws and screwdrivers. Thereafter, the head, mechanism, circuit, and power source units were mounted onto the outer case with screws and screwdrivers. In holding that the country of origin of the assembled printers was Japan, CBP recognized that the vast majority of the printer's parts were of Japanese origin and that the operations performed in China were relatively simple assembly operations.

CBP first considered the country of origin of a military flashlight made by Energizer in HQ H008708 dated May 7, 2007. We found that the various imported components (individual parts and subassemblies) were substantially transformed as a result of the operations performed in the United States to produce the replacement lens head assembly and the finished flashlight. Under each manufacturing scenario, we concluded that the imported components lost their individual identities and became an integral part of a new article possessing a new name, character, and use. However, unlike the scenario here, in support of this conclusion, we noted that the U.S. origin LED imparted the essential character to both the replacement part and the finished product, as it generated the primary light of both products. We also recognized that Energizer had expended significant resources in connection with the design and development of the flashlight in the United States. We also pointed out that the U.S.-origin LED and the labor performed in the United States during the assembly and testing operations represented the majority of the costs associated with the production of both the replacement lens head subassembly and the finished flashlight.

In HQ H017620, dated February 5, 2008, CBP considered the country of origin of the prior model Generation I flashlight for government procurement purposes. We determined that the manufacturing operations performed in the U.S. to produce the replacement lens head subassembly and the finished flashlight resulted in a substantial transformation of the imported components. In support of this conclusion, we explained that the U.S.-origin LED imparted the essential character to both the replacement part and the finished product, as it generates the primary light of both products. We also recognized that Energizer had expended significant resources in connection with the design and development of the subject flashlight in the United States. Moreover, the U.S.-origin LED and the labor performed in the United States during the assembly and testing operations represented a majority of the costs associated with the production of both the replacement lens head subassembly and the finished flashlight. We followed this analysis in an advisory ruling, HQ H057777 dated July 16, 2009, concerning the revised Generation II flashlight and determined that the various imported components (individual parts and subassemblies) were substantially transformed as a result of the operations performed in the U.S. to produce both the lens head subassembly and the finished flashlight. In support of this conclusion, we agreed that the U.S. origin LED imparts the essential character to the Generation II flashlight as it generates the primary light of the flashlight.

As previously noted, in contrast to HQ H017620 and HQ H057777, we indicated in the advisory ruling H195536 that the U.S. assembly of the various foreign parts and LED into the military Generation II flashlight did not result in a substantial transformation. We mentioned that the LED still imparted the essential character of the finished flashlight, and since it was not of U.S. origin, the country of origin of the flashlight for government procurement purposes would not be the United States. You have now provided additional information with this request for a final determination regarding the assembly process of the Generation II military flashlight. Some of the information was presented on a DVD showing the assembly process.

Upon consideration of the additional information that you have provided and our observations of the assembly process shown in the DVD, we continue to believe that our conclusion in advisory ruling H195536 that the foreign made components and parts do not undergo a substantial transformation when they are assembled together in the United States was correct. We note virtually all of the components of the military Generation II flashlight, including the most important component, the LED, are of Chinese origin. All of the components arrive in the United States ready for assembly into the Generation II flashlight. Only the assembly process is done in the United States. Although the assembly process involves putting together a number of different parts to produce the flashlight, most of this work consists of rather simple insertions, relatively simple attaching and fastening of the components and parts together. This work seems to involve following a fairly straightforward routine and does not seem to be exceptionally complex, and it only takes several minutes to complete. You point out that the operators must solder some of the components together, but we do not believe that the soldering involved in this case is a particularly complex operation that is indicative of a substantial transformation, when compared to the operation performed in China in creating the various parts including the LED of the flashlight.

It is also noted that in the United States, the Generation II flashlight is programmed with software that is written in the United States. We observe, however, that the programming is not essential to the basic operation of the flashlight. The programming constitutes only an enhancement how the flashlight operates, but it does not change its fundamental nature. While the programming does provide the flashlight with some additional features, such as being able to detect the battery type installed in the flashlight, and controlling the power level for protection of the LEDs, the programming is not sufficiently complex enough to change

the identity or the character of the device. The flashlight could still function as a flashlight without the software programming; after the software is loaded onto the device, it still remains a flashlight.

Consequently, we find that the assembly and programming operations Energizer performs in the United States on the various imported components (individual parts and subassemblies) do not create a new article of commerce with a new name, character, and use. Therefore, we find the imported components, including the LED, from China are not substantially transformed as a result of the operations performed in the United States to produce both the lens head subassembly and the completed Generation II military flashlight. Accordingly, we find that the country of origin of the Generation II military flashlight for government procurement purposes remains the country of origin of the components and subassemblies, including the LED, China.

HOLDING:

Based upon the specific facts of this case, we find that the imported components of the flashlight and replacement lens head subassembly are not substantially transformed as a result of the described assembly operations and programing operations performed in the United States. The country of origin for government procurement purposes of the Generation II military flashlight is China.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR § 177.29. Any party-at-interest other than the party which requested the final determination may request, pursuant to 19 CFR § 177.31, that CBP reexamine the matter anew and issue a new final determination. Any party-at-interest may, within 30 days after publication of the **Federal Register** notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell,

Executive Director, Office of Regulations and Rulings, Office of International Trade

[FR Doc. 2013–10555 Filed 5–2–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5681–N–18]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Ritta, Office of Enterprise Support Programs, Program Support Center, HHS, room 12–07, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (i.e., acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Agriculture:* Ms. Brenda Carignan, Department of Agriculture, Reporters Building, 300 7th Street SW., Room 337, Washington, DC 20024, (202) 401–0787; *Air Force:* Mr. Robert Moore, Air Force Real Property Agency, 2261 Hughes Avenue, Suite 156, Lackland AFB, TX, 78236–9852, (210) 395–9512; *Coast Guard:* Commandant, United States Coast Guard, Attn: Jennifer Stomber, 2100 Second St. SW., Stop 7901, Washington, DC 20593–0001; (202) 475–5609; *GSA:* Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040 Washington, DC 20405, (202) 501–0084; *Navy:* Mr. Steve Matteo, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374;

(202) 685–9426; (This is not toll-free numbers).

Dated: April 25, 2013.

Mark Johnston,

Deputy Assistant Secretary for Special Needs.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM, FEDERAL REGISTER REPORT FOR 05/03/2013

Suitable/Available Properties

Building

Colorado

Pagosa JCC Bunkhouse
3939 Piedra Rd.
Pagosa Springs CO 81147
Landholding Agency: Agriculture
Property Number: 15201320002
Status: Excess
Comments: 48 yrs.-old; 1 floor; 120 months vacant; very poor conditions

New Jersey

Portion of former Sievers-Sandberg US Army Reserves Center (Camp Pedricktown)
Artillery Ave at Garrison St.
Oldmans NJ 08067
Landholding Agency: GSA
Property Number: 54201320003
Status: Surplus
GSA Number: 1–D–NJ–0662–AB
Directions: On the north side of Rte 130, between Perkintown Road (Rte 644) and Pennsgove-Pedricktown Rd (Rte 642)
Comments: #171; mess hall bldg. #173; 14,282 total sf.; fair/poor conditions; asbestos/lead-based paint; potential legal constraints in accessing property; Contact GSA for more info.

New York

Former Leso-Leano US Army Reserve Center
500 Massey St. South
Watertown NY 13601
Landholding Agency: GSA
Property Number: 54201320004
Status: Surplus
GSA Number: 1–D–NY–0698
Directions: On Massey St So, corner of Pine St and Ten Eyck St W.
Comments: off/admin. bldg. = 25,025 sf; oper./veh. maint. bldg. = 2,400 sf.; asbestos/lead-based paint; bldgs. locked—entry by appt. with GSA; contact GSA for more info.

Land

Wisconsin

TACAN Annex
6400 Block of Lake Rd.
Windsor WI 53598
Landholding Agency: GSA
Property Number: 54201320005
Status: Excess
GSA Number: 1–D–WI–611
Comments:
1 acre; moderate conditions

Suitable/Unavailable Properties

Building

Virginia

Building 641
216 Hunting Ave.
Hampton VA 23681
Landholding Agency: GSA
Property Number: 54201320006
Status: Excess
GSA Number: 4–Z–VA–0602–A1
Comments: 11,671 total sf.; office; fair/moderate conditions; existing Federal need

Unsuitable Properties

Building

Arizona

7 Buildings
Davis Monthan AFB
Tucson AZ 85707
Landholding Agency: Air Force
Property Number: 18201310042
Status: Underutilized
Directions: 145, 4101, 4857, 4858, 5122, 5313, 5315
Comments: military installation; public access denied & no alternative w/out compromising nat'l security
Reasons: Secured Area

Georgia

8 TACTS
U.S. Navy
Savannah GA
Landholding Agency: Navy
Property Number: 77201320002
Status: Unutilized
Directions: Tactical Air Combat Training System towers
Comments: located 55 to 103 miles offshore; accessible by boat only
Reasons: Other—offshore; Not accessible by road

New Jersey

US Coast Guard Shark River
125 Washington Ave.
Avon by the Sea NJ 07717
Landholding Agency: Coast Guard
Property Number: 88201320002
Status: Excess
Comments: located on secured active military installation; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

New Mexico

Building 442
401 N. Chindit Blvd.
Cannon AFB NM 88103
Landholding Agency: Air Force
Property Number: 18201320002
Status: Unutilized
Comments: AF controlled installation; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

North Carolina

Sewer Pump Station 65
1664 Weeksville Rd.
Elizabeth City NC 27909
Landholding Agency: Coast Guard
Property Number: 88201320001
Status: Excess
Comments: located w/in secured military facility; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

[FR Doc. 2013–10217 Filed 5–2–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[134D0102DM DLSN00000.000000 DS10100000 DX10101]

Proposed Information Collection: National Blueways System Application

AGENCY: Office of the Secretary, Department of the Interior.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of the Secretary, Department of the Interior announces the proposed public information collection necessary as part of the process to nominate a river and associated watershed for National Blueway recognition, ''National Blueways System Application,'' and that it is seeking comments on its provisions.

DATES: Consideration will be given to all comments received by July 2, 2013.

ADDRESSES: Written comments and recommendations on this information collection should be sent to the Office of Secretary—Department of the Interior, Attn: National Blueways System, 1849 C Street NW., Room 7328, Washington, DC 20040. You may also email comments to: *blueways@ios.doi.gov.* Individuals providing comments should reference ''National Blueways System Application.''

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the collection instrument, the National Blueways System Application, go to: *http://www.doi.gov/americasgreatoutdoors/whatwedo/rivers/upload/Draft_National_Blueways_System_Application_April_2013.PDF.* To request more information on this information collection, please see the contact information in the **ADDRESSES** section above.

SUPPLEMENTARY INFORMATION:

I. Abstract

This notice is for a new information collection.

The Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.,* require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)).

Secretarial Order 3321 created the National Blueways System under the

authority of the Take Pride in America Act, Public Law 101–628; the Outdoor Recreation Act, Public Law 87–714; and the Cooperative Watershed Management Program of the Omnibus Public Land Management Act of 2009, Public Law 111–11. Rivers and their associated watersheds may be nominated voluntarily for National Blueways recognition by stakeholder partnerships, in collaboration with sponsoring Federal and state agencies.

Section 5b of Secretarial Order 3321 gives the National Blueways Committee responsibility for overseeing ''the process of National Blueways criteria development, assessment, and designation'' and making ''recommendations to the Secretary for the designation of National Blueways.'' The National Blueways Committee includes representatives of agency directors and Assistant Secretaries within the Department of the Interior, and representatives of the Departments of Agriculture and of the Army (Civil Works).

The National Blueways Committee developed the ''National Blueways System Application'' as the first step in the process of nomination. From the applications received, up to nine watershed partnerships per year may be invited by the National Blueways Committee to submit a nomination. The National Blueways Committee will review the nominations and make a recommendation to the Secretary of the Interior for official recognition.

This information collection allows the Office of the Secretary to collect the information necessary for the National Blueways Committee to assess whether a given river and watershed is likely to meet the criteria for recognition as a National Blueway. If this information were not collected, the National Blueways Committee would not be able to determine whether a river and watershed are likely to meet the criteria for recognition as a National Blueway and invite the watershed partnership to submit a nomination for consideration for National Blueway System recognition by the Office of the Secretary—Department of the Interior.

II. Data

(1) *Title:* National Blueways System Application.

OMB Control Number: 1093–NEW.

Current Expiration Date: Not applicable, this is a new collection.

Type of Review: New information collection request.

Affected Entities: Watershed stakeholder partnerships.

Estimated annual number of respondents: maximum of 25.

Frequency of responses: maximum of 2 per year.

(2) *Annual reporting and recordkeeping burden:*

Total annual reporting per response: The National Blueways Committee will accept applications twice per year. The first time a partnership responds it is estimated at 118 hours per application. Those partnerships not invited to submit a nomination will be able to submit another application during the second application window for that calendar year. The time required to re-submit the application for the second application window would be much reduced; we estimate 20 hours per application for second responses.

Total number of estimated responses: 40.

Total annual reporting: 3250 hours [3250 hours = (25 × 118 hours) + (15 × 20 hours)].

Total non-labor burden: estimated at $750 per application for the first response and $0 per application for second responses.

Total annual non-labor burden: $18,750 (= 25 × $750).

(3) *Description of the need and use of the information:* The information will be used to assess whether a given river and watershed and its partnership are likely to meet the criteria for recognition as a National Blueway.

III. Request for Comments

The Department invites comments on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the Office, including whether the information will have practical utility;

(b) The accuracy of the Office's estimate of the burden of the collection of information and the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on respondents, including through the use of appropriate automated, electronic, mechanical, or other collection techniques or other forms of information technology.

''Burden'' means the total time, effort, and financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install, and use technology and systems for the purposes 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, and to complete and review the collection of information; and to transmit or otherwise disclose the information.

All written comments, with names and addresses, will be available for public inspection. If you wish us to withhold your personal information, you must prominently state at the beginning of your comment what personal information you want us to withhold. We will honor your request to the extent allowable by law. If you wish to view any comments received, you may do so by scheduling an appointment with the Office of the Secretary—Department of the Interior via the contact information in the **ADDRESSES** section above. A valid picture identification is required for entry into the Department of the Interior.

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.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

Dated: April 25, 2013.

Rebecca Wodder,

Senior Advisor to the Secretary, Office of the Secretary—Department of the Interior.

[FR Doc. 2013–10443 Filed 5–2–13; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

UTAH RECLAMATION MITIGATION AND CONSERVATION COMMISSION

[A1R–17549897–100–00–0–0, CUPCA00]

Central Utah Project Completion Act; East Hobble Creek Restoration Project Final Environmental Assessment

AGENCY: Office of the Assistant Secretary for Water and Science, Interior; Utah Reclamation Mitigation and Conservation Commission.

ACTION: Notice of availability.

SUMMARY: On April 2, 2013, the Department of the Interior and the Utah Reclamation Mitigation and Conservation Commission each signed a Finding of No Significant Impact associated with the Final Environmental Assessment—East Hobble Creek Restoration Project. These two agencies have determined that the proposed

action as detailed in the Final Environmental Assessment will not have a significant impact on the quality of the human environment, and that an environmental impact statement is not required.

ADDRESSES: Copies of the Final Environmental Assessment and Finding of No Significant Impact are available for inspection at:

- Central Utah Water Conservancy District, 355 West University Parkway, Orem, Utah 84058–7303
- Department of the Interior, Central Utah Project Completion Act Office, 302 East 1860 South, Provo, Utah 84606
- Utah Reclamation Mitigation and Conservation Commission, 230 South 500 East, Suite 230, Salt Lake City, Utah 84102

The documents are also available at *www.cuwcd.com*, *www.mitigationcommission.gov*, and *www.cupcao.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Lee Baxter, Central Utah Project Completion Act Office, at (801) 379–1174; or email at *lbaxter@usbr.gov.*

SUPPLEMENTARY INFORMATION: The Department of the Interior, the Utah Reclamation Mitigation and Conservation Commission, and the Central Utah Water Conservancy District have completed evaluating the impacts of the proposed East Hobble Creek Restoration Project. The Final Environmental Assessment has been completed in conjunction with the June Sucker Recovery Implementation Program, and provides an analysis of the anticipated environmental effects of a proposed restoration effort on a portion of lower Hobble Creek, near Springville, Utah. This restoration effort is intended to facilitate the recovery of the June sucker, a federally listed endangered species, through improvement of spawning habitat and maintenance of stream flow. The effort analyzed included the potential restoration of approximately 2 miles of stream channel, modification or removal of several existing barriers to fish passage, use of the Utah Lake System Hobble Creek Valve Station for supplemental stream-flow releases, and enhancement of the existing water supply.

Dated: April 15, 2013.

Reed R. Murray,

Program Director, Central Utah Project Completion Act, Department of the Interior.

Dated: April 15, 2013.

Michael C. Weland,

Executive Director, Utah Reclamation Mitigation and Conservation Commission.

[FR Doc. 2013–10458 Filed 5–2–13; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2013–N064; 60120–1113–0000–C2]

Endangered and Threatened Wildlife and Plants; Draft Conservation Strategy for the Northern Continental Divide Ecosystem Grizzly Bear

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability; request for comments.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability of a draft Conservation Strategy for the Northern Continental Divide Ecosystem grizzly bear (*Ursus arctos horriblis*) population for public review and input. The strategy will be the post-delisting management plan for the NCDE grizzly bears and their habitat. This document is necessary to demonstrate the adequacy of regulatory mechanisms in order to delist this grizzly population.

Grizzly bears are currently federally listed as threatened in the lower 48 States under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), as amended (Act). The Service solicits review and comment from the public on this draft document.

DATES: Comments on the draft revised recovery plan must be received on or before August 1, 2013.

ADDRESSES: An electronic copy of the draft Conservation Strategy for the Northern Continental Divide grizzly bear population is available at *http://www.fws.gov/endangered/species/recovery-plans.html*. Hard copies of the draft strategy are available by request from the Grizzly Bear Recovery Coordinator, U.S. Fish and Wildlife Service, University Hall, Room 309, University of Montana, Missoula, MT 59812; telephone 406–243–4903. Submit comments on the draft Conservation Strategy for the Northern Continental Divide grizzly bear population to the Grizzly Bear Recovery Coordinator at this same address.

FOR FURTHER INFORMATION CONTACT: Project Leader, at the above address, or telephone 406–243–4903.

SUPPLEMENTARY INFORMATION:

Background

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the Service's endangered species program. Conservation Strategy for the Northern Continental Divide Ecosystem of the grizzly bear (*Ursus arctos horribilis*) demonstrates the adequacy of regulatory mechanisms that will remain in place post-delisting to assure the health of this grizzly population. The Conservation Strategy describes the management and monitoring direction to maintain a recovered grizzly bear population in the NCDE and documents the commitment of signatory agencies to the Memorandum of Understanding implementing the Strategy to continue to manage the grizzly and its habitat as per the specifics in the Strategy document. The NCDE Conservation Strategy is the post-delisting management plan for this population and its habitat.

Request for Public Comments

The Service hereby solicits public comments on a draft Northern Continental Divide Ecosystem Conservation Strategy. All comments received by the date specified in **DATES** will be considered prior to approval of the final Northern Continental Divide Ecosystem Conservation Strategy. Written comments and materials regarding the Strategy should be addressed to the Grizzly Bear Recovery Coordinator (see **ADDRESSES** section). Comments and materials received will be available, by appointment, for public inspection during normal business hours at the above address. All public comment information provided (e.g., names, addresses, letters of comment, input recorded during meetings) becomes part of the official public record. If requested under the Freedom of Information Act (5 U.S.C. 552) by a private citizen or organization, the Service may provide copies of such information.

Authority

The authority for this action is section 4(f) of the Act, 16 U.S.C. 1533(f).

Dated: April 17, 2013.

Noreen E. Walsh,

Regional Director, Denver, Colorado.

[FR Doc. 2013–10492 Filed 5–2–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14952–B; LLAK940000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision will be issued by the Bureau of Land Management (BLM) to Unalakleet Native Corporation. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq*). The subsurface estate in these lands will be conveyed to Bering Straits Native Corporation when the surface estate is conveyed to Unalakleet Native Corporation. The lands are in the vicinity of Unalakleet, Alaska, and are located in:

Lot 5, U.S. Survey No. 5266, Alaska

Containing 8.91 acres.

Kateel River Meridian, Alaska

T. 18 S., R. 10 W.,
Sec. 36.

Containing approximately 10 acres.
Aggregating approximately 19 acres.

Notice of the decision will also be published once a week for four consecutive weeks in the *Nome Nugget.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until June 3, 2013 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4 shall be deemed to have waived their rights. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, AK 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at: 907–271–5960 or by email at: *blm_ak_akso_public_room@blm.gov.* Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Joe J. Labay,

Land Transfer Resolution Specialist, Division of Lands and Cadastral.

[FR Doc. 2013–10503 Filed 5–2–13; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLID9310000.L10200000.EE0000. LXSSD0010000]

Notice of Availability of the Draft Environmental Impact Statement for the Jump Creek, Succor Creek, and Cow Creek Watersheds Grazing Permit Renewal, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (EIS) for the Jump Creek, Succor Creek, and Cow Creek Watersheds Grazing Permit Renewal and by this notice is announcing the opening of the comment period.

DATES: To ensure comments will be considered, the BLM must receive written comments on the Draft EIS for the Jump Creek, Succor Creek, and Cow Creek Watersheds Grazing Permit Renewal by June 17, 2013.

The BLM will announce meetings or hearings and any other public involvement activities regarding the Draft EIS at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: You may submit comments related to the Draft EIS for the Jump Creek, Succor Creek, and Cow Creek Watersheds Grazing Permit Renewal by any of the following methods:

- *Web site: http://www.blm.gov/id/st/en/prog/nepa_register/owyhee_grazing_group/grazing_permit_renewal0.html.*
- *Email: BLM_ID_NPR_EIS@blm.gov.*
- *Fax:* (208) 373–3805.
- *Mail:* Bureau of Land Management, 1387 S. Vinnell Way, Boise ID 83709.

Copies of the Draft EIS for the Jump Creek, Succor Creek, and Cow Creek Watersheds Grazing Permit Renewal are also available on CD (upon request) from the BLM Idaho State Office at the above address.

FOR FURTHER INFORMATION CONTACT: Jake Vialpando, Project Manager, telephone: 208–373–3814; address: 1387 S. Vinnell Way, Boise ID 83709; email: *jvialpando@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM Owyhee Field Office in Marsing, Idaho, has prepared a Draft EIS to address grazing permit renewal requests in the Jump Creek, Succor Creek, and Cow Creek areas, and announces the beginning of the 45-day public comment period. The area covered by the permit renewal requests is located in Owyhee County, Idaho, and encompasses approximately 120,000 acres of public land. In addition to livestock grazing, a variety of other multiple uses exist within this area, including: Year-long recreation activities, particularly hiking, boating, fishing, hunting, and off-road vehicle use; wild horse management; potential wind energy development and electrical transmission line development. The Owyhee Field Office will consult with the Shoshone-Paiute Tribes and other parties, as applicable, on this action during regular consultation proceedings and briefings. Federal, state, and local agencies, along with other stakeholders that may be interested or affected by the BLM's decision on this project are invited to comment as well.

The purpose of the action in the Draft EIS is to provide for livestock grazing opportunities on public lands using existing infrastructure where such grazing is consistent with meeting management objectives, including the Idaho Standards for Rangeland Health and Guidelines for Livestock Grazing Management (1997).

The need is established by the Taylor Grazing Act (TGA), the Federal Land Policy and Management Act (FLPMA), and the Owyhee Resource Management Plan (ORMP) (1999), which require that the BLM respond to applications to renew or for new permits to graze livestock on public land. In detail, analysis of the actions identified in the applications for grazing permit renewals and the alternative actions is needed because:

• BLM-Idaho adopted the Idaho Standards for Rangeland Health and Guidelines for Livestock Grazing Management (Idaho S&Gs) in 1997. Rangelands should be meeting or making significant progress toward meeting the standards and must provide for proper nutrient cycling, hydrologic cycling, and energy flow. Guidelines direct the selection of grazing management practices and, where appropriate, livestock facilities to promote significant progress toward, or the attainment and maintenance of, the standards.

• The ORMP identifies resource management objectives and management actions that guide the management of a broad spectrum of land uses and allocations for public lands in the Owyhee Field Office. The ORMP allocated public lands within the 25 allotments available for domestic livestock grazing. Where consistent with the goals and objectives of the ORMP and Idaho S&Gs, allocation of forage for livestock use and the issuance of grazing permits to qualified applicants are provided for by the TGA and the FLPMA.

Issues were identified by BLM personnel, Federal, state, and local agencies, and other stakeholders during scoping. Some of these key issues include the effects of livestock grazing on rangelands, wild horse herd management areas, wildlife habitats (including greater sage-grouse habitats), as well as the potential for disease transmission between domestic and bighorn sheep. Livestock management modifications are required where current livestock grazing management is determined by the authorized officer to be a significant causal factor for not meeting or making significant progress towards meeting the Idaho Standards for Rangeland Health; and to achieve ORMP objectives. Evidence on interaction between bighorn sheep and domestic sheep suggests that contact between the two species can transmit disease, cause mortality to individual bighorn sheep, and affect herd health.

Other key issues that are identified and analyzed in the Draft EIS involve the impact of livestock grazing on riparian area conditions and aquatic habitat causing the alteration of the health and composition of riparian vegetation communities, especially fish and amphibian habitat conditions directly related to conditions within the riparian vegetation community; sage-grouse habitat conditions as it relates to rangeland health conditions, and the maintenance and enhancement of sage-grouse populations in accordance with BLM policy. Additionally, upland vegetation and watershed conditions affected by livestock grazing that may reduce or remove native vegetation communities that protect watershed soil and hydrologic function are analyzed in the Draft EIS. Also included in the analysis of issues are special status plant species and how their reproduction can be affected by livestock grazing, and how noxious and invasive weeds have the potential to increase or spread by livestock grazing and trailing.

The BLM analyzed the potential effects of six alternative grazing systems. Alternative 1 is the No Action alternative, which analyzes the consequences if current grazing management actions were to continue. Alternative 2 reflects the applications received from the current permittees who are authorized to graze in these allotments. This alternative is described as the Proposed Action which, in this case, is one that was developed by non-BLM parties. Alternative 3 analyzes the incorporation of a deferred grazing schedule where postponement or delay of grazing is used to achieve management objectives. Alternative 4 incorporates a grazing schedule that prescribes seasons-of-use changes including rest and deferment to protect and enhance high-value resources during certain times of the year. Alternatives 3 and 4 both include AUM reductions at varying levels. Alternative 5 addresses the effects specific to a change in livestock classification from sheep to cattle. Alternative 6 analyzes the effects of no grazing in the allotments for a period of 10 years.

By the time the Final EIS is published, the agency is required to identify its preferred alternative (40 CFR 1502.14 (e)) and will do so at that time. The agency seeks public comments on the proposed action and alternative methods of rangeland management that are analyzed in the Draft EIS.

Please note that public comments and information submitted including names, street addresses, and email addresses of persons who submit comments will be available for public review and disclosure at the above address during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays.

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.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

Loretta V. Chandler,

BLM Owyhee Field Manager.

[FR Doc. 2013–10250 Filed 5–2–13; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNV952000 L14200000.BJ0000 241A; 13–08807; MO# 4500050438; TAS: 14X1109]

Filing of Plats of Survey; NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested State and local government officials of the filing of Plats of Survey in Nevada.

DATES: *Effective Dates:* Filing is effective at 10:00 a.m. on the dates indicated below.

FOR FURTHER INFORMATION CONTACT: David D. Morlan, Chief, Branch of Geographic Sciences, Bureau of Land Management, Nevada State Office, 1340 Financial Blvd., Reno, NV 89502–7147, phone: 775–861–6490. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

1. The Plat of Survey of the following described lands was officially filed at the Bureau of Land Management (BLM) Nevada State Office, Reno, Nevada on February 19, 2013:

The plat, in 1 sheet, representing the dependent resurvey of the Fifth Standard Parallel North through Range 51 East, the west boundary and a portion of the subdivisional lines, Township 26 North, Range 51 East, of the Mount Diablo Meridian, Nevada, under Group No. 918, was accepted February 14, 2013. This survey was executed to meet certain administrative needs of the BLM and to locate specific Federal interest lands for Barrick Gold Exploration, Inc.

2. The Supplemental Plat of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on March 20, 2013:

The supplemental plat, in 1 sheet, showing a correction to the area of former lot 1, section 13, Township 24 North, Range 63 East, Mount Diablo Meridian, Nevada under Group 922 was accepted March 18, 2013. This supplemental plat was prepared to meet certain administrative needs of the BLM.

3. The Plat of Survey of the following described lands will be officially filed at the Nevada State Office, Reno, Nevada on the first business day after thirty (30) days from the publication of this notice:

This plat, in 2 sheets, representing the dependent resurvey of portions of the south, west and north boundaries and portions of the subdivisional lines, the survey of a portion of the south boundary and a portion of the subdivisional lines, and the subdivision of certain sections, Township 12 North, Range 28 East, of the Mount Diablo Meridian, Nevada, under Group No. 906, was accepted April 16, 2013. This survey was executed to meet certain administrative needs of the Bureau of Indian Affairs.

Subject to valid existing rights, the provisions of existing withdrawals and classifications, the requirement of applicable laws, and other segregations of record, these lands are open to application, petition and disposal, including application under the mineral leasing laws. All such valid applications received on or before the official filing of the Plat of Survey described in paragraph 1, shall be considered as simultaneously filed at that time. Applications received thereafter shall be considered in order of filing.

The surveys listed above are now the basic record for describing the lands for all authorized purposes. These surveys have been placed in the open files in the BLM Nevada State Office and are available to the public as a matter of information. Copies of the surveys and related field notes may be furnished to the public upon payment of the appropriate fees.

Dated: April 23, 2013.

David D. Morlan,

Chief Cadastral Surveyor, Nevada.

[FR Doc. 2013–10493 Filed 5–2–13; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–IMR–BITH–12033: PX.PD109246K.00.1]

General Management Plan, Draft Environmental Impact Statement, Big Thicket National Preserve, Texas

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service announces the availability of a Draft Environmental Impact Statement for the General Management Plan, Big Thicket National Preserve, Texas.

DATES: The National Park Service will accept comments on the Draft Environmental Impact Statement from the public for 60 days after the date the Environmental Protection Agency publishes this Notice of Availability. Public meetings on the draft will be scheduled during the comment period. Interested parties are encouraged to check the park Web site and local media for information.

ADDRESSES: Information will be available for public review and comment online at *http://parkplanning.nps.gov/BITH,* in the office of the Superintendent, Doug Neighbor, 6044 FM 420, Kountze, TX 77625, 409–951–6801, and at the following location: Fire Management Office, 860 CR 1040, Woodville, TX 75997.

FOR FURTHER INFORMATION CONTACT: Doug Neighbor, Superintendent, Big Thicket National Preserve, 6044 FM Road 420, Kountze, TX 77625, email address *BITH_Superintendent@nps.gov;* 409–951–6801.

SUPPLEMENTARY INFORMATION: The document describes four management alternatives for Big Thicket National Preserve, including a no-action alternative and the National Park Service preferred alternative. The anticipated environmental impacts of those alternatives are also analyzed. *Alternative 1,* the no-action alternative, would extend existing conditions and management trends into the future. This alternative serves as a basis of comparison for evaluating the action alternatives. *Alternative 2, the NPS preferred alternative,* would support a broad ecosystem approach for preserve management using partnerships and collaboration. This alternative recognizes the challenges associated with management of cross-boundary resource issues and the importance of encouraging partnerships to address and resolve resource issues. The National Park Service would proactively engage in regional planning and policy efforts for the benefit of resource protection, compatible visitor use, and other issues both within and outside the preserve boundaries. Initiatives that advance the long-term protection of the preserve's natural resources would receive the primary focus of management attention and funding. Appropriate visitor uses and experiences would also be improved and expanded. Preserve staff would expand and encourage new partnership agreements with outside public and private organizations. *Alternative 3* would emphasize natural resource preservation and research while providing self-reliant recreational opportunities. *Alternative 4* would seek to increase the importance of the preserve and the National Park Service to the people in the communities of southeast Texas and to visitors from all over the world. If you wish to comment, you may submit your comments by any one of several methods. You are encouraged to submit comments via the Internet at *http://parkplanning.nps.gov/BITH.* You may also mail comments to National Park Service, Denver Service Center—Erin Flanagan, P.O. Box 25287, Denver, CO 80225. Finally, you may hand-deliver comments to 6044 FM Road 420, Kountze, TX 77625. 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: January 15, 2013.

John Wessels,

Regional Director, Intermountain Region, National Park Service.

[FR Doc. 2013–10423 Filed 5–2–13; 8:45 am]

BILLING CODE 4312–CB–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–13–009]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: May 10, 2013 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.
2. Minutes
3. Ratification List
4. Vote in Inv. No. 731–TA–1206 (Preliminary) (Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan). The Commission is currently scheduled to transmit its determination to the Secretary of Commerce on or before May 13, 2013; Commissioners'' opinions are currently scheduled to be transmitted to the Secretary of Commerce on or before May 20, 2013.
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: May 1, 2013.

By order of the Commission.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2013–10648 Filed 5–1–13; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–805]

Certain Devices for Improving Uniformity Used in a Backlight Module and Components Thereof and Products Containing Same; Commission Decision To Review in Part a Final Initial Determination on Remand Finding No Violation of Section 337 and on Review To Affirm With Modification; Termination of Investigation With a Finding of No Violation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part the presiding administrative law judge's (''ALJ'') final initial determination on remand (''Remand ID'') issued on February 28, 2013, finding no violation of section 337 of the Tariff Act of 1930, (as amended), 19 U.S.C. 1337 (''section 337''), in the above-captioned investigation, and on review, to affirm the Remand ID's finding of no violation of section 337 with modification. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on September 14, 2011, based on a complaint filed by Industrial Technology Research Institute of Hsinchu, Taiwan and ITRI International Inc. of San Jose, California (collectively ''ITRI''). 76 FR 56796–97 (Sept. 14, 2011). The complaint alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain devices for improving uniformity used in a backlight module and components thereof and products containing same by reason of infringement of certain claims of U.S. Patent No. 6,883,932 (''the '932 patent''). The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named as respondents LG Corporation of Seoul, Republic of Korea; LG Electronics, Inc. of Seoul, Republic of Korea; and LG Electronics, U.S.A., Inc. of Englewood Cliffs, New Jersey. The Office of Unfair Import Investigations was named as a participating party. The complaint was later amended to add respondents LG Display Co., Ltd. of Seoul, Republic of Korea and LG Display America, Inc. of San Jose, California to the investigation. Notice (Feb. 2, 2012); Order No. 11 (Jan. 19, 2012). The Commission later terminated LG Corporation from the investigation. Notice (July 13, 2012); Order No. 18 (June 22, 2012).

On October 22, 2012, the ALJ issued his final initial determination (''Final ID''), finding no violation of section 337 as to the '932 patent. The ID included the ALJ's recommended determination (''RD'') on remedy and bonding. In particular, the ALJ found that claims 6, 9 and 10 of the '932 patent are not infringed literally or under the Doctrine of Equivalents by the accused products under his construction of the claim limitation ''structured arc sheet'' found in claim 6. The ALJ also found that ITRI's domestic industry product does not satisfy the technical prong of the domestic industry requirement. The ALJ did find, however, that ITRI has satisfied the economic prong of the domestic industry requirement under 19 U.S.C. 1337(a)(3)(A) and (B). Because he found no infringement and no domestic industry, the ALJ did not reach the issues of patent validity or enforceability. In the event the Commission found a violation of section 337, the ALJ recommended that the appropriate remedy is a limited exclusion order barring entry of LG's infringing products. The ALJ also recommended issuance of cease and desist orders against LG Electronics USA and LG Display America. The ALJ further recommended that LG be required to post a bond of one percent of the entered value of each infringing product during the period of Presidential review.

On November 5, 2012, ITRI filed a petition for review of certain aspects of the Final ID. Also on November 5, 2012, participating respondents LG Electronics, Inc., LG Electronics U.S.A., Inc., LG Display Co., Ltd., and LG Display America, Inc. (collectively ''LG'') filed a contingent petition for review of certain aspects of the ID. No post-RD statements on the public interest pursuant to Commission Rule 210.50(a)(4) or in response to the post-RD Commission Notice issued on October 24, 2012, were filed. *See* 77 FR 65579 (Oct. 29, 2012).

On December 21, 2012, the Commission determined to review the Final ID in its entirety and to remand-in-part to the ALJ to consider the issues of invalidity and patent unenforceability. 77 FR 77092–7093 (Dec. 31, 2012). On January 29, 2013, the Commission determined not to review an ID (Order No. 22) extending the target date for completion of the investigation by four months to June 28, 2013. *See* Notice (Jan. 29, 2013); Order No. 22 (Jan. 9, 2013).

On February 28, 2013, the ALJ issued his Remand ID, finding no violation of section 337. In particular, the ALJ found that the asserted claims of the '932 patent are invalid as anticipated under 35 U.S.C. 102. He further found that the

asserted claims of the '932 patent are not invalid as obvious under 35 U.S.C. 103. The ALJ also found that the asserted claims of the '932 patent are not invalid for failure to satisfy the written description requirement under 35 U.S.C. 112, or for failure to satisfy the definiteness requirement under 35 U.S.C. 112. He further found that the asserted claims are not unenforceable due to inequitable conduct before the U.S. Patent and Trademark Office.

On March 13, 2013, ITRI filed a petition for review of the Remand ID's finding that U.S. Patent Application Publication No. 2003/0107892 to Yao (''Yao '892'') anticipates the asserted claims of the '932 patent. Also on March 13, 2013, LG filed a contingent petition for review of the Remand ID's finding that U.S. Patent No. 5,101,331 to Katoh (''Katoh '331'') does not anticipate asserted claims 6 and 10 of the '932 patent. LG also argues that the Remand ID errs in finding that Japanese Patent Publication 2000–338895 to Azuma (''Azuma '895'') does not anticipate claim 6 of the '932 patent. LG further argues that the Remand ID errs in not finding that the asserted claims of the '932 patent are obvious in light of various combinations of prior art references. On March 21, 2013, ITRI filed a response to LG's contingent petition for review. *See* ITRI's Remand Resp. Also on March 21, 2013, LG filed a response to ITRI's petition for review. *See* LG's Remand Resp. Further on March 21, 2013, the Commission investigative attorney filed a combined response to ITRI's and LG's petitions. *See* IA's Remand Resp.

Having examined the record of this investigation, including the ALJ's Final ID, the petitions for review, and the responses thereto, the Commission has determined to review the Remand ID in part. In particular, the Commission has determined to review the Remand ID's finding that Yao '892 anticipates claims 6, 9, and 10 of the '932 patent, and on review, finds that Yao '892 anticipates the asserted claims based on modified reasoning. The Commission has also determined to review the Remand ID's finding that LG has not shown by clear and convincing evidence that Katoh '331 does not anticipate claims 6 and 10 of the '932 patent, and on review, finds that Katoh '331 does not anticipate the asserted claims based on modified reasoning. The Commission has determined not to review the remaining issues decided in the Remand ID.

With respect to other issues the Commission determined to review in the Final ID, the Commission affirms the Final ID's construction of the limitation ''structured arc sheet'' of claim 6 of the '932 patent. The Commission also finds that the accused products do not infringe the asserted claims of the '932 patent based on slightly modified reasoning. The Commission further finds that ITRI has failed to satisfy the technical prong of the domestic industry requirement based on slightly modified reasoning. The Commission affirms the Final ID's finding that ITRI has satisfied the economic prong of the domestic industry requirement.

The investigation is terminated. A Commission opinion will issue shortly.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.42–46 and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 210.42–46 and 210.50).

By order of the Commission.
Issued: April 29, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–10444 Filed 5–2–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–59]

Top RX Pharmacy; Decision and Order

On November 8, 2012, Chief Administrative Law Judge (ALJ) John J. Mulrooney, II, issued the attached Recommended Decision. Neither party filed exceptions to the Recommended Decision.

Having reviewed the record in its entirety, I have decided to adopt the ALJ's recommended rulings, findings of fact, and conclusions of law, except as discussed below.[1] I have also decided to adopt the ALJ's recommended order.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration FT3034117, issued to Top RX Pharmacy, be, and it hereby is, revoked. I further order that any pending application of Top RX Pharmacy, to renew or modify the above registration, be, and it hereby is, denied. This Order is effective immediately.[2]

Dated: April 25, 2013.

Michele M. Leonhart,

Administrator.

Anthony Yim, Esq., and Frank Mann, Esq., for the Government
Jeffrey C. Grass, Esq., for the Respondent

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

Chief Administrative Law Judge John J. Mulrooney, II. On August 1, 2012, the Administrator of the Drug Enforcement Administration (DEA), issued an Order to Show Cause and Immediate Suspension of Registration (OSC/ISO) immediately suspending and proposing to revoke the DEA

[1] In his discussion of Factor Five—such other conduct which may threaten public health and safety—the ALJ cited the Agency's decision in *Paul Weir Battershell,* 76 FR 44359, 44368 n.27 (2011), for the proposition that ''although a registrant's non-compliance with the Food, Drug, and Cosmetic Act *is not relevant under Factor Five,* consideration of such conduct may properly be considered on the narrow issue of assessing a respondent's future compliance with the CSA.'' Recommended Decision at 53 (slip op.) (emphasis added). However, as *Battershell* makes clear, it is not the case that such conduct is irrelevant under factor five, but simply, that such conduct, by itself, is not dispositive of whether a respondent's continued registration is consistent with the public interest. *See* 76 FR at 44368 n.27. Thus, evidence of non-compliance with provisions of the FDCA is relevant ''for the limited purpose of assessing the likelihood of [a] [r]espondent's future compliance with the CSA.'' *Id.* (citing *Wonderyears, Inc.,* 74 FR 457, 458 (2009)); *see also 4 OTC, Inc.,* 77 FR 35031, 35032–33 (2012).

Also, in his discussion of Respondent's failure to accept responsibility, the ALJ opined that ''[t]here is nothing in the record to rebut the persuasive record evidence that the conduct of the owner and PIC exceeded inaction and rose to the level of willing complicity in controlled substance diversion on a massive scale.'' Recommended Decision at 56. I agree that the evidence clearly shows that Respondent's principals knowingly diverted controlled substances. However, to the extent the ALJ's reasoning suggests that ''inaction'' on the part of a pharmacy's principals in dispensing prescriptions does not violate their duty under federal law to dispense only those prescriptions which have been ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice,'' 21 CFR 1306.04(a), it is inconsistent with federal law. *See United States* v. *Seelig,* 622 F.2d 207, 213 (6th Cir. 1980) (upholding jury instruction that knowledge may be inferred from evidence that pharmacists ''deliberately closed their eyes to what would otherwise be obvious to them''); *Grider Drug #1 & Grider Drug #2,* 77 FR 44070, 44097 (2012) (quoting *Ralph J. Bertolino,* 55 FR 4729, 4730 (1990) (''When prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescriptions.'')). As these cases make clear, inaction on the part of a pharmacist who fills a prescription can by, itself, support a finding of a violation of 21 CFR 1306.04(a) and the revocation of a registration.

As the ALJ noted earlier in his decision, when the circumstances surrounding a prescription present a red flag as to the prescription's legitimacy, that red flag must be resolved conclusively to show that the prescription is legitimate prior to dispensing it. Recommend Decision at 44. Indeed, the circumstances surrounding the prescription may be such that it cannot be dispensed. *See Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195,* 77 FR 62316, 62317–22 (2012).

[2] Based on the egregious acts proven on this record, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

Certificate of Registration (COR), Number FT3034117, of the Respondent pursuant to 21 U.S.C. § 824(a), and to deny any pending applications for registration, renewal or modification pursuant to 21 U.S.C. §§ 823(f) and 824(a). On August 6, 2012, the Respondent, through counsel, timely requested a hearing, which was conducted in Dallas, Texas on October 2, 2012.

The issue ultimately to be adjudicated by the Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes, by substantial evidence, that the Respondent's COR should be revoked as inconsistent with the public interest, as that term is used in 21 U.S.C. §§ 823(f) and 824(a).

After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions of law below.

The Allegations

In its OSC/ISO [3] and its Prehearing Statements,[4] the Government alleges that the Respondent, through its owner, agents, and employees: (1) failed to create an initial inventory of controlled substances, in violation of 21 U.S.C. § 827(a)(1) and 21 C.F.R. § 1304.11(b); (2) provided false information to controlled substance distributors; (3) failed to maintain accurate and complete records and failed to account for controlled substances in violation of 21 U.S.C. §§ 827(a)(3) and 842(a)(5) and 21 C.F.R. §§ 1304.03, 1304.04 and 1304.21; (4) diluted promethazine syrup before dispensing, in violation of 21 U.S.C. § 331; and (5) dispensed controlled substances under circumstances where it knew or should have known that the drugs were being diverted for illicit purposes and were not being dispensed for a legitimate medical purpose.

The Stipulations of Fact

The Government and the Respondent, through counsel, have entered into stipulations regarding the following matters:

1) Top RX Pharmacy is registered with DEA as a retail pharmacy in Schedules III–V under DEA Certificate of Registration FT3034117 at 2381 S. Collins Street, Arlington, Texas, 76014 with an expiration date of November 30, 2014.

2) Top RX is currently licensed as a pharmacy in the State of Texas pursuant to license number 27844, which is currently active and set to expire on January 31, 2014.

3) Top RX is owned by Mr. Jesse Sanders III. The pharmacist-in-charge of Top RX is Mr. Alonzo Grape, R.Ph.

The Evidence

The Government's Evidence

The Government called four witnesses in support of its case-in-chief. The Government's witnesses included Dale Newkirk, the lead (now retired) diversion investigator (DI) on the DEA case, Charles Pinkerton, an investigator from the Texas Department of Public Safety (DPS), Ronald White, an investigator from the Texas State Board of Pharmacy (Texas Pharmacy Board), and Heather Tippie, a pharmacy technician-in-training who was formerly employed at the Respondent Pharmacy.

DPS Investigator Pinkerton testified that he has been an investigator with the Regulatory Services Division of DPS for eleven years, and was a thirty-year veteran of the Fort Worth Police Department prior to joining DPS. Tr. 14. Investigator Pinkerton testified that as a DPS investigator he conducts regulatory investigations of pharmacies, which can include random inspections, pill counts, and pharmacy paperwork assessments. Tr. 15. Pinkerton stated that he has received training at DPS, and that in his eleven years on the job has conducted 75–80 pharmacy inspections. Tr. 15–16.

Investigator Pinkerton testified that he first visited the Respondent pharmacy on March 13, 2012, pursuant to a tasking from a DPS supervisor, based on a report that the Respondent had not been transmitting required data to the Texas prescription monitoring program (PMP).[5] Tr. 17–18. Upon his arrival at the Respondent pharmacy, Investigator Pinkerton and another DPS investigator, named Susan Furnas, spoke with the pharmacy owner, Jesse Sanders, III (Mr. Sanders). Tr. 18–19. The two DPS investigators informed Mr. Sanders that they were there to conduct an investigation/security audit (First DPS Audit) of the pharmacy.[6] Tr. 19–20. Pinkerton explained the DPS pharmacy audit protocol as follows:

> What we do . . . is we pick a particular drug, okay, and then we look at the invoices showing where [the pharmacy has] bought what [it has] bought. We also look at the dispensing logs, what [the pharmacy has] sold, if [the pharmacy has] any credits where [it has] transferred drugs or have bought anything. We look at that. And then we have a formula that we go through and we add all this together and determine whether or not there's a shortage or an overage of the drug.

Tr. 26.

Investigator Pinkerton described the Respondent's invoices of controlled substances purchased and its ''storage of drugs'' as ''messy.'' [7] Tr. 20–21. According to Investigator Pinkerton, the invoices were not filed as they should have been, ''[t]hey were just laying on a desk . . . just kind of laying around haphazardly.'' Tr. 21

Additionally, Pinkerton testified that, as part of the First DPS Audit, he asked for an initial inventory. Tr. 23. Investigator Pinkerton explained the Texas initial inventory requirement as follows:

> With the rules and regulations that we go by, an initial inventory is made by the pharmacy when they [sic] first start business. On the very first day of their [sic] business, they are to count all of their drugs, particularly the schedule drugs, to find out what they [sic] have on hand when they [sic] start their business.

Id. It was thus, Pinkerton's understanding that in Texas, the initial inventory requirement ripens on the first day a pharmacy opens.[8] Pinkerton testified that when he asked the Respondent's Pharmacist-in-Charge (PIC) Alonzo Grape, and its owner, Mr. Sanders, to produce an initial inventory, both men conceded that none existed and that they were unaware of any requirement to generate one. Tr. 23–24. According to Pinkerton, PIC Grape then stated that he did not think that he needed to have one until the pharmacy had been open six months. Tr. 24. Mr. Sanders, for his part, offered no explanation as to why the pharmacy had no initial inventory. Tr. 25. Further, the Respondent pharmacy staff was unable produce any dispensing logs. *Id.* Hard copies of prescriptions were the only dispensing records provided by the Respondent pharmacy. Tr. 25–26. On a positive note, Mr. Sanders did demonstrate to the DPS investigators that he had resolved his software issues sufficiently to transmit required weekly controlled substance reports

[3] ALJ Ex. 1.

[4] ALJ Exs. 7, 8.

[5] Investigator Pinkerton testified that Texas pharmacies are required to transmit a weekly accounting of all scheduled drugs filled in the previous seven days. Tr. 17.

[6] On cross-examination, Investigator Pinkerton acknowledged that when he first arrived at the Respondent pharmacy he was under the misimpression that it had been in business for over a year. Tr. 55. The evidence shows that the Respondent pharmacy opened its doors approximately two months prior to Investigator Pinkerton's March 13 visit.

[7] Investigator Pinkerton also described the ''general condition of the pharmacy'' as ''unclean.'' Tr. 20. When asked whether this cleanliness observation related to a regulatory standard, Pinkerton explained: ''I guess it's more of an observation. I noted dust, dirt, in and around the edges of the place, of the walls. We have no training as far as that goes. That was just an observation that I did make on my own.'' Tr. 22. Although Pinkerton was unable to identify the applicable state authority on point, 22 Tex. Admin. Code § 291.33(b) provides that ''[t]he pharmacy shall be arranged in an orderly fashion and kept clean.'' While maintaining an unclean or even unsanitary pharmacy is certainly unsavory, and may be a violation of state law, no clear nexus between Pinkerton's cleanliness observation and any law related to controlled substances is apparent in the record or proffered by the Government. *See Gregg & Son Distributors,* 74 Fed. Reg. 17517 n.1 ([I]t is the Government's obligation as part of its burden of proof and not the ALJ's responsibility to sift through the records and highlight that information which is probative of the issues in the proceeding.''). That Pinkerton felt the pharmacy was not sufficiently clean, at least as offered here, is not a relevant consideration in determining whether the Respondent can be entrusted with a DEA COR. *See Judulang v. Holder,* 132 S.Ct. 476, 556 U.S. ____ (2011) (actions of a regulatory agency must bear a rational relationship to the purposes of the statute it is charged with enforcing); *Tony T. Bui, M.D.,* 75 Fed. Reg. 49979, 49989 (2010) (holding that in order for a registrant's ''conduct to be actionable under factor five, there must be a substantial relationship between the conduct and the CSA's purposes of preventing drug abuse and diversion, and that the conduct may constitute a threat to public health and safety.''); *see also Paul Weir Battershell, N.P.,* 76 Fed. Reg. 44359 n.27 (2011) (to same effect).

[8] Although Investigator Pinkerton was unable to furnish a citation for any authority related to the Texas initial inventory requirement (Tr. 27), 22 Tex. Admin. Code § 291.17(b) requires that ''[a] new [community] pharmacy shall take an [initial] inventory on the opening day of business.''

to the Texas PMP, hence resolving the initial issue that spawned their visit. Tr. 19–20, 64.

The drug selected[9] by Investigators Pinkerton and Furnas for review at the Respondent pharmacy at the First DPS Audit was alprazolam.[10] Tr. 28. Pinkerton testified that, consistent with the DPS protocol, the audit was conducted on the pharmacy premises with pharmacy staff, and the audit counts recorded are the result of an agreement between the inspectors and the pharmacy personnel. Tr. 29. Heather Tippie, a pharmacy technician-in-training employed at the Respondent, counted the drugs with Investigator Pinkerton, with PIC Grape standing beside her.[11] Tr. 28–29, 59–60.

A copy of the audit results computation sheet prepared by the DPS investigators (DPS Computation Form 1) was received into evidence through Investigator Pinkerton's testimony. Gov't Ex. 3, at 1; Tr. 53. Based on Mr. Sanders' representation that there was no initial inventory, a zero was placed in the column of DPS Computation Form 1, denoting the initial inventory amount on board as of the January 16, 2012 date that Sanders told Pinkerton that the pharmacy opened (pharmacy opening date).[12] Gov't Ex. 3, at 1. A comparison of the total number of dosage units the Respondent pharmacy's paperwork reflects as having been purchased since the opening date, with the total amount of dosage units on hand (pursuant to the agreed-upon count), indicates that the pharmacy was 5,469 dosage units shy of alprazolam amounts that should have been there. Gov't Ex. 3, at 1; Tr. 35. This translated into a 43.06% difference between the amount of alprazolam justified by the paperwork and the amount the pharmacy could find in the store. Gov't Ex. 3, at 1; Tr. 37. Pinkerton stated that neither Sanders nor Grape could supply any reason for the shortage. Tr. 36. Pinkerton asked Sanders and Grape for additional information to explain the shortage (such as additional invoices or sale records) but none were supplied. *Id.* Pinkerton stated that he gave Sanders and Grape an additional seven days to find paperwork to account for the shortage. Tr. 37. About a week later, Pinkerton received a phone call from Mr. Sanders, who informed him that additional paperwork and drugs had been discovered in the pharmacy back room. Tr. 37–39. Mr. Sanders also telephonically communicated to Pinkerton that he was in possession of a computer printout showing that the number of prescriptions during the First DPS Audit should not have been 480 dosage units, but rather 690. Tr. 49.

Based on the follow up call from Mr. Sanders, Pinkerton and Alicia Alexander, another DPS investigator, returned to the Respondent pharmacy on March 20, 2012[13] and conducted another audit (Second DPS Audit). Tr. 39. The investigators re-counted, and the amount of alprazolam remained the same. Tr. 49–50. The results of the Second DPS Audit were memorialized by Pinkerton in another DPS computation form (DPS Computation Form 2). Gov't Ex. 3, at 2. In contrast to the First DPS Audit, which revealed a 5,469 dosage unit *shortage,* the Second DPS Audit, which was conducted ''from scratch,''[14] reflected a 2,275 dosage unit *overage* (17.91%) of alprazolam 2 milligram (mg). Gov't Ex. 3, at 2; Tr. 41. Mr. Sanders and PIC Grape were present at the Second DPS Audit, but neither offered any explanation as to how the previous shortage had now morphed into an overage. Tr. 42. Mr. Sanders told the investigators that he assumed that the pills discovered in the back room of the pharmacy would remedy the audit anomalies identified in the First DPS Audit. *Id.*

On March 29, 2012, Sanders again telephoned Pinkerton and advised him that another invoice for 1,000 dosage units of alprazolam 2 mg had been discovered at the pharmacy. Tr. 45. Pinkerton did not return to the Respondent pharmacy, but based on Mr. Sanders' newest revelation, completed another drug computation form (DPS Computation Form 3), which incorporated the new information supplied by Mr. Sanders. Gov't Ex. 3, at 3; Tr. 45–46. Even assuming the accuracy of the purported newly-discovered invoice, DPS Computation Form 3 reflects a 1,275 dosage unit overage (9.3%) of alprazolam 2 mg. Gov't Ex. 3, at 3; Tr. 47. Investigator Pinkerton subsequently telephoned Mr. Sanders seeking further explanation of the overage, but the latter was unable to shed any light on the matter. Tr. 47.

Investigator Pinkerton testified that he returned to the Respondent pharmacy in May of 2012 at the request of Ronald White, an investigator with the Texas Pharmacy Board. Tr. 51. Investigator White invited Pinkerton to provide assistance during an audit to be conducted by DEA (DEA Audit). *Id.* Pinkerton testified that it was his recollection that the DEA Audit (discussed in greater detail, *infra*) focused on the following controlled substances: hydrocodone,[15] alprazolam, Soma,[16] and promethazine with codeine.[17] Tr. 52.

Investigator Pinkerton presented as an impartial investigator who tendered testimony that was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

The Government also presented the testimony of retired DEA DI Dale Newkirk. Newkirk testified that he worked as a diversion investigator with DEA in Fort Worth, Texas for thirteen years, and retired in September of 2012. Tr. 68. DI Newkirk testified that he has undergone multiple training evolutions as a DEA DI, and that prior to his employment at DEA, he spent twenty-five years as a police officer in El Paso, Texas. Tr. 69–70.

Newkirk testified that he was aware of the Respondent pharmacy because he conducted its pre-COR investigation. Tr. 70. DI Newkirk recalled that the case came to him as a result of an application liability question, which alerted DEA that the Respondent's PIC, Alonzo Grape, had a history of discipline by the Texas Pharmacy Board. Tr. 70. Newkirk recalled that he approved the Respondent's application after he confirmed that the Pharmacy Board had resolved its issue with PIC Grape. Tr. 70–71. DI Newkirk testified that because of the issue encountered during the registration process, he periodically monitored ARCOS entries related to the Respondent, and observed that (at least in his opinion) the Respondent was ordering large amounts of hydrocodone. Tr. 71. According to DI Newkirk, because of his suspicions and the volume amounts reflected in the ARCOS data, he ''kept an eye on'' the Respondent.[18] *Id.*

Newkirk testified that on May 7, 2012, DPS Investigator Pinkerton telephonically advised him of the shortage/overage audit results obtained from his visits to the Respondent pharmacy. *Id.* Based on this information, Newkirk conducted an inspection of the Respondent the following day (First DEA Visit). *Id.* In addition to Investigator Pinkerton, DI Newkirk was accompanied on his inspection visit to the Respondent pharmacy by his partner, DI Christopher Hull, DPS Investigators Susan Furnas and Alicia Alexander, and Investigator Ronald White from the Texas Pharmacy Board. Tr. 71–72.

Newkirk testified that when the investigators arrived at the Respondent pharmacy, they were met by Heather Tippie (Ms. Tippie) at the window. Tr. 72. Newkirk recalled that Ms. Tippie ''represented herself as a pharmacy tech-in-training . . . told [the inspectors] that she had been through the required classes [to be a pharmacy technician], and [Newkirk observed that] her

[9] Investigator Pinkerton testified that the audit drug choice is selected at random. Tr. 18.

[10] Alprazolam is a Schedule IV controlled substance pursuant to 21 C.F.R. § 1308.14(c)(1).

[11] There is simply no factual basis for the assertion made in the Respondent's post-hearing brief that the alprazolam counts were made exclusively by Ms. Tippie and that Investigator Pinkerton testified that ''this could be the reason why [Grape] and [Sanders] couldn't [sic] explain the variances that were resulting from Ms. Tippie's count.'' Resp't Brief at 4.

[12] During cross examination, Investigator Pinkerton acknowledged that although the Respondent's COR lists February 2, 2012 as the date of issuance, based on his discussions with Mr. Sanders, he fixed the initial inventory date as January 16, 2012 on DPS Computation Form 1. Gov't Ex. 1; Gov't Ex. 3, at 1; Tr. 56–57.

[13] There was some confusion at the hearing as to the date contained on the audit form. Investigator Pinkerton testified that although the form states the date as ''3–19–12,'' it was not an accurate date. Gov't Ex. 3, at 2; Tr. 43. According to Pinkerton, the Second Audit was actually conducted on March 20, 2012, but he ''[g]uess[ed he] just got the dates mixed up. . . .'' Tr. 43–44.

[14] Tr. 39.

[15] Hydrocodone is a Schedule III controlled substance pursuant to 21 C.F.R. § 1308.13(e)(1).

[16] Soma is the brand name of a drug containing carisoprodol. 5–S Attorneys' Dictionary of Medicine S–107381. Carisoprodol is a Schedule IV controlled substance pursuant to 21 C.F.R. § 1308.14(c)(5).

[17] Promethazine with codeine cough syrup is a Schedule V controlled substance pursuant to 21 C.F.R. § 1308.15(c)(1).

[18] No context was elicited regarding why DI Newkirk characterized the amounts of hydrocodone he reviewed as ''large.'' Tr. 71. Similarly, the record contains no elucidation of what Newkirk meant by ''ke[eping] an eye on'' the Respondent. *Id.*

[pharmacy technician-in-training] certificate was on the wall . . . to the left as you enter the pharmacy.'' Tr. 107–08. Ms. Tippie retrieved the Respondent's owner, Mr. Sanders, and upon the presentation of a DEA notice of inspection, Mr. Sanders executed the document and consented to the inspection. Tr. 72. Mr. Sanders inquired of Newkirk whether the inspectors had come to inquire about two recent burglaries at the Respondent pharmacy and was told that the break-ins would be discussed during the inspection. Tr. 73.

Newkirk described the inspection procedure undertaken by himself, DI Hull, the Texas DPS investigators, and Investigator White. Tr. 72–74. DI Hull and the three DPS investigators conducted a closing inventory of all controlled substances and interviewed Ms. Tippie and PIC Grape. *Id.* Investigator White periodically assisted DI Newkirk in his conversations with Mr. Sanders. Tr. 73–74. Newkirk stated that during the inspection several violations were observed. Tr. 74. According to DI Newkirk, although the Respondent pharmacy had been ordering controlled substances [19] since February 3, 2012,[20] it failed to take an initial inventory, did not maintain its records, and did not annotate inventories when product was received.[21] *Id.* Newkirk also testified that the Respondent was transferring controlled substances to a pharmacy in Houston with documentation that did not comply with DEA regulations. Tr. 75. Specifically, Newkirk testified that the transfer records were deficient in that ''[t]hey [did not] contain the bottle size, the full name of the product or the amount of tablets or amount of liquid in the product [and] the receipts did not annotate who received the product, the date it was received or the correct amount received.'' *Id.*

Newkirk also testified that he observed unmarked bottles containing promethazine with codeine, hydrocodone, and alprazolam.[22] Tr. 75–76. According to DI Newkirk, he was able to identify the contents of the bottles containing hydrocodone and alprazolam by examining the pills, and the promethazine syrup by smelling it. Tr. 76. Although Newkirk conceded that he was unable, through his smelling process, to discern the presence or concentration of codeine in the syrup, Ms. Tippie and PIC Grape acknowledged the correctness of his assumption, and (as discussed, *infra*) samples of the contents were subsequently tested by DPS. Tr. 76–78.

Newkirk testified about the results of the controlled substance audit conducted during the First DEA Visit. Tr. 87. Several controlled substances were audited, revealing both shortages and overages. *Id.* Following the audit, Newkirk conducted an exit interview with Mr. Sanders and PIC Grape. Tr. 89. Newkirk informed Sanders and Grape of the shortages and overages observed, along with the Respondent's lack of an initial inventory, and poor recordkeeping. Tr. 89–90. Newkirk informed them that in his view, poor recordkeeping was one of the reasons that the audit did not balance. Tr. 90. Newkirk also pointed out the lack of annotations on invoices, the fact that the pharmacy was dirty, and that there were bottles containing controlled substances that did not have labels as other issues he observed during his visit. *Id.* Mr. Sanders responded that he would correct those issues. *Id.* When Mr. Sanders explained to Newkirk that he was a new pharmacy owner, and that he did not understand DEA policies, Newkirk referred him to the DEA Web site for detailed information and suggested that he could even consult with his father, Jesse Sanders, II (Mr. Sanders, Sr.), who served as a PIC at another pharmacy, as well as an advisor to the Respondent pharmacy.[23] *Id.*

Newkirk returned to the Respondent pharmacy on May 22, 2012 (Second DEA Visit) with another Notice of Inspection, accompanied by DI Hull, and Investigators White and Adrian Bower from the Texas Pharmacy Board. Tr. 91. The Second DEA Visit was initiated so that Newkirk could obtain copies of prescription records and so that Investigator White could procure samples to confirm his suspicion that the bottles he encountered during the First DEA Visit actually did contain promethazine with codeine.[24] *Id.* Newkirk testified that he recollected that conditions there, in his estimation, had improved to the extent that the pharmacy appeared cleaner, and there was a new pharmacy technician, Danielle Colvin (Colvin). Tr. 100. During the Second DEA Visit, Mr. Sanders conceded that he still had not prepared an initial inventory. Tr. 92.

DI Newkirk testified that he returned to the Respondent pharmacy for a third time on July 31, 2012 (Third DEA Visit). Tr. 93. According to Newkirk, the Third DEA Visit was prompted by a request from the Houston DEA Office to investigate an intelligence lead that emerged from an investigation that was unrelated to Newkirk's prior two visits to the Respondent. *Id.* Upon his arrival at the Third DEA Visit to the pharmacy (which he observed to be in a cleaner condition, with no regulatory violations he could recall),[25] he encountered PIC Grape, and Pharmacy Technician Colvin. *Id.* Newkirk informed Grape and Colvin that he was there to reexamine prescription records, and that he ''wanted to verify [the pharmacy's] daily dispensing report to see the drugs that [it was] dispensing and [that he] also wanted to get a month's printout of [the pharmacy's] dispensing records so that [he] could see what doctors were prescribing and the patients that were getting the drugs filled at the pharmacy.'' Tr. 93–94. A subsequent review of the prescription records obtained that day revealed to DI Newkirk that the three controlled substances most frequently dispensed at the Respondent pharmacy were hydrocodone,[26] alprazolam, and promethazine with codeine cough syrup. Tr. 96. Although Newkirk referred to the combination of these medications as ''the trinity cocktail,'' he provided no explanation for that term. *Id.*

Newkirk's fourth and final visit to the Respondent pharmacy occurred on August 2, 2012 (Fourth DEA Visit), when he served the OSC/ISO that is the subject of the present proceedings and seized all controlled substances on board at that location into DEA custody.[27] Tr. 94.

Retired DI Newkirk presented as an impartial investigator whose testimony was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

The Government also called Investigator Ronald White from the Texas Pharmacy Board. Investigator White testified that he has been an investigator with the Board for a little over two years. Tr. 111. Before becoming an investigator, White worked as an investigative analyst on a project with the federal government, a city marshal, and as a corrections officer. *Id.* In his current role, White testified that he investigates violations of the Texas Pharmacy Act, and that he has some diversion training and some college. Tr. 111–12.

[19] Although DI Newkirk testified that the Respondent had been ordering controlled substances from multiple sources in various locations around the country, and that this was ''one of [his] reasons for concern about the pharmacy'' (Tr. 105–06), there was no development or explanation of this observation that would render it relevant to any issue that must or should be decided in these proceedings. *See Alvin Darby, M.D.,* 75 Fed. Reg. 26993, 26999, n.31 (2010) (''[U]nder the substantial evidence test, the evidence must 'do more than create a suspicion of the existence of the fact to be established.' '') (citing *NLRB v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939).

[20] Tr. 104–05.

[21] Newkirk testified that when a pharmacy receives controlled substances on an invoice from a distributor, the person receiving the controlled substances must initial the inventory, date it, and verify the amount received. Tr. 74. Under 22 Tex. Admin. Code § 291.55(d)(4), pharmacists are required to ''verify that the controlled drugs listed on the invoices were actually received by clearly recording his/her initials and the actual date of receipt of the controlled substances.''

[22] Photographs of the unlabeled bottles were received into the record without objection. Gov't Ex. 6, at 2–3; Tr. 85–86.

[23] Although the Respondent, in his post-hearing brief, provided some background information about Sanders, Sr.'s qualifications, no evidence on this subject (like many other factual elements set forth in the Respondent's brief) appears anywhere in the record. Resp't Brief at 3.

[24] Newkirk testified that the samples taken during this visit confirmed that the syrup was promethazine with codeine. Tr. 95. However, the testing detected no evidence of adulteration. *Id.*

[25] Tr. 94.

[26] DI Newkirk testified that the hydrocodone was dispensed at ''two different strengths, 10/650 and 10/325, which are both the strongest available.'' Tr. 96.

[27] Although DI Newkirk testified that on the Fourth DEA Visit he observed ''some unmarked bottles'' (Tr. 94), the record did not indicate what, if anything, was contained in those unmarked bottles. Similarly, although DI Newkirk testified to his understanding that on the day of the Fourth DEA Visit the Respondent pharmacy did not accept credit cards or Medicare or Medicaid Insurance plans, and was a cash-only business (Tr. 94–95, 102–03), the record did not contain competent expert testimony or sufficient contextual background information that would have rendered this information relevant to any issue that must be adjudicated in these proceedings. *See Alvin Darby, M.D.,* 75 Fed. Reg. 26993, 26999 n.31 (2010) (''[U]nder the substantial evidence test, the evidence must 'do more than create a suspicion of the existence of the fact to be established.''') (citing *NLRB v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939)).

The Government elicited testimony from Investigator White about his observations during the First DEA Visit. White testified that when he accompanied Newkirk to the Respondent pharmacy on May 8, 2012, it was his first time on the premises, and although he went there looking to evaluate the pharmacy for recordkeeping violations, he ''ended up conducting an actual audit.'' Tr. 113–14.

Investigator White testified as to the physical appearance of the Respondent pharmacy, which is situated in what White characterized as a ''strip shopping center.'' Tr. 114. According to White, a customer entering the establishment traverses a short hallway which leads to a ''small [waiting] area with just a few chairs.'' *Id.* To the right of the windows looking out to the parking lot is a wall with two small openings [28] for prescription drop-off and pick-up, as well as a door opening into the back of the pharmacy. *Id.* Neither of the approximately 1.5 feet by 1.5 feet windows was adorned with a counter. Tr. 115. White said that bars on the outside door and windows of the pharmacy had been added to the structure after the First DEA Visit. Tr. 117. White testified that there were no other items available for sale as one might ordinarily see in a retail store. Tr. 116.

Upon arrival at the Respondent pharmacy for the First DEA Visit, White testified that he looked through one of the openings and observed that Pharmacy Technician-In-Training Tippie was filling prescriptions. Tr. 117–18, 189. White explained that ''[s]he appeared to be counting tablets into a bottle.'' *Id.* White stated that under ''our guidelines'' a pharmacy technician is not permitted to fill prescriptions without a pharmacist present. Tr. 118. He said it was also a violation of Texas Pharmacy Board regulations [29] for a pharmacy technician-in-training to fill prescriptions without a pharmacist present. Tr. 117–18, 121. White testified that PIC Grape was not present when White observed Ms. Tippie filling prescriptions. Tr. 118. White testified that he believed that Mr. Sanders was in his office at the time and that Ms. Tippie offered to go and retrieve him. Tr. 118–19. After agreeing to bring back Mr. Sanders, Tippie returned to the fill counter and resumed her activity filling prescriptions.[30] Tr. 119. White recalled that when he asked Tippie and Sanders about the current whereabouts of PIC Grape, they told him that he was likely on his way into the pharmacy. Tr. 190. White said PIC Grape did indeed appear later during this visit. *Id.*

White observed that the bottles Ms. Tippie filled during the visit were unlabeled, but that he could tell by the markings on the pills that Tippie was filling hydrocodone prescriptions. Tr. 120. White also saw Ms. Tippie fill some labeled bottles for specific patients' prescriptions and fill some prepackaged unlabeled bottles for customers visiting the pharmacy later in the day. *Id.* White explained that ''[p]harmacies are allowed to prepackage some drugs if they know a particular quantity of pills or a particular drug and quantity is what a doctor prefers and [the pharmacy] fill[s] a lot of scrip[]s for that doctor.'' Tr. 121. Although supplying no authority for the proposition, White testified that when a pharmacy prepackages bottles, the label must ''have the name of the drug, the strength of the drug, the expiration date, the National Drug Code (NDC) number, and the quantity of pills that are in the container.'' Tr. 122–23. However, according to Investigator White, there were no labels on the bottles Ms. Tippie prepackaged. Tr. 123.

White observed that Ms. Tippie was using the ''basket system for production,'' in which the wholesale bottle of the drug is placed in a small bread basket, along with the vial that they filled, the labels, and hard copies of the script. *Id.* Although, according to White, the ''basket'' system is not an uncommon procedure at pharmacies, the procedure being utilized at the Respondent pharmacy that day was infirm in that instead of keeping the hard copy prescriptions with the bottles, Mr. Tippie (who, at least in White's view, was not authorized to do this on her own) was filing the hard copy prescriptions away. Tr. 127–28. Ms. Tippie's explanation for this was that the prescriptions referred to in the hard copies had already been filled. Tr. 128. White testified the standard of practice for filling a prescription is to use a basket with hard copies of the prescriptions and the label on the wholesale manufacturer's bottle in order to identify the drug being filled. Tr. 127. When White pointed out to Ms. Tippie that it was a violation of Texas regulations for her to fill the prescriptions without any pharmacist present, she told him that Sanders had instructed her to fill the prescriptions, and explained that she was not familiar with all of the rules because she was just a technician-in-training. Tr. 126–27.

White then checked the shelves where the Respondent stored its controlled substances. *Id.* White observed that there were eight-ounce bottles of syrup on the shelf that did not have labels. *Id.* When White asked PIC Grape about the contents of the unlabeled bottles, the latter explained to the former that the bottles contained promethazine with codeine. Tr. 128–29. White testified (again, without supplying authority in support of his assertion) that it is a violation of Texas Board of Pharmacy regulations to store promethazine with codeine in an unlabeled bottle. Tr. 129.

White discussed several photographs that he took during his visit to the Respondent pharmacy. The photographs were offered by the Government and received into evidence as Government Exhibit 6. Among the photographs were several depicting the unlabeled bottles which PIC Grape had informed White contained promethazine with codeine. Gov't Ex. 6, at 2–4; Tr. 131. White also identified a picture showing an open, empty medication bottle lying on the ground with a ''white speck that's just a little ways forward from that bottle.'' Gov't Ex. 6, at 6; Tr. 133. The investigators determined that the white speck was a tablet of hydrocodone. Tr. 133.

White testified that he conducted an audit during the First DEA Visit.[31] Tr. 134. White began by asking Mr. Sanders for an initial inventory, which according to him, a pharmacy is required to prepare for controlled and non-controlled substances on the first day it is open for business. Tr. 135.[32] When White asked PIC Grape about the initial inventory, the latter replied that he was not sure that one had been prepared. *Id.* White then asked Sanders for Respondent's initial inventory. *Id.* Sanders told White that he also believed that an initial inventory had not been generated because he was not aware that one was required. *Id.* When White asked PIC Grape why an initial inventory had not been created, Grape referred White back to Mr. Sanders. *Id.* White also requested the Respondent's dispensing records for the drugs White planned to audit, along with any invoices, credits or returns, and any records of losses. Tr. 136.

White testified that in the course of conducting his audit, he consulted two DEA Report of Theft or Loss forms (DEA Form 106) documenting losses sustained during two break-ins to Respondent's pharmacy.[33]

[28] During his testimony, Mr. Sanders indicated that the windows were designed to limit the ability of customers to see into the pharmacy area. Tr. 267.

[29] White could not provide the citation for the relevant regulation, saying ''I believe it's under 219, and I can't tell you the exact section.'' Tr. 124. 22 Tex. Admin. Code § 291.32(d)(2) provides that the ''nonjudgmental and technical duties associated with the preparation and distribution of prescriptions drugs'' do not include duties enumerated under 22 Tex. Admin. Code § 291.32(c)(2) that must be performed by a pharmacist. Included among the enumerated pharmacist-only duties are ''interpreting drug orders,'' ''selection of drug products,'' and ''performing the final check of the dispensed prescription before delivery to the patient to ensure that the prescription has been dispensed accurately as prescribed.'' *Id.*

[30] During cross examination, White agreed although true that by filling prescriptions without a pharmacist present, Ms. Tippie was acting in violation of the regulations, no disciplinary actions have been lodged against her in this regard. Tr. 191.

[31] A copy of the written audit results completed by Investigator White was received into the record. Gov't Ex. 4; Tr. 158. A Combined Receipt Log was included in the audit results, and consists of a compilation of orders placed by the Respondent for controlled substances from distributors. Gov't Ex. 4, at 2–7. Also included in the audit results was a Combined Sales Log, representing a combination of the Respondent's dispensing, losses, and transfers out. Gov't Ex. 4, at 8–9. The Computation Chart documents the results of the audit of the following drugs: hydrocodone 10/650; hydrocodone 10/325; alprazolam 2 mg; carisoprodol 350 mg; and promethazine with codeine. Gov't Ex. 4, at 1. The audit results demonstrate a shortage of 17,119 dosage units of hydrocodone 10/650, an overage of 5,890 dosage units of hydrocodone 10/325, a shortage of 2,363 dosage units of alprazolam 2mg, a shortage of 2,800 dosage units of carisoprodol, and a shortage of 4,767 dosage units of promethazine with codeine syrup. *Id.*

[32] While 21 C.F.R. § 1304.11(b) requires that the initial inventory be taken on the date that the pharmacy ''first engages in the * * * dispensing of controlled substances,'' the initial inventory requirement under Texas regulations is slightly different. Under Texas regulations, the initial inventory must be taken ''on the opening day of business.'' 22 Tex. Admin. Code § 291.17(b)(1). However, regardless of the difference, the evidence establishes that the Respondent pharmacy did not take an initial inventory on either date, and thus was in violation of both federal and state regulations.

[33] Two DEA 106 Report of Theft or Loss of Controlled Substances Forms prepared on behalf of

Continued

Tr. 136–37. White said the forms ''were submitted by Top RX [to the DEA] in regards to the two nighttime burglaries.'' [34] Tr. 138. White witnessed a conversation between Newkirk and Sanders regarding the accuracy of these forms, wherein Newkirk asked Sanders ''how could these records be accurate if you didn't have a starting point and an ending point to figure the numbers.'' Tr. 138–39. White testified that Sanders admitted that the numbers he reported in the DEA Form 106s were ''really just guesses or an estimate.'' [35] Tr. 140; *see also* Tr. 210.

White stated that he consulted the DEA Forms 106 when completing his audit, along with invoices from wholesale distributors, transfer forms, and dispensing records. Tr. 146. With regards to the invoices, White said that he consulted the invoices available on the pharmacy premises and also requested wholesale records from the distributors supplying Respondent with controlled substances. *Id.* White testified that fifty (50) invoices were missing from the pharmacy, but copies of the missing invoices were made available by the distributors. Tr. 148. White added that under Texas law there is a requirement that pharmacies must keep all invoices regarding purchases of controlled substances. Tr. 149. Regarding the missing invoices, Mr. Sanders placed the blame on his pharmacy technician-in-training, explaining to Investigator White that Ms. Tippie ''had not taken care of the records properly.'' Tr. 150.

White described the records he created during the First DEA Visit to the Respondent pharmacy. White testified to creating a computation chart, combined receipt log for all of the drugs that came into the pharmacy, and a combined sales log of all of the drugs that were dispensed from the pharmacy. Tr. 150. White explained that he created these records from the invoices gathered from the wholesalers and the Respondent. Tr. 153. White said that these records are in a format traditionally used by the Texas Pharmacy Board, and were prepared using an Access-based software program. *Id.* White testified that his supervisor reviewed the file he prepared to check its accuracy. Tr. 153–54.

White testified that he physically counted the controlled substances on the premises. Tr. 154. A copy of the results from White's count was received into evidence. Gov't Ex. 4; Tr. 158. The counts were certified as being ''true and correct'' by PIC Grape. Tr. 154. White testified that he entered zero for the initial inventory of hydrocodone, with the concurrence of Mr. Sanders, and PIC Grape. Tr. 155. White stated that the audit revealed a shortage of hydrocodone 10/650, alprazolam 2 mg, carisoprodol 350 mg, and promethazine with codeine, and an overage of hydrocodone 10/325. Gov't Ex. 4, at 1; Tr. 157–59.

White testified that he also requested what he characterized as an annual inventory [36] from the Respondent during his first visit. Tr. 168. No annual inventory was produced and no one indicated to him what date they planned to conduct one. *Id.* White testified that the regulations require that an annual inventory be completed on May 1 of every year, but the regulations allow pharmacies the flexibility to choose their own date. *Id.* White testified that in practice, a majority of pharmacies take an annual inventory on May 1, but there are some exceptions. Tr. 170. Furthermore, like initial inventories, annual inventories require notarization within 72 hours of completion. Tr. 184. On cross-examination, White admitted that the pharmacy had only been open three or four months and that Respondent was not obligated to take the annual inventory on May 1. Tr. 196.

White discussed the audit results with Mr. Sanders and PIC Grape on July 31, 2012. Tr. 159. When White pointed out the discrepancies, Grape stated that he was surprised that the number was so high for hydrocodone 10/650. Tr. 160.

White then testified that he gave Mr. Sanders and PIC Grape two weeks to produce documents that could assist in accounting for the inconsistencies in the audit. Tr. 162. White advised that only authenticated documents, such as computer records from the pharmacy's software, would be helpful, and specifically informed Sanders and Grape that he could not accept an initial inventory at this point, in view of the fact that they had already told him that none had been prepared. Tr. 162, 197. White took all of the invoices obtained during the First DEA Visit with him at the conclusion of the audit. Tr. 197. Although White had afforded two weeks for the provision of additional documents, he waited for a total of four weeks before finalizing his audit, completing his case file and forwarding the file through his Texas Pharmacy Board channels. Tr. 163, 198, 202. No additional documents were provided by the Respondent. Tr. 198.

White returned to the Respondent pharmacy with DI Newkirk on May 22, 2012 (this event was previously described as the Second DEA Visit) to obtain samples of promethazine with codeine. Tr. 163. White's desire to take samples of promethazine with codeine was based on Ms. Tippie's representation that the pharmacy was diluting it. Tr. 164. White stated that during the Second DEA Visit, an inspector took approximately twelve samples and White helped the inspector send the samples to a laboratory for testing. Tr. 164–65. The results of the testing [37] indicated no dilution or adulteration. Tr. 192.[38] While the samples were collected, White testified that once again he observed unlabeled bottles of promethazine with codeine. Tr. 166. White pointed this fact out to PIC Grape, who insisted that, at least in his opinion, putting the manufacturer's bottle of promethazine with codeine in front of the other bottles on the shelf was sufficient identification of the contents of the unmarked bottles. *Id.* During the Second DEA Visit, White also noted ''[t]hey had done some cleaning, but still things were not that unchanged from the first visit.'' Tr. 170.

White testified that he met with Ms. Tippie on May 23, 2012 at a restaurant. Tr. 171. According to White, DIs Newkirk and Hull had already interviewed Ms. Tippie, but White arranged a meeting to obtain more information. *Id.* White confirmed that at the time this conversation took place, Ms. Tippie was no longer employed by the Respondent. Tr. 174. Tippie said that on numerous occasions she observed Mr. Sanders and his father (Mr. Sanders, Sr.) diluting bottles of promethazine with codeine by mixing seven ounces of promethazine with codeine with one ounce of regular promethazine; and that this dilution would typically be done in Mr. Sanders' office. Tr. 171–72. Ms. Tippie said that Mr. Sanders ''would do it full strength'' initially and then would start diluting it down to the point that customers started complaining. Tr. 172. Ms. Tippie told White that it got to the point that customers would ask to taste the promethazine with codeine before they bought it. *Id.* Eventually, employing a unique application of the *caveat emptor* principle, Mr. Sanders directed Ms. Tippie that she was not to allow customers to taste the promethazine with codeine before purchasing it. Tr. 173. White testified that Ms. Tippie told him there were times when the pharmacy would run out of promethazine syrup before the day was over. Tr. 173–74.

According to White, Ms. Tippie told him that the typical dilution routine involved diluting the mixture in Sanders' office as soon as it arrived at the Respondent pharmacy. Tr. 174. Ms. Tippie said that customers knew to come in the afternoon between 1:00 and 1:30 p.m. when the promethazine with codeine would be ready for dispensing. *Id.* White recalls Ms. Tippie saying that she confronted Sanders about the dilutions and that they ''got into some type of argument, which led to her leaving.'' Tr. 174–75.

White testified that Ms. Tippie told him there was also a ''suspicious . . . set of doctors'' that the Respondent pharmacy accepted prescriptions from. Tr. 176. Ms. Tippie said that it was her observation that these doctors would prescribe the same

the Respondent were received into evidence. Gov't Ex. 2; Tr. 211. The first form, dated April 25, 2012 (April 25, 2012 Form), identifies the Respondent as the registrant, and states the date of theft as April 24, 2012. Gov't Ex. 2, at 2. The Form identifies the filer as the owner of the pharmacy, Jesse Sanders. *Id.* It lists the following controlled substances as being stolen: (1) 10,000 tablets of hydrocodone/APAP 10–650; (2) 5,000 tablets of hydrocodone/APAP 10–500; (3) 5,000 tablets of carisoprodol 350 mg; (4) 10,000 tablets of hydrocodone/APAP 10–325; (5) 2,000 tablets of alprazolam 2 mg; and (6) 4,000 tablets of hydrocodone/APAP 10–325. *Id.* The second form, dated May 3, 2012 (May 3, 2012 Form), identifies the Respondent as the registrant, and states the date of theft as May 2, 2012. Gov't Ex. 2, at 3. The Form identifies the filer as the owner of the pharmacy, Jesse Sanders. *Id.* It lists the following controlled substances as being stolen: (1) 473 ml of promethazine-codeine syrup; (2) 1,000 tablets of hydrocodone/APAP 10–650; and (3) 500 tablets of hydrocodone/APAP 10–500. *Id.*

[34] Contrary to the assertion made in the Respondent's post-hearing brief, no video tapes regarding the purported burglary were offered or admitted into the record. Resp't Brief at 10.

[35] There is no portion of a DEA Form 106 that queries the preparer to note whether the numbers provided are estimates or the result of a particular metric or method of calculation.

[36] The Respondent pharmacy had not yet been open for a year.

[37] No lab reports were offered or admitted into the record.

[38] *See also* Tr. 95.

strength and quantity of pills to multiple patients. *Id.* White remembered Tippie saying that if an individual customer came in and did not agree with the strength or quantity of drug prescribed by one of these doctors, these doctors would easily approve an increase. *Id.* Tippie said that with some doctors, there was an understanding that it was acceptable for the Respondent to increase the dosage strength or quantity of the prescription, while other doctors required Tippie to contact them for approval. Tr. 177. On cross examination, White acknowledged that of the physicians referenced by Ms. Tippie, he was aware of only one, a Dr. Cruz, who had been the subject of professional discipline.[39] Tr. 193. White also testified that he discussed several customers with Ms. Tippie. Tr. 176–77. Tippie told White that a caller would phone the pharmacy and inquire about whether a multitude of prescriptions for multiple patients were ready for pick up. *Id.* Then, the controlled substances dispensed in the names of the multiple patients would be provided to a single individual who would arrive to retrieve them. Tr. 177.

White recalled a discussion with Ms. Tippie regarding the prices charged for promethazine at the Respondent pharmacy. Tr. 177–78. Ms. Tippie advised White that the Respondent was charging $400.00 for a pint of promethazine,[40] which, in White's experience, is many times higher than the price charged at a typical chain pharmacy, and is consistent, in White's experience, with the ''black market'' prices charged ''on the street,'' in Texas. Tr. 182–83. On cross examination, White testified that ''as far as [he is] aware,'' Respondent has continued to conduct business involving non-controlled substances after DEA suspended Respondent's controlled substances registration. Tr. 194.

Investigator White presented as an impartial investigator who tendered testimony that was sufficiently detailed, plausible, and internally consistent to be fully credited in this recommended decision.

The Government also presented the testimony of the Respondent's former Pharmacy Technician-in-Training, Heather Tippie. Tr. 213. Ms. Tippie testified that she graduated from Remington College, and that her major was in the pharmacy technician field.[41] Tr. 214–15. Tippie testified that she became registered as a pharmacy technician-in-training while enrolled at Remington. Tr. 215. She explained that ''[t]hey registered me right then about three months into the program as a tech-in-training.'' *Id.* Tippie clarified that this registration was with the State of Texas. *Id.*

Tippie testified that she worked at the Respondent pharmacy for ''three or four months'' as a pharmacy technician-in-training. *Id.* Ms. Tippie was unequivocal in her assertion that she never told Mr. Sanders that she was licensed. Tr. 233. Rather, Tippie stated that she told Mr. Sanders that she had taken her licensure test, but had not paid the $80 to have the ''tech[nician]-in-training'' title removed from her name. *Id.*

Tippie related that she initially learned of this position from her mother, who was working at a restaurant when she encountered Mr. Sanders and his father (Mr. Sanders, Sr.) as patrons. *Id.* Tippie's mother, upon overhearing the two Sanders discussing their business, seized upon the opportunity to solicit employment for her daughter, who had training in the pharmacy technician field. *Id.* For her efforts, Tippie's mother received a business card from Mr. Sanders, and following separate interviews with Mr. Sanders and his father, Ms. Tippie was ultimately rewarded with a position at the Respondent pharmacy. Tr. 213–14. Ms. Tippie acknowledged that personal health issues had resulted in roughly a year of unemployment prior to obtaining work at the Respondent pharmacy. Tr. 213–14, 233.

Ms. Tippie testified that while she was working at the Respondent pharmacy, she routinely dealt with several men she characterized as ''runners.'' Tr. 215. According to Tippie, these runners would ''come in several times throughout the week,'' and ''drop off multiple prescriptions, 5, 10, sometimes 20 prescriptions all at the same time.'' *Id.* Tippie said that the prescriptions were not for the runners themselves, but for other people. Tr. 216. Along with the prescriptions, the runners brought the drivers' licenses of the individuals whose names appeared on the scrips. *Id.* Tippie testified that these runners came into the pharmacy ''once or twice a week, on the upwards of five times a week.'' *Id.*

Tippie described her encounters with some of the runners in greater detail. One such runner, who called himself ''Mike,'' would frequently visit the pharmacy. Tr. 216–17. Tippie testified that on several occasions ''while I was outside smoking he would—we would talk, or in the pharmacy we would talk.'' Tr. 217. Tippie learned Mike's real name when Mike ''came into the pharmacy one day'' and confided to her ''that he had to actually see the doctor to get prescriptions for himself.'' *Id.* Mike told Tippie that his real name was ''Alfonso Jones,'' and presented his driver's license. *Id.* Tippie clarified that Mike told her that he ''had to see the doctor [himself] because [he] didn't have anybody else.'' Tr. 218. It was Ms. Tippie's opinion that Alfonso Jones, a/k/a ''Mike,'' is a drug dealer. *Id.* Her opinion was principally founded in a conversation between the two outside the pharmacy during a smoking break where he admitted as much. Tr. 219. During their conversation, Mike offered to Ms. Tippie ''that if I—if you ever need anything, you just let me know.'' *Id.* Mike also asked Ms. Tippie if she could ''slip him a couple extra'' pills when dispensing the drugs. *Id.* Ms. Tippie stated that she spoke several times with Mr. Sanders about her conversations with drug-dealer Mike. *Id.* Ms. Tippie testified that she told Mr. Sanders, ''that's what they're doing with the pills.'' *Id.* Ms. Tippie testified that Mr. Sanders responded, ''what they do outside once they leave the pharmacy, I can't do anything about it. It's none of my business.'' *Id.* Ms. Tippie said that PIC Grape was present ''[m]ost of the time'' when Mr. Sanders made these statements regarding the runners. *Id.* Ms. Tippie testified that she raised these concerns with Mr. Sanders every time the runners came in to the Respondent pharmacy, which was ''[f]ive times a week, just about every day that [Tippie] was there for three months.'' Tr. 220. Tippie testified that Mr. Sanders provided her with the same response each time she raised her concerns. *Id.*

Tippie also testified that she overheard a remarkable conversation between Mike and Mr. Sanders. The interaction, as described by Ms. Tippie, proceeded this way:

> Mike had come in one day, and I was making photocopies of the driver's licenses, and he had said, I don't need the non-controls, if you want to just keep them, and I'll pay for them, that's okay with me because I just end up throwing them away anyway. And I kind of looked at [Mr. Sanders] and [PIC Grape], and he was told by [Mr. Sanders] that he had to take them because it would mess up our inventory.

Tr. 220–21. Ms. Tippie testified that after Sanders explained to Mike that he would have to take the non-controlled substances so that there would be no inventory anomaly, none of the participants to the conversation had anything further to add on the matter. Tr. 222.

Ms. Tippie testified that she also encountered a two-man runner team who employed the monikers ''Jay'' and ''Uncle Bo.'' *Id.* Jay and Uncle Bo worked in tandem, with Uncle Bo dropping off the prescriptions and Jay picking up the filled prescriptions. *Id.* During her testimony, Ms. Tippie recounted how the enterprise, based in a Dallas homeless shelter, was explained to her by Uncle Bo and Jay:

> Uncle Bo said they were running a homeless shelter. Jay told me what they did is they take these people at this homeless shelter to the doctors, and they pay them to get their prescriptions, and then they bring their prescriptions to a pharmacy. . . . Jay and Uncle Bo pay for the prescriptions, and they keep them. They don't give them to the people that are actually going to the doctor.

Tr. 222–23.

Ms. Tippie testified that she approached Mr. Sanders and told him, ''you know, you know what they're doing with these. They're distributing them themselves out on the street.'' *Id.* Ms. Tippie recalled that Mr. Sanders replied, ''what they do is none of my business.'' *Id.* Ms. Tippie stated that PIC Grape overheard these conversations with Mr. Sanders. Tr. 223–24.

Ms. Tippie stated that Jay and Uncle Bo were not the only runners who used the address of the Dallas homeless shelter to fill prescriptions. Tr. 224, 231. Sometimes Mike would use the address, as would another runner, who referred to himself as ''Wendell.'' Tr. 224. Ms. Tippie said that Wendell came in to the Respondent pharmacy, and ''explained that he was running this homeless shelter along with

[39] During his testimony, Mr. Sanders stated that the Respondent pharmacy did not fill prescriptions for Dr. Cruz ''because more or less even if we hear of any bad reputations of medical doctors, we decide not to fill those prescriptions.'' Tr. 281.

[40] Tr. 178.

[41] Tippie testified that a college degree is not required to become a certified pharmacy technician-in-training in Texas. Tr. 214.

Uncle Bo.'' *Id.* Ms. Tippie testified Wendell would not deal with her, but ''would always ask for [Mr. Sanders or Mr. Sanders, Sr.]'' Tr. 224–25. Ms. Tippie estimated that ''a couple hundred [prescriptions] I guess'' came from the homeless shelter, and testified that she specifically raised her concerns about the common address of so many prescriptions with Mr. Sanders. Tr. 231.

Ms. Tippie also testified that she also dealt with a runner who referred to himself as ''Polo.'' Tr. 225. Ms. Tippie said that Polo would bring in several prescriptions for other people and carried large quantities of cash. *Id.* Ms. Tippie stated that Polo ''made it very well-known that he had 2—, 3—, $4,000 on him at a time,'' and usually sought Xanax, hydrocodone, and promethazine with codeine. Tr. 225–26.

Ms. Tippie testified that while working at the Respondent pharmacy she also grew suspicious of some prescribing physicians. For example, the pharmacy frequently filled prescriptions from a physician named Dr. Vandervoot.[42] Tr. 234. Ms. Tippie testified Dr. Vandervoot was prescribing to Mike, as well as to other runners. *Id.* In addition, Tippie said she filled prescriptions from a practitioner named Dr. Okechku [43] and also the U.S. Physicians Group. Tr. 235. Ms. Tippie testified that the runners dropped off prescriptions written by these physicians and the prescriptions were written for Xanax,[44] hydrocodone, and promethazine with codeine. Tr. 226, 239. According to Ms. Tippie, the runners paid for these prescriptions in cash; never by credit card. Tr. 226.

In response to a question on cross-examination, Ms. Tippie testified that it was her understanding that as a licensed pharmacy technician-in-training, she bore a legal responsibility similar to a pharmacist to dispense only prescriptions written for a legitimate medical purpose. Tr. 236.[45] Ms. Tippie testified that she ''called Dr. Vandervoot's office at the beginning to make sure that the prescriptions were a legitimate prescription.'' *Id.* Ms. Tippie said PIC Grape was present for this call because she was challenging a prescription written for Xanax and hydrocodone. Tr. 237. Ms. Tippie testified that she went through a similar process with prescriptions for Dr. Okechku, since his prescriptions were also for large amounts of controlled substances. *Id.*

Ms. Tippie also testified that she witnessed the dilution of promethazine with codeine at the Respondent pharmacy. *Id.;* Gov't Ex. 5.[46] Ms. Tippie testified that she observed Mr. Sanders and/or his father funneling pure promethazine into a promethazine with codeine mixture, and that this took place in Sanders' office or in the back room of the pharmacy. Gov't Ex. 5; Tr. 226. Ms. Tippie testified that when she asked the pair why the syrup was being diluted, ''[t]hey said that it was cost effective because the promethazine with codeine was so expensive for a pint bottle.'' Tr. 227.

According to Ms. Tippie, the dilutions she observed occurred before the First DEA Visit on May 8, 2012, but not after that date. Tr. 226. Ms. Tippie testified that things changed because Mr. Sanders ''seemed a little bit worried, nervous about it.'' Tr. 226. Interestingly, although Mr. Sanders appeared concerned, his father, Sanders, Sr., according to Ms. Tippie, ''acted like it was no big deal. He said that they're just trying to scare us, that they don't have anything against us.'' Tr. 227.

Ms. Tippie testified that on the Friday following the First DEA Visit, after working for Top RX for three months, she quit. Tr. 228, 237. Ms. Tippie recalled telling PIC Grape before she left, ''what they're doing is wrong, and you know it as well as I do.'' *Id.* Ms. Tippie testified that PIC Grape answered ''best of luck, and you know, you got to do what you got to do.'' *Id.* Ms. Tippie then informed Mr. Sanders that she was leaving because ''ethically'' she could not stay at the pharmacy. *Id.* Ms. Tippie testified that Mr. Sanders asked her why she was quitting and why she felt she could no longer work at his pharmacy. *Id.* Ms. Tippie also testified that she talked with Mr. Sanders, Sr. that day as well. Tr. 229. Before Ms. Tippie left the pharmacy that day, Mr. Sanders (who had listened to her explain her reasons for leaving) paid her in cash for the hours she had worked. *Id.* On cross examination, Ms. Tippie stated that on the day she left the Respondent's employ, she was neither disgruntled, nor complaining, and had not been fired. Tr. 237. Ms. Tippie unequivocally declared that she had not been fired from the pharmacy, and denied ever receiving any documentation to the contrary. Tr. 228–29.

Ms. Tippie met with a DEA investigator on May 23, 2012. *Id.* Ms. Tippie admitted that initially she was concerned about having a disciplinary action initiated against her license, but explained that she is no longer concerned since she now understands that she ''didn't do anything wrong'' and that she ''was working under the supervision of a pharmacist as a tech[nician]-in-training.'' Tr. 238. Ms. Tippie testified that she has never been promised anything in exchange for her cooperation with the Texas Pharmacy Board. *Id.* Ms. Tippie no longer works as a pharmacy technician-in-training and instead, is employed as a live-in caregiver. Tr. 233.

The testimony presented by Pharmacy Technician-in-Training, Heather Tippie, was not without some causes for caution. Even by her own account, Ms. Tippie was well aware of ongoing activity that made her sufficiently alarmed that she raised her concerns with her PIC and her employer. Yet she continued to perform her part in the dance. She knew Mike was a drug dealer because he told her so, and had actual knowledge that the dangerous drugs she was doling out to drug-dealer-runners were never destined to reach the patients named in the scrips and the labels on the bottles. It is not unreasonable to extrapolate that had the Respondent not been visited by the authorities on the First DEA Visit, that Ms. Tippie would, even now, be blithely shelling out copious amounts of dangerous narcotics into the hands of those who brazenly sold them for profit. Ms. Tippie cannot fairly be described as an innocent bystander who fled to the authorities at the first sign of impropriety. The credible evidence of record supports the proposition that she cooperated with DEA because she felt she got caught. That said, the record contains scant bases for her to embellish her testimony. Although Investigator White testified that the Texas Pharmacy Board investigation concerning the Respondent pharmacy is still an open matter,[47] he also acknowledged that there is currently no case currently pending against Ms. Tippie.[48] Furthermore, the Texas Code that circumscribes the duties and responsibilities of a pharmacy technician-in-training virtually insulates her from judgment calls related to the dispensing of prescriptions. 22 Tex. Admin. Code § 291.32(d). Ms. Tippie's testimony that she has been offered no

[42] Ms. Tippie testified that while Mike brought prescriptions exclusively from Dr. Vandervoot's office, other runners, such as Polo, Jay, and Uncle Bo, also presented prescriptions from Dr. Vandervoot and other physicians to the pharmacy. Tr. 233–35.

[43] Ms. Tippie testified that Jay and Uncle Bo brought prescriptions from the offices of Dr. Okechku and Dr. Vandervoot. Tr. 234–35.

[44] Xanax is the brand name of a drug containing alprazolam. 6–X Attorneys' Dictionary of Medicine X–125138. Alprazolam is a Schedule IV controlled substance pursuant to 21 C.F.R. § 1308.14(c)(1).

[45] *But see* 22 Tex. Admin. Code § 291.32(d) (2012). This Texas Administrative Code section on ''Personnel'' indicates that ''[p]harmacy technicians and pharmacy technician trainees may perform only *nonjudgmental* technical duties associated with the preparation and distribution of prescription drugs.'' *Id.* § 291.32(d)(2)(C) (emphasis added). They ''may not perform any of the duties listed'' under the duties of a pharmacist, which most notably includes ''interpreting prescription drug orders.'' *Id.* § 291.32(d)(2)(A), (c)(2)(B). Thus, Texas law insulates pharmacy technicians in training from the sort of judgment calls Ms. Tippie referenced in her testimony, which would have required her to determine whether a prescription had been written for a legitimate medical purpose.

[46] The handwritten statement by Heather Tippie, dated May 23, 2012, was later received into the record as Government Exhibit 5. Tr. 301. In it, she stated that Mr. Sanders and Mr. Sanders, Sr. ''has [sic] mixed promethazine w/codine [sic] with regular promethazine many times.'' Gov't Ex. 5, at 1. She said that Sanders and Sanders, Sr. mixed ''one (1) ounce of promethazine with no codine [sic] . . . with seven (7) ounces of promethazine with codine [sic].'' *Id.* Tippie's statement also asserts that she had been working at the Respondent pharmacy since February, and she ''quickly learned that there is a relationship between [Sanders and Sanders, Sr.] and the staff at [D]r[. C]apastrano['s] office.'' *Id.* Tippie also testified that the controlled substance prescriptions from each of these three practitioners fell into its own definable pattern. *Id.* at 1–2. If the patients came from ''Dr Vanderoots office they usually wrote for (120) one hundred and twenty of the pain meds and sixty (60) of the two (2) milligram Xanax. If the script came from Capistranos office (80) eighty Soma eighty (80) or ninety (90) pain meds and thirty (30) Xanax.'' *Id.* at 1. If the patient came from ''Okechuku, the prescription is usually wrote [sic] for one hundred and fourty [sic] (140) or one hundred and fifty (150) pain pills and 30 (thirty) flexerel.'' *Id.* at 2. Although the Government introduced this evidence, it presented no argument relative to the significance to be attached to these numbers.

[47] The representation in the Respondent's post-hearing brief that ''[Investigator] White confirmed . . . that there was no pending or planned disciplinary action against the Respondent by the [Texas Pharmacy Board]'' is not accurate. Resp't Brief at 8. Investigator White stated that the ''case is still open . . . '' Tr. 191.

[48] Tr. 191.

consideration for her cooperation[49] stands unchallenged and unrefuted. When pressed on the issue, Tippie stated that while she was initially fearful of the status of her state license, she is no longer concerned ''[b]ecause I know that I didn't do anything wrong. I was working under the supervision of a pharmacist as a tech[nician]-in-training.'' Tr. 238. Ms. Tippie is not a DEA registrant, and in view of the State of Texas law regarding her responsibilities and obligations as a pharmacy technician-in-training, her potential exposure to discipline at the hands of the Texas Board, at least on this record, appears minimal to nonexistent.[50] Based on her subjective understanding of her potential disciplinary exposure, which is consistent with the state of the law, it would be difficult to conjure up a persuasive motive for her to fabricate testimony against the Respondent, its owner, and its PIC. Accordingly, notwithstanding its shortcomings, Ms. Tippie's hearing testimony was sufficiently detailed, consistent, and plausible to be deemed credible in this recommended decision.

The Respondent's Evidence

In support of its case on the merits, the Respondent presented the testimony of PIC Grape and Mr. Sanders. PIC Grape testified that he earned his Bachelor of Science degree in pharmacy from the Texas Southern School of Pharmacy, located in Houston, Texas, in 1963. Tr. 242–43. He testified that he has been registered as a licensed pharmacist since 1963. Tr. 243. Although he was either unwilling or unable to provide much detail on the early phases of his pharmacist career,[51] PIC Grape testified that he was the owner of a ''medicine shop'' in Fort Worth, Texas from 1992 to 2000, and that he retired from a Walgreens pharmacy after ten years of employment there. Tr. 254. Grape testified that following his retirement in 2010, he has filled in ''as needed'' as a pharmacist at Sam Healthcare Pharmacy in Arlington for two years. Tr. 252.

Grape admitted that during his career he had sustained a single disciplinary action against his license to practice pharmacy in 2008. Tr. 244–45. The action arose when he simultaneously dispensed medications that, if taken together, would have caused an ''adverse reaction.'' *Id.* Grape testified ''[i]t was prescription that had anti-gout with an anti-fungus medication.'' Tr. 245. According to PIC Grape, the patient never ingested the medications and the Texas Pharmacy Board resolved the action by assessing a $1,000.00 fine against his license. *Id.* PIC Grape testified that his state pharmacy license is presently active and unrestricted, and that he has never been arrested, charged, or convicted of any crime. Tr. 245–46.

When Respondent's counsel expanded questioning of the direct testimony to topics of continuing education and regulations, PIC Grape became increasingly difficult to understand. Although, at the outset of his testimony, Grape indicated that he is difficult to understand due to a diagnosis of sleep apnea,[52] his demeanor presented less as sleepy than it did as profoundly confused, and his testimony was punctuated with long pauses. While some testimony was elicited from the witness regarding some continuing education classes he participated in, this was done with the highest degree of leading questions. Tr. 246, 249–50. Other than answering in the affirmative when asked if he took courses that were named in various documents he did not prepare and which were never offered into evidence, PIC Grape gave no indication that he possessed the capacity to explain any content from any of the classes he was asked about. Tr. 246–47, 249–50. The most Grape could contribute through his testimony was a simple ''yes'' in response to a series of leading questions, which included ''[i]s this a certification that you took a class called ''Update on Federal Controlled Substances,'' ''[d]id you take that class,'' ''[d]id you complete it,'' ''did you get credit for it,'' ''[i]s this a certificate that shows that you've complied and got credit for that?'' Tr. 250. However, as this line of questioning progressed, PIC Grape agreed with the suggestions of the Respondent's counsel that he participated in courses entitled ''Pharmacist's Special Knowledge,'' ''Update on Federal Controlled Substances,'' and ''Prescription Errors and Their Legal Consequences.'' Tr. 249–50.

Notwithstanding the length of his experience as a pharmacist, the force of PIC Grape's testimony was significantly undermined when he struggled to testify about the requirements for issuing a valid prescription. PIC Grape seemed abjectly unable to focus. The following colloquy between PIC Grape and the Respondent's counsel is illustrative:

Q As being a pharmacist licensed by the state of Texas, are you familiar with what's required in order to have a valid prescription?

A Yes.

Q What is that?

A You file the written prescription in one blank—I mean one folder, and your control in another folder, and at that time the class two folder you file that one in that, so you had three different folders to file the prescription.

Tr. 255. PIC Grape, a pharmacist with decades of experience in the field, in an ultimately fruitless effort to clarify his answer on the subject, then offered the following:

Oh, issuing a valid prescription? I apologize. A valid prescription would have the patient name, address, the name of the medication with a strength. You have the—whether a tablet or capsule, the quantity, and if it was a regular prescription—will, in a controlled prescription you have the DE number, the doctor's DE number with some type of—you can qualify some relation with the doctor to this patient, you know. That's what I did.

Id. Suffice it to say, that in all of this, there was no reference made to any requirement set forth in federal or state regulations. *See* 21 C.F.R. § 1306.04.

Since PIC Grape's unintelligible answer did contain the words ''doctor,'' ''relation,'' and ''patient,'' he was invited to clarify that part of his response. This effort was similarly unrewarding. In response to this entreaty, PIC Grape testified ''[t]he patient or the—I mean the doctor know[s] his patient, and then he prescribe[s] medication according to his diagnosis or what he want[s] to give it for, that particular ailment.'' Tr. 255–56. To add additional discomfiture to an already disquieting dynamic, when asked to repeat his answer, PIC Grape responded as follows:

The doctor relation with the patient is—he will prescribe medication that dictate[s] what he want[s] to give to the patient because the relationship is not just the patient, and either element he's think he will prescribe the medication for.

Tr. 256. Grape then added:

Well, the patient and the doctor—the doctor is familiar with his patient. I'm trying to think of a term they use. But the two, the doctor know[s] his patient, and the patient know[s] the doctor, but the doctor know[s] the patient because he is prescribing medication for him.

Tr. 257. These statements indicate no understanding of any of the elements of what a pharmacist might be looking for in evaluating whether a particular controlled substance prescription reflects a valid physician-patient relationship, apart from a generalized feeling that PIC Grape appears generally to be in favor of such a relationship.

In response to a direct question from the Respondent's counsel, Grape agreed that he has declined to fill a prescription in the past when he was ''unsure about—I was uneasy about the client or especially if I can't get in touch with the doctor to verify the prescription.'' *Id.* Grape explained his recollection of the prescription he turned down this way:

It's something about the signature, mainly the signature, and the patient, the way I feel about the patient, whether I feel something is illegal or something, the reason why they have the prescription.

Id.

Grape further testified in barely audible phrases that he would contact a doctor before making a decision about whether a prescription is valid, saying he would check ''if that's what he [the doctor] want[s], or did he write the prescription, or thing of that nature [sic].'' Tr. 258. When asked whether he would confirm that the patient is actually a patient of the doctor, Grape said incoherently:

It depend[s]. I talked with them about it, but mainly if you think it's the wrong prescription, maybe you go to the phone and check the patient who knew, get out of the store place, you know, going to give you a chance. But if you have no chance, and you can't get in touch with the doctor, I just tell the patients I need to contact the doctor so I can verify the—I'll say, I'll give any answer

[49] Tr. 238.

[50] The multiple representations in the Respondent's post-hearing brief that Investigator White ''confirmed that a disciplinary action was pending against Heather Tippie's Pharmacy Tech license [sic]'' is simply contrary to the evidence of record. Resp't Brief at 9–10.

[51] Tr. 253–54.

[52] Tr. 240.

like I want to check something with the doctor before I can fill it.

Id.

When asked ''how [he] might identify evidence of diversion,'' a truly bedrock competence inquiry at this level, and presumably a topic that would have been covered in at least one of the recent continuing education courses supposedly completed, he offered the following:

Sometime[s] you can tell by the way the prescription is written, if it's written a certain way, the direction is written a certain way. And that way I normally pick them up. Then I'll sit with the patient, you know, observe the patient. And then that's the way I know to check it, the prescription, especially if it's out of, say the metro area while I'm working in Fort Worth, if out of town or something like that, or another state, that way I would recognize it.

Tr. 258–59.

Since the witness was generally unable to clearly articulate the key elements of specific federal or state regulations that apply to pharmacies or pharmacists, the Respondent's counsel attempted to demonstrate that Grape at least knew where to look up the information that he was unable produce from memory. Tr. 259. However, even this attempted line of questioning proved futile. When asked by Respondent's counsel where he could find rules and regulations concerning the practice of pharmacy, Grape responded, ''the Texas law book.'' *Id.* This ended the witness's direct testimony and the Government declined the opportunity to cross-examine him. Tr. 259–60. PIC Grape concluded his testimony by saying, ''Okay. And I apologize for not understanding.'' Tr. 261.

PIC Grape's testimony, to the extent it was not undermined by excessive leading on the part of the Respondent's counsel, was largely incoherent. To the extent that PIC Grape did understand the rudimentary questions he was asked, he was unable or unwilling to convey answers in a way that provided any level of confidence in his competence as a pharmacist. While there is no way from the record to discern the extent to which Grape's communication issues were genuine or contrived, it is worthy of note that none of the witnesses who testified about prior conversations with PIC Grape, indicated that communication with him was as problematic as it was when he took the stand. *See, e.g.,* Tr. 18, 24, 36, 60 (Investigator Pinkerton), 70, 72, 86, 100 (DI Newkirk), 128–29, 131, 135, 155, 159–60, 162–63, 166, 197 (Investigator White), 219, 228, (Ms. Tippie), 271–72, 282–83, 288–89, (Mr. Sanders). After PIC Grape's testimony, Sanders noted a respiratory ailment that required hospitalization about a month prior to the hearing,[53] described Grape as ''a little nervous'' and offered the modest observation that ''sometimes his speech is kind of hard to understand.'' Tr. 264. Irrespective of the origins of deficits in communication and understanding, it is undisputed that this witness was unable to articulate virtually anything helpful about the scrutiny he applies to executing his duties as a pharmacist on behalf of a DEA registrant. Either PIC Grape was feigning impairment, a behavior which would eviscerate his credibility, or he was genuinely bereft of any ability to relate his obligations as a pharmacist. In either event, his testimony did little, if anything to advance the Respondent's position, and if anything, was supportive of the revocation sought by the Government.

The Respondent also presented the testimony of its owner, Mr. Sanders. Mr. Sanders testified that he is not a pharmacist, but rather a licensed insurance broker with a bachelor's degree in finance and marketing and a master's degree in finance from the University of North Texas. Tr. 262. After his graduation in 2003, he worked as a mortgage broker at AmeriQuest Mortgage and a senior account executive at Century Payments. *Id.* Sanders emphasized on several occasions throughout his testimony that he has never been trained in the practice of pharmacy and that he is not a licensed pharmacist. Tr. 263, 268, 270, 273. When asked about his ''role as the owner of the [Respondent] pharmacy,'' Mr. Sanders explained ''I do the marketing, trying to find—you know, get business in, hiring and firing'' and that he had no ''intent to manage'' the ''day-to-day operations.'' Tr. 265. In response to a question, Mr. Sanders testified that his ''business plan,'' was to hire experienced staff to run the business, such as PIC Grape. Tr. 265–66.

Mr. Sanders testified that the Respondent pharmacy was issued a DEA COR on February 2, 2012. Tr. 267.[54] According to Sanders, when the pharmacy first opened it had no controlled substances on hand. Tr. 267–68. Mr. Sanders's recollections regarding the status of the initial inventory issue is at some variance with the accounts of all the investigators who testified. As discussed, *supra,* Investigator Pinkerton testified that he asked Mr. Sanders and PIC Grape about an initial inventory and was told by the two men that they were unaware of the need to create such a document. Tr. 23–34. Investigator White recalled asking Mr. Sanders about an initial inventory during the First DEA Visit and being told by Mr. Sanders that one had never been generated. Tr. 134–35. DI Newkirk testified that, although he explained the requirement of preparing an initial inventory to Sanders and PIC Grape during DEA Visit 1, during DEA Visit 2, Sanders conceded that he had not yet prepared one. Tr. 92. Mr. Sanders, however, testified that an initial inventory had indeed been prepared, that the number on board had been recorded as zero, and that the document had been stored in the pharmacy's safe. Tr. 268, 271–72, 293–94. When asked ''Did you tell either Mr. White or Mr. Pinkerton or Mr. Newkirk that you had [the initial inventory] in the safe?'' Mr. Sanders replied:

More or less . . . I wasn't exactly, you know, sure about [the] beginning inventory. I wasn't a licensed pharmacist. I know one was done, but in regards to the day-to-day operations, where all the—everything was held, I wasn't 100 percent aware.

Tr. 268. When asked why a document reflecting an initial inventory was not provided to inspectors, Mr. Sanders attributed the misstep to ''organizational issues'' and Ms. Tippie, explaining that ''anything regarding to [sic] inventories and invoices Heather Tippie mostly took care of that.'' Tr. 270. Sanders also testified that the investigators asked him questions, but he could not help them since he is ''not a pharmacist'' and only ''do[es] the marketing.'' *Id.* Mr. Sanders also allowed that he ''might have actually misunderstood, the investigator, where they are wanting [sic] to see some documentation of controls when we first opened, when we had indeed one.'' Tr. 272. Mr. Sanders explained that to the extent that Ms. Tippie was not responsible, the fault lied with PIC Grape:

In regards to like the beginning inventory and what is required, see, I wasn't exactly sure. Learning the fact that it was done after the fact—like I said, I didn't do it. I'm not the licensed pharmacist—that it was actually done. But initially, I wasn't—like I said, I was—I didn't do the beginning inventory, so I wasn't 100 percent aware of all of the logistical paperwork where it all—that's why I hired [Grape] as well as Heather Tippie, where they can maintain that.

Tr. 272–73.

Although Mr. Sanders testified that he spoke with his pharmacist-father, Mr. Sanders, Sr., who served as a consultant for the Respondent pharmacy,[55] about the matters raised during the visits and investigations, and he knew that multiple authorities were looking for an initial inventory, he stated that he never asked his father for advice on this point. Tr. 274.

Even setting aside issues as to whether an initial inventory of controlled substances that complied with DEA regulations was ever prepared, Mr. Sanders testified that it is his understanding that an initial inventory (such as the one purportedly in the Top RX safe and never presented to the investigators) should be prepared before controlled substances are brought into a pharmacy, and should reflect zero substances. Tr. 268–69. This (incorrect) belief about the nature of the initial inventory required by DEA regulations persisted even to near the close of the hearing. Tr. 294–96. Sanders explained that the reason for this supposition is founded in his assessment that his pharmacy is ''not like a large wholesaler like—large pharmacy like Walgreens or these larger places where they have a wholesaler.'' Tr. 269. According to Sanders:

Being a smaller wholesaler, we had to call a lot of different wholesalers to either—we didn't meet their criteria. A lot of them wanted us to do a [$]50– to $60,000 opening order. So we didn't have any beginning inventory, so we sent the form in. We did a beginning inventory of zero, and we notated that, where it took us a week to two weeks to start actually getting [controlled substances] in.

Id. During his testimony, Mr. Sanders never explained where he ''sent the form in''

[53] Tr. 287.

[54] Sanders initially said that he obtained the DEA COR on the same day that the pharmacy opened for business, which he indicated was February 6, 2012, but corrected to February 2, 2012, when prompted by the Respondent's counsel. Tr. 267.

[55] Tr. 90.

to, why he and PIC Grape repeatedly told the investigators seeking the document that no initial inventory had been generated, why he was unable to produce the form (whatever it was) to the investigators, or why the initial inventory requirements under federal or state law were somehow dependent on the size of a pharmacy. *Id.*

Mr. Sanders, who testified that he attended a single day of a two-day conference about diversion in Houston, Texas with Grape approximately three weeks prior to the hearing,[56] provided some testimony regarding his knowledge of some controlled substance dispensing prerequisites. He stated that in order to dispense a controlled substance, there must be a ''doctor-patient relationship'' and a ''legitimate medical purpose.'' Tr. 275. After some level of prompting, he explained that ''[i]f you have any question [sic], you would need to call a doctor or a staff to verify the prescription. You also need to verify DEA, DPS. Also, we also on all of our issuings [sic], if we have a new doctor that sends us prescriptions, we do a site visit . . . .'' Tr. 275–76. When asked about record-keeping regulations, Sanders said a pharmacy is ''[r]equired to keep [its] inventory separated with controls and non-controls for the course of two years.'' Tr. 276.

When asked to detail some signs of potential diversion, Mr. Sanders provided the following:

If a prescription is coming from a city 2- or 300 miles away, I believe that's a sign of diversion. If the prescription doesn't have the same signature—I guess the doctor doesn't have the same signature, it's not consistent, or the DEA isn't matching up, or I don't know.

Tr. 279–80. Focusing in on signature anomalies, Sanders explained that ''there's been situations . . . where doctors have got their scrip[] pads stolen, where if it's not a consistent signature, if a doctor usually signed his name on a scrip[], and someone actually writes it in English or regular letters, that's a sign of diversion.'' Tr. 281. When asked to describe additional signs of diversion, Sanders restated the geographic considerations he previously explained, and added ''[i]f you feel like you know, more or less it's not for a legitimate purpose, that could be a sign of diversion.'' *Id.* In explaining how he would determine that a prescription was not for a legitimate purpose, Mr. Sanders stated:

I don't know. I wouldn't make that decision, honestly. You know, if something was ever brought to my attention, I would ask [PIC Grape] regarding it. But I wouldn't, you know, for a legitimate purpose—like I know for a fact that when I looked at the prescriptions that I know [PIC Grape] would look at it where if it didn't have a PRN pain or PRN, you know, muscle spasms, if it didn't have a diagnosis on most of the prescriptions, he didn't feel comfortable filling that prescription.

Tr. 282. When invited to supplement his answer with any additional reasons he could think of that should result in refusing to fill a prescription, Mr. Sanders added:

And the patient doesn't have a legitimate doctor-patient relationship, and it's not for—let me see. If you suspect—I don't know any other reasons.

Id.

Mr. Sanders disavowed any knowledge of the runners described by Ms. Tippie. Tr. 280, 296. Further, Sanders did not even include drug dealer-runners presenting multiple prescriptions among the factors which would justify a refusal to dispense controlled substances. *Id.* According to Sanders, Ms. Tippie is a disgruntled employee and her testimony about the runners she dealt with at the pharmacy was merely a fabrication. Tr. 296. Although Mr. Sanders testified that he terminated Ms. Tippie for ''[i]ncompetence [and] laziness,'' ''talking to customers outside on a regular basis,'' and because ''she misrepresented herself as being a licensed pharmacy tech[nician],''[57] no paperwork to corroborate any of these claims was received (or even offered) into evidence. When asked if such paperwork exists, Mr. Sanders said that there ''[p]ossibly'' was such paperwork ''at the pharmacy.'' Tr. 297. Mr. Sanders's contention that Ms. Tippie misrepresented her status as a pharmacy technician-in-training is belied by the credible testimony of DI Newkirk, who observed Ms. Tippie's pharmacy technician-*in-training* certificate on the wall of the Respondent pharmacy. Tr. 107.

In similar fashion, Ms. Tippie's testimony regarding the diluting of promethazine with codeine was met by Mr. Sanders with a flat, unembellished denial. Tr. 264. When asked about various doctors whose prescriptions were filled at Top RX, Sanders responded that he had heard of and filled prescriptions for Dr. Vandervoot, but was confident that that the Respondent pharmacy had not filled prescriptions for Dr. Cruz because the pharmacy did not fill prescriptions written by doctors with ''bad reputations.'' Tr. 280, 281.

Regarding the shortages and overages described by the investigators who testified, Sanders offered that ''[w]e were a fairly new pharmacy, and we had overstock of alprazolam and some boxes close to the back.'' Tr. 285; Gov't Ex. 3. When asked to explain how it happened that the pharmacy came upon more alprazolam ''in a box in the back with overstock'' that Sanders was unaware of until after the First DPS Audit with Investigator Pinkerton, Sanders again placed the blame on the Pharmacy Technician-in-Training Tippie. Mr. Sanders explained that ''[m]ore of the questions that Pinkerton—he was doing a lot of the questions towards Heather Tippie and regarding, you know, getting stock, counting drugs, and so she must have missed that.'' Tr. 286, 290.

Mr. Sanders also testified that the Respondent pharmacy was victimized by two burglaries, and that he completed and submitted DEA Forms 106 documenting the events. Tr. 288. According to the information on the forms, the Respondent pharmacy reported burglaries occurring on April 24 and May 2, 2012. Gov't Ex. 2. The burglaries were thus reported to have occurred after the two DPS Audits, but before the First DEA Visit. Mr. Sanders acknowledged that he was unsure of the amounts of controlled substances reported as missing in the two DEA Forms 106, and conceded that he did not indicate that the amounts reported were estimates.[58] Tr. 289–90. Mr. Sanders explained that he and PIC Grape analyzed surveillance videos and the amount of drugs they felt were on board at the time the break-in occurred when making these estimates. Tr. 288–89. To explain how these amounts were distilled into the forms, Mr. Sanders placed the responsibility on the shoulders of PIC Grape. According to Mr. Sanders, Grape was his only source of advice on the matter of completing the DEA Forms 106. Tr. 289.

Suffice to say that during his testimony, Mr. Sanders did not excel in the area of accepting responsibility for the actions of his pharmacy. In addition to exhibiting a consistent pattern of blaming his then-pharmacy technician-in-training and his PIC at the hearing, when asked what, if any part of the pharmacy's shortcomings are his responsibility, Sanders had this to say: ''I'm responsible to the fact [sic] where if I see some issues, I should *probably* take action, maybe get new people.'' Tr. 273 (emphasis supplied).

On the issue of whether remedial steps have been taken to guard against reoccurrence of any established deficiencies, Mr. Sanders testified that the Respondent pharmacy has now purchased new inventory management software, which ''is a system where we will track any incoming inventory we have coming in verifying the lot number, NDC.''[59] Tr. 277. Sanders indicated that there has been a marked improvement ''regarding where paperwork is stored, the cleanliness, [and] documentation.'' Tr. 273. Sanders also expressed a future intention to conduct site visits on the physicians who write controlled substance prescriptions handled by the pharmacy. Tr. 299. Furthermore, Sanders testified that the Respondent pharmacy will be more compliant in the future because he has replaced his pharmacy technician-in-training with a new, superior employee. Tr. 293. Inasmuch as Mr. Sanders has provided his testimonial assurance that PIC Grape ''has been a great pharmacist,''[60] it is difficult to deem his representation that the Respondent pharmacy is in the process of recruiting a new pharmacist in charge, as a plan of remedial action. Tr. 287, 298. Stated differently, if his PIC has been a ''great pharmacist,'' then no cognizable remedial benefit to past regulatory deficiencies would be accrued by replacing him.

The testimony of Mr. Sanders cannot be considered entirely credible. It makes little sense for Sanders to at once vouch for the skill and ability of PIC Grape while presenting his poor advice and incompetence as excuses for violations of the duties

[56] Tr. 283.

[57] Tr. 266.

[58] As discussed, *supra,* the Form 106 does not contain a query related to whether the loss amounts are estimates, or any place to designate the manner in which the losses are calculated.

[59] Since the DEA imposed the OSC/ISO that is the subject of these proceedings, the system remains in use for non-controlled substances. Tr. 278.

[60] Tr. 298.

required by the DEA registration and simultaneously offering up the recruitment of a new PIC a remedial step. Likewise, Sanders' testimony that Ms. Tippie was terminated without offering a shred of documentation to corroborate that action, profoundly undermines its reliability, and lends support to her version—that she walked out of her own volition from fear of the misconduct that permeated the establishment. Further, it was ludicrous and incredible for Mr. Sanders to maintain that he had been somehow duped by Ms. Tippie into believing that she was a licensed pharmacy technician (not a pharmacy technician-in-training) when her certificate reflecting her status was hanging on the wall of the Respondent pharmacy on the day that DI Newkirk conducted the First DEA Visit. Tr. 107. Similarly, Sanders' statements that he was not aware that an initial inventory was required (because he is not a trained pharmacist), stands in sharp contrast with his more recent insistence that such an inventory (reflecting zero controlled substances) was timely generated and lies undisturbed in his safe. Additionally, when asked to furnish details about important issues, Sanders offered marginally responsive testimony. In short, even apart from the reality that Mr. Sanders, as the owner of the Respondent pharmacy, had the most at stake in these proceedings, his testimony was not sufficiently consistent, detailed, or plausible to be afforded full credit in this recommended decision. Accordingly to the extent that Mr. Sanders' testimony conflicts with other credible evidence of record, it will not be afforded controlling weight.

The Analysis

Pursuant to 21 U.S.C. § 824(a)(4) (2006), the Administrator[61] is permitted to revoke a COR if persuaded that the registrant ''has committed such acts as would render . . . registration under section 823 . . . inconsistent with the public interest. . . .'' The following factors have been provided by Congress in determining ''the public interest'':

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(3) The [registrant's] conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. § 823(f) (2006 & Supp. III 2010).

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 Fed. Reg. 15227, 15230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Administrator may properly give each factor whatever weight she deems appropriate in determining whether a registration should be revoked. *Morall v. DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005); *JLB, Inc., d/b/a Boyd Drugs,* 53 Fed. Reg. 43945, 43947 (1988); *David E. Trawick, D.D.S.,* 53 Fed. Reg. 5326, 5327 (1988); *see also Joy's Ideas,* 70 Fed. Reg. 33195, 33197 (2005); *David H. Gillis, M.D.,* 58 Fed. Reg. 37507, 37508 (1993); *Henry J. Schwarz, Jr., M.D.,* 54 Fed. Reg. 16422, 16424 (1989). Moreover, the Administrator is ''not required to make findings as to all of the factors . . . .'' *Hoxie v. DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall,* 412 F.3d at 173–74. The Administrator is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick v. DEA,* 861 F.2d 72, 76 (4th Cir. 1988) (the Administrator's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors and remand is required only when it is unclear whether the relevant factors were considered at all). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest . . . .'' *Jayam Krishna-Iyer, M.D.,* 74 Fed. Reg. 459, 462 (2009).

In an action to revoke a registrant's COR, the DEA has the burden of proving that the requirements for revocation are satisfied. 21 C.F.R. § 1301.44(e). The Government may sustain its burden by showing that the Respondent has committed acts inconsistent with the public interest. *Jeri Hassman, M.D.,* 75 Fed. Reg. 8194, 8235–36 (2010). Once DEA has made its *prima facie* case for revocation of the registrant's COR, the burden of production then shifts to the respondent to present sufficient mitigating evidence to assure the Administrator that he or she can be entrusted with the responsibility commensurate with such a registration. *Steven M. Abbadessa, D.O.,* 74 Fed. Reg. 10077, 10078, 10081 (2009); *Medicine Shoppe-Jonesborough,* 73 Fed. Reg. 364, 387 (2008); *Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23848, 23853 (2007); *Morall,* 412 F.3d at 174; *Humphreys v. DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz v. U.S. Dept. of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 Fed. Reg. 72311, 72312 (1980). ''[T]o rebut the Government's *prima facie* case, [the respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 Fed. Reg. at 8236. Normal hardships to the practitioner and even to the surrounding community that are attendant upon the lack of registration are not relevant considerations. *Linda Sue Cheek, M.D.,* 76 Fed. Reg. 66972, 66973 (2011); *Abbadessa,* 74 Fed. Reg. at 10078; *see also Gregory D. Owens, D.D.S.,* 74 Fed. Reg. 36751, 36757 (2009).

The Agency's conclusion that past performance is the best predictor of future performance has been sustained on review in the courts, *Alra Labs. v. DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct.[62] *Mackay v. DEA,* 664 F.3d 808, 822 (10th Cir. 2011); *Hoxie,* 419 F.3d at 483.

While the burden of proof at this administrative level is a preponderance-of-the-evidence standard, *see Steadman v. SEC,* 450 U.S. 91, 100–01 (1981), the Administrator's factual findings will be sustained on review so long as they are supported by ''substantial evidence.'' *Hoxie,* 419 F.3d at 481. Thus, ''the possibility of drawing two inconsistent conclusions from the evidence'' does not limit the Administrator's ability to find facts on either side of the contested issues in the case. *Shatz,* 873 F.2d at 1092; *Trawick,* 861 F.2d at 77. However, in rendering a decision, the Administrator must consider all ''important aspect[s] of the problem,'' such as a Respondent's defense or explanation that runs counter to the Government's evidence. *Wedgewood Vill. Pharmacy v. DEA,* 509 F.3d 541, 549 (DC Cir. 2007); *Humphreys,* 96 F.3d at 663. The ultimate disposition of the case must be in accordance with the weight of the evidence, not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *Steadman,* 450 U.S. at 99 (internal quotation marks omitted).

Regarding the exercise of discretionary authority, the courts have recognized that gross deviations from past agency precedent must be adequately supported. *Morall,* 412 F.3d at 183. Mere unevenness in application standing alone does not, however, render a particular discretionary action unwarranted. *Chein v. DEA,* 533 F.3d 828, 835 (DC Cir. 2008) (citing *Butz v. Glover Livestock Comm. Co.,* 411 U.S. 182, 188 (1973)), *cert. denied,* 555 U.S. 1139 (2009). It is well-settled that since the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings set forth in a recommended decision are entitled to significant deference. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496 (1951). Thus, a recommended decision constitutes an important part of the record that must be considered in the Administrator's decision. *Morall,* 412 F.3d at 179. However, any recommendations set forth herein regarding the exercise of discretion are not binding on the Administrator and do not limit the exercise of that discretion. 5 U.S.C. § 557(b) (2006); *River Forest Pharmacy, Inc. v. DEA,* 501 F.2d 1202, 1206 (7th Cir. 1974); *Attorney General's Manual on the Administrative Procedure Act* 8 (1947).

[61] This authority has been delegated pursuant to 28 C.F.R. §§ 0.100(b) and 0.104.

[62] *See, e.g., Ronald Lynch, M.D.,* 75 Fed. Reg. 78745, 78749 (2010) (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.,* 75 Fed. Reg. 66138, 66140, 66145, 66148 (2010); *East Main Street Pharmacy,* 75 Fed. Reg. 66149, 66165 (2010); *George C. Aycock, M.D.,* 74 Fed. Reg. 17529, 17543 (2009); *Abbadessa,* 74 Fed. Reg. at 10078; *Krishna-Iyer,* 74 Fed. Reg. at 463; *Medicine Shoppe,* 73 Fed. Reg. at 387.

Factors 1 and 3: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority; Any Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

Regarding Factor 1, it is undisputed that the Respondent pharmacy holds a valid license in the State of Texas. Stip. of Fact 2. It is likewise undisputed that, although the Texas Pharmacy Board has been intimately involved in multiple visits and audits conducted in connection with these proceedings, there is no recommendation from any state licensing board in this matter. However, the fact that a state has not acted against a registrant's medical license is not dispositive in this administrative determination as to whether continuation of its registration is consistent with the public interest. *Patrick W. Stodola, M.D.,* 74 Fed. Reg. 20727, 20730 (2009); *Jayam Krishna-Iyer,* 74 Fed. Reg. at 461. It is well-established Agency precedent that a ''state license is a necessary, but not a sufficient condition for registration.'' *Leslie,* 68 Fed. Reg. at 15230; *John H. Kennedy, M.D.,* 71 Fed. Reg. 35705, 35708 (2006). DEA bears an independent responsibility to determine whether a registration is in the public interest. *Mortimer B. Levin, D.O.,* 55 Fed. Reg. 9209, 8210 (1990). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 Fed. Reg. 6580, 6590 (2007), *aff'd, Chein v. DEA,* 533 F.3d 828 (DC Cir. 2008), *cert. denied,* 555 U.S. 1139 (2009). Congress vested authority to enforce the CSA in the Attorney General, not state officials. *Stodola,* 74 Fed. Reg. at 20375. Thus, on these facts, the absence of a recommendation by a state licensing board does not weigh for or against a determination as to whether continuation of the Respondent's DEA certification is consistent with the public interest. *See Roni Dreszer, M.D.,* 76 Fed. Reg. 19434, 19444 (2011) (''[T]he fact that the record contains no evidence of a recommendation by a state licensing board does not weigh for or against a determination as to whether continuation of the Respondent's DEA certification is consistent with the public interest.'').

Regarding the third factor (convictions relating to the manufacture, distribution, or dispensing of controlled substances), the record in this case does not contain evidence that the Respondent, its owner, or any pharmacist or key employee of the pharmacy has been convicted of (or charged with) a crime related to the manufacture, distribution, or dispensing of controlled substances. DEA administrative proceedings are non-punitive and ''a remedial measure, based upon the public interest and the necessity to protect the public from those individuals who have misused controlled substances or their DEA COR, and who have not presented sufficient mitigating evidence to assure the [Administrator] that they can be trusted with the responsibility carried by such a registration.'' *Jackson,* 72 Fed. Reg. at 23853; *Leo R. Miller, M.D.,* 53 Fed. Reg. 21931, 21932 (1988). Where evidence in a particular case reflects that the Respondent has acquired convictions relating to the manufacture, distribution, or dispensing of controlled substances, those convictions must be carefully examined and weighed in the adjudication of whether the issuance of a registration is in the public interest. 21 U.S.C. § 823(f).

Although the standard of proof in a criminal case is more stringent than the standard required at an administrative proceeding, and the elements of both federal and state crimes relating to controlled substances are not always co-extensive with conduct that is relevant to a determination of whether registration is within the public interest, evidence that a registrant has been convicted of crimes related to controlled substances is a factor to be evaluated in reaching a determination as to whether he or she should be entrusted with a DEA certificate. The probative value of an absence of any evidence of criminal prosecution is somewhat diminished by the myriad of considerations that are factored into a decision to initiate, pursue, and dispose of criminal proceedings by federal, state, and local prosecution authorities. *See Robert L. Dougherty, M.D.,* 76 Fed. Reg. 16823, 16833 n.13 (2011); *Dewey C. Mackay, M.D.,* 75 Fed. Reg. 49956, 49973 (2010) (''[W]hile a history of criminal convictions for offenses involving the distribution or dispensing of controlled substances is a highly relevant consideration, there are any number of reasons why a registrant may not have been convicted of such an offense, and thus, the absence of such a conviction is of considerably less consequence in the public interest inquiry''), *aff'd, Mackay v. DEA,* 664 F.3d 808 (10th Cir. 2011); *Ladapo O. Shyngle, M.D.,* 74 Fed. Reg. 6056, 6057 n.2 (2009). Therefore, the absence of criminal convictions (Factor 3), like the absence of a recommendation from any state licensing authorities (Factor 1), militates neither for nor against the revocation sought by the Government.

Factors 2 and 4: The Respondent's Experience in Dispensing Controlled Substances, and Compliance With Applicable State, Federal, or Local Laws Relating to Controlled Substances

Regarding Factor Two, in requiring an examination of a registrant's experience in dispensing controlled substances, Congress acknowledged that the qualitative manner and the quantitative volume in which a registrant has engaged in the dispensing of controlled substances may be significant factors to be evaluated in reaching a determination as to whether a registrant should be (or continue to be) entrusted with a DEA COR. In some cases, viewing a pharmacy registrant's actions against a backdrop of how it has performed activity within the scope of its certificate can provide a contextual lens to assist in a fair adjudication of whether continued registration is in the public interest. In this regard, however, the Agency has held that this factor can be outweighed by acts held to be inconsistent with the public interest. *Jayam Krishna-Iyer,* 74 Fed. Reg. at 463; *see also Jeri Hassman, M.D.,* 75 Fed. Reg. 8194, 8235 (2010) (acknowledging Agency precedential rejection of the concept that conduct which is inconsistent with the public interest is rendered less so by comparing it with a respondent's legitimate activities which occurred in substantially higher numbers); *Paul J. Cargine, Jr.,* 63 Fed. Reg. 51592, 51560 (1998) (''[E]ven though the patients at issue are only a small portion of Respondent's patient population, his prescribing of controlled substances to these individuals raises serious concerns regarding [his] ability to responsibly handle controlled substances in the future.''). Moreover, in *Cynthia M. Cadet, M.D.,* 76 Fed. Reg. 19450, 19450 n.1 (2011), the Agency determined that existing List I precedent [63] holding that experience related to conduct within the scope of the COR sheds light on a practitioner's knowledge of applicable rules and regulations, would not be applied to cases where intentional diversion allegations were sustained. The Agency's approach in this regard has been sustained on review. *Mackay,* 664 F.3d at 819.

On the present record, that portion of Factor Two relating to the Respondent's knowledge of his obligations as DEA registrant presents a troubling picture. Under Texas law, a non-pharmacist owner of a community pharmacy [64] may receive advice from a PIC, but the ''responsibility for all administrative and operational functions of the pharmacy'' rests with him alone. 22 Tex. Admin. Code § 291.32(b). The Respondent's owner, Mr. Sanders, holds a degree in finance and marketing and is licensed, not as a pharmacist, but as an insurance broker. Tr. 262. Mr. Sanders has repeatedly averred that he is not a pharmacist. Tr. 262–63, 268–71, 273; Resp't Brief at 11. Indeed, apart from attendance for one day of a two-day seminar, the record has no evidence that Sanders has training in any aspect of drug diversion. Tr. 283. When asked by the Respondent's counsel to detail his understanding of diversion and signs of diversion, Mr. Sanders' testimony was disjointed and confusing. Tr. 275–76, 279–82. Yet, when compared to the testimony of PIC Grape, Sanders' answers were a model of clarity. *See e.g.,* Tr. 258–61. To the extent these two men have the knowledge and/or skill set to protect the closed regulatory system against diversion, it is not supported at all in this record.

The manner in which controlled substances were dispensed at the Respondent pharmacy impacts both Factor Two (experience in dispensing) and Factor Four (compliance with laws related to controlled substances). To effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.'' *Gonzales v. Raich,* 545 U.S. 1, 13 (2005). Agency precedent has consistently held that the registration of a pharmacy may be revoked as the result of the unlawful activity of the

[63] *See, e.g., Volusia Wholesale,* 69 Fed. Reg. 69409, 69410 (2004).

[64] *See* 22 Tex. Admin. Code § 291.17(b).

pharmacy's owners, majority shareholders, officers, managing pharmacist or other key employee. *EZRX, LLC,* 69 Fed. Reg. 63178, 63181 (1988); *Plaza Pharmacy,* 53 Fed. Reg. 36910 (1988).

Under the regulations, ''[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription.'' 21 C.F.R. § 1306.04(a). Under this language, a pharmacist has a duty ''to fill only those prescriptions that conform in all respects with the requirements of the [CSA] and DEA regulations, including the requirement that the prescribing practitioner be properly registered.'' *Electronic Prescriptions for Controlled Substances,* 75 Fed. Reg. 16236, 16266 (2010). In short, a pharmacist has a ''corresponding responsibility under Federal law to dispense only lawful prescriptions.'' *Liddy's Pharmacy, L.L.C.,* 76 Fed. Reg. 48887, 48895 (2011).

The corresponding responsibility to ensure the dispensing [65] of valid prescriptions extends to the pharmacy itself. *Medicine Shoppe-Jonesborough,* 73 Fed. Reg. 364, 384 (2008) (finding that a respondent pharmacy was properly charged with violating corresponding responsibility); *see also United Prescription Services, Inc.,* 72 Fed. Reg. 50397, 50407–08 (2007) (same); *see* Drug Enforcement Administration, *Issuance of Multiple Prescriptions for Schedule II Controlled Substances,* 72 Fed. Reg. 64921, 69424 (2007) (referring to a *pharmacy's* corresponding responsibility); *see also* Drug Enforcement Administration, *Role of Authorized Agents in Communicating Controlled Substance Prescriptions to Pharmacies,* 75 Fed. Reg. 61613, 61617 (2010) (referring to a pharmacy's ''corresponding responsibility regarding the dispensing of controlled substances.''); *EZRX, LLC,* 69 Fed. Reg. at 63181 (''DEA has issued orders to show cause and subsequently revoked the DEA registrations of pharmacies which failed to fulfill *their* corresponding responsibility in Internet prescribing operations.'') (emphasis added). Settled Agency precedent has interpreted this corresponding responsibility as prohibiting the filling of a prescription where the pharmacist or pharmacy ''knows or has reason to know'' that the prescription is invalid. *Bob's Pharmacy & Diabetic Supplies,* 74 Fed. Reg. 19599, 19601 (2009) (citing *Medicine Shoppe-Jonesborough,* 73 Fed. Reg. at 381 (quoting *Medic-Aid Pharmacy,* 55 Fed. Reg. 30043, 30044 (1990))); *see also United Prescription Services, Inc.,* 72 Fed. Reg. 50397, 50407–08 (2007) (finding violation of corresponding responsibility where pharmacy ''had ample reason to know'' that the practitioner was not acting in the usual course of professional practice).

DEA has interpreted the ''legitimate medical purpose'' feature of the corresponding responsibility duty ''as prohibiting a pharmacist from filling a prescription for a controlled substance when he either knows or has reason to know that the prescription was not written for a legitimate medical purpose,'' and has been equally consistent in its admonishment that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Sun & Lake Pharmacy, Inc.,* 76 Fed. Reg. 24523, 24530 (2011); *Liddy's Pharmacy, L.L.C.,* 76 Fed. Reg. at 48895; *East Main Street Pharmacy,* 75 Fed. Reg. 66149, 66163 (2010); *Lincoln Pharmacy,* 75 Fed. Reg. 65667, 65668 (2010); *Bob's Pharmacy,* 74 Fed. Reg. at 19601.

The Agency does not require omniscience. *Carlos Gonzalez,* 76 Fed. Reg. 63118, 63142 (2011) (citing *Holloway Distrib.,* 72 Fed. Reg. 42118, 42124 (2007)). However, when the circumstances surrounding the presentation of a prescription would give rise to suspicion in a ''reasonable professional,'' there is a duty to ''question the prescription[].'' *Bertolino,* 55 Fed. Reg. at 4730. Though initially framed as a ''reasonable professional'' standard, the Agency has considered the duty to discharge the corresponding responsibility by evaluating the circumstances in light of what would be considered suspicious by a ''reasonable pharmacist.'' *East Main Street Pharmacy,* 75 Fed. Reg. at 66165; *see also Winn's Pharmacy,* 56 Fed. Reg. 52559, 52561 (1991). Accordingly, a pharmacist or pharmacy may not dispense a prescription in the face of a red flag (i.e., a circumstance that does or should raise a reasonable suspicion as to the validity of a prescription) unless he or it takes steps to resolve the red flag and ensure that the prescription is valid. *Id.* Because Agency precedent limits the corresponding responsibility to circumstances which are known or should have been known, *Sun & Lake Pharmacy, Inc.,* 76 Fed. Reg. at 24530, it follows that, to show a violation of a corresponding responsibility, the Government must establish that: (1) the Respondent dispensed a controlled substance; (2) a red flag was or should have been recognized at or before the time the controlled substance was dispensed; and (3) the question created by the red flag was not resolved conclusively prior to the dispensing of the controlled substance. *See Sun & Lake Pharmacy,* 76 Fed. Reg. at 24532 (finding that pharmacy violated corresponding responsibility where it took no steps to resolve red flags prior to dispensing controlled substances). Necessarily, the conclusiveness of the resolution will be judged in light of a reasonable pharmacist standard. *East Main Street Pharmacy,* 75 Fed. Reg. at 66165. The steps necessary to resolve the red flag conclusively will *perforce* be influenced by the nature of the circumstances giving rise to the red flag.

When considering whether a pharmacy has violated its corresponding responsibility, the Agency considers whether the *entity,* not the pharmacist, can be charged with the requisite knowledge. *See United Prescription Services,* 72 Fed. Reg. 50397, 50407 (Respondent pharmacy violated corresponding responsibility because ''an *entity* which voluntarily engages in commerce [to] other States is properly charged with knowledge of the laws regarding the practice of medicine in those States.''). *See also Pharmboy Ventures Unlimited, Inc.,* 77 Fed. Reg. 33770, 33772 n.2 (2012) (''DEA has long held that it can look behind a pharmacy's ownership structure 'to determine who makes decisions concerning the controlled substance business of a pharmacy.' ''); *S&S Pharmacy, Inc.,* 46 Fed. Reg. 13051, 13052 (1981) (the corporate pharmacy acts through the agency of its PIC). Knowledge obtained by the pharmacists and other employees acting within the scope of their employment may be imputed to the pharmacy itself. *See U.S.* v. *One Parcel of Land,* 965 F.2d 311, 316 (7th Cir.1992) (''Only knowledge obtained by corporate employees acting with the scope of their employment is imputed to the corporation.'').

The Texas state standard is in substantial accord with the DEA regulations. The Texas Pharmacy Board has been authorized to regulate the practice of pharmacy within the state, including the regulation of issues related to conduct and competence. Tex. Occ. Code § 551.02. Under applicable state regulations, a pharmacist is required to ''exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order dispensed.'' 22 Tex. Admin. Code § 291.29(a). The regulation echoes the federal standard, requiring that a pharmacist ''make every reasonable effort to ensure that any prescription drug order, regardless of the means of transmission, has been issued for a legitimate medical purpose by a practitioner in the course of medical practice. . . .'' *Id.* § 291.29 (b). The regulations further indicate that, ''a pharmacist shall not dispense a prescription drug if the pharmacist knows or should have known that the order for such drug was issued without a valid pre-existing patient-practitioner relationship.'' *Id.* Reasons for a pharmacist suspecting that a prescription was written in the absence of a valid patient-practitioner relationship include ''the manner in which the prescriptions are . . . received by the pharmacy,'' ''the number of prescriptions authorized on a daily basis by the practitioner,'' and whether ''a disproportionate number of patients of the practitioner receive controlled substances.'' *Id.* § 291.29 (c).

The preponderant evidence of record establishes that, on a regular basis, the Respondent pharmacy filled controlled substance prescriptions presented by ''runners.'' The Respondent's owner and PIC both had actual knowledge, through their pharmacy technician-in-training, Heather Tippie, that individuals bearing made-up names such as ''Uncle Bo,'' ''Jay,'' and ''Wendell,'' were providing bundles of fraudulent scrips with photocopies of driver's licenses meant to give the appearance that the patients themselves had been at the pharmacy, and receiving dangerous controlled substances for distribution and profit. These ''runners'' would ''drop off multiple prescriptions, 5, 10, sometimes 20 prescriptions all at the same time.'' Tr. 215. Tippie explained that these visits occurred ''once or twice a week, on the upwards of five times a week.'' Tr.

[65] Under the CSA, ''[t]he term 'dispense' means to deliver a controlled substance to an ultimate user . . . pursuant to the lawful order of, a practitioner . . . .'' 21 U.S.C. § 802(10). The Respondent's registration as a retail pharmacy authorizes the dispensing of controlled substances to ultimate users. 21 C.F.R. 1301.13(e).

216. Ms. Tippie credibly testified that she repeatedly informed Mr. Sanders and his PIC that the Respondent pharmacy was essentially serving as a drug supplier to unapologetic street dealers, and that Sanders turned a blind eye. In fact, when directly told about the criminal enterprise his business was facilitating, and the admissions made to his own employee by one of the perpetrators, Mr. Sanders dismissed Ms. Tippie's concerns, stating ''what they do outside once they leave the pharmacy, I can't do anything about it. It's none of my business.'' Tr. 219. The owner and PIC at the Respondent pharmacy received actual knowledge that controlled substances were being provided to drug dealers and acted neither to stop it, nor to even investigate the report by its employee. At a minimum, to the extent that Ms. Tippie's statements to Sanders and Grape constituted a red flag, it should have stopped all controlled substance dispensing until resolved. To the more likely extent that Sanders and Grape knew well that the runners (one of whom offered to forgo collection of non-controlled substances) were drug traders, their conduct (and so the conduct of the Respondent pharmacy) amounted to intentional diversion. It would be difficult to conjure up a more egregious example of a registrant pharmacy violating its legal responsibility to ensure that the controlled substances being dispensed were pursuant to legitimate prescriptions. Facilitating a steady stream of dangerous controlled substances into the hands of willing drug traffickers reflects negatively on the Respondent's experience in dispensing controlled substances (Factor Two) and the Respondent's lack of compliance with applicable federal and state laws relating to controlled substances (Factor Four). This willing complicity with obvious drug dealing is sufficient, even standing alone, to meet the Government's burden to demonstrate acts as would render the Respondent's continued registration inconsistent with the public interest. 21 U.S.C. § 824(a)(4).

Record evidence related to the Respondent's recordkeeping also impacts upon Factor Four. ''Recordkeeping is one of the central features of the CSA's closed system of distribution. . . . A registrant's accurate and diligent adherence to this obligation is absolutely essential to protect against the diversion of controlled substances.'' *Satinder Dang, M.D.,* 76 Fed. Reg. 51424, 51429 (2011) (internal punctuation and citations omitted). There is no question that the maintenance of accurate records by registrants is critical to DEA's ability to fulfill its obligations to regulate controlled substances. As previously held by the Agency, ''[r]ecordkeeping is one of the CSA's central features; a registrant's accurate and diligent adherence to this obligation is absolutely essential to protect against the diversion of controlled substances.'' *Paul H. Volkman,* 73 Fed. Reg. 30630, 30644 (2008), *aff'd, Volkman,* 567 F.3d at 224 (DEA Administrator's reliance on recordkeeping violations in denying COR application specifically upheld). Accurate and reliable records are an obvious bedrock safeguard that is essential to ensure the integrity of the closed regulatory system. A truly closed system requires that certain records and inventories be kept by all those registrants who either generate or take custody of controlled substances in any phase of the distribution chain until they reach the ultimate user. Stated differently, where a registrant is unable to produce the documentation required by the regulations to establish the integrity of his function in the closed system, the Agency cannot determine whether diversion has occurred. The Agency has held that a registrant's ''failure to maintain accurate records'' is in and of itself sufficient to support revocation. *Id.* That said, the Agency has also declined to revoke a registration where non-egregious recordkeeping errors were acknowledged by the pharmacy PIC and remedied promptly. *Terese, Inc., d/b/a/Peach Orchard Drugs,* 76 Fed. Reg. 46843, 46848 (2011).

DEA regulations require a registrant pharmacy to ''take an inventory of all stocks of controlled substances on hand on the date [it] first engages in the . . . dispensing of controlled substances.'' 21 C.F.R. § 1304.11(b). The initial inventory provides a vital baseline by which the controlled substances handled by the registrant can be accounted for. The DEA regulations require that this inventory take place on the day when controlled substance dispensing commences. *Id.* Texas regulations require that new community pharmacies ''take an inventory on the *opening day of business''* of ''all controlled substances.'' 22 Tex. Admin. Code § 291.12(b)(1)(A) (emphasis supplied); *see also* Tr. 23, 134–35; *but see* 183–84 (Investigator White mistakenly indicated that the initial inventory is required under Texas regulations on the first day a pharmacy begins dispensing). The Texas regulations further provide that ''[i]n the event the . . . pharmacy commences business with [no controlled substances] on hand, the pharmacy shall record this fact as the initial inventory.'' *Id.* at § 291.12(b)(2).

The evidence of record establishes that the Respondent did not conduct an initial inventory of its controlled substances on either the first day the pharmacy began dispensing (federal requirement) controlled substances or on its first day of business (state requirement). Investigator Pinkerton (DPS) and Investigator White (Texas Pharmacy Board) both testified that each sought an initial inventory from the Respondent and that none was provided. Tr. 23–24, 134–35. Pinkerton credibly testified that PIC Grape told him he believed (incorrectly) that no such inventory was required until a pharmacy had been open for six months, and Mr. Sanders indicated that he did not have one because he did not realize that one was required. Tr. 24. Investigator White credibly testified that Mr. Sanders told him that no such inventory was prepared. Tr. 135.

DI Newkirk likewise testified that he requested an initial inventory from Mr. Sanders and PIC Grape ''on multiple occasions'' during both the First and Second DEA Visits. Tr. 86–87, 92. Newkirk recounted that Sanders and Grape indicated that they did not have an initial inventory during the course of the First DEA Visit, and at the Second DEA Visit, Mr. Sanders told Newkirk that ''he had still not made one.'' Tr. 86, 92.

In view of the multiple, credible accounts from multiple investigators from multiple agencies which consistently relate that Mr. Sanders and PIC Grape unwaveringly maintained that no initial inventory was created or available, Mr. Sanders' assertion (first heard during his testimony at the hearing) that he had in fact prepared an initial inventory and that it resided (inexplicably) in the Respondent's safe,[66] is simply unpersuasive.

In addition to requiring an initial inventory, DEA regulations provide that ''[e]very registrant required to keep records pursuant to § 1304.03[67] shall maintain on a current basis a complete and accurate record of each substance * * * imported, received, sold, delivered, exported, or otherwise disposed of by [it], except that no registrant shall be required to maintain a perpetual inventory.'' 21 C.F.R. § 1304.21(a). Additionally, 21 C.F.R. § 1304.22 requires dispensers of controlled substances to maintain records of: ''the number of units or volume of such finished form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the substance on behalf of the dispenser.'' Likewise, the regulations require that the date on which controlled substances are actually received serve as the receipt date for purposes of records and accountability. *Id.* § 1304.21(d).

The evidence presented at the hearing demonstrates serious recordkeeping deficiencies on the part of the Respondent pharmacy. When DPS Investigator Pinkerton first went to the Respondent pharmacy on March 13, 2012, the only records of the pharmacy's dispensing were hard copies of prescriptions written; no dispensing logs were provided. Tr. 25–26. Further, Investigator White testified that when he requested invoices from the Respondent's distributors, he discovered that the Respondent pharmacy was missing fifty invoices[68] in violation of Texas Pharmacy Board regulations requiring pharmacies to keep a record of ''suppliers' invoices of controlled substances.'' 22 Tex. Admin. Code § 291.55(d)(4). This regulation was further violated by the lack of annotations on the Respondent's invoice records, as observed by DEA DI Newkirk. Tr. 74. Under Texas regulations, pharmacies are required to maintain

> suppliers' invoices of . . . controlled substances; a pharmacist shall verify that the controlled drugs listed on the invoices were actually received by clearly recording his/her initials and the actual date of receipt of the controlled substances.

22 Tex. Admin. Code § 291.34(h)(4).

The Respondent's violations of recordkeeping regulations are further

[66] Tr. 268, 271–72; Respt's Brief at 4–5.

[67] Section 1304.03 provides that ''[e]each registrant shall maintain the records and inventories and shall file the reports required by this part, except as exempted by this section.'' Respondent does not contend that any of the § 1304.03 exemptions apply in this case.

[68] Tr. 148.

demonstrated by the inconsistent results of numerous audits conducted by state and federal investigators. Three audits conducted over a period of two months revealed multiple shortages and overages of controlled substances. Tr. 35, 41, 87, 157–59. These findings demonstrate that, at best, the Respondent's recordkeeping was so deplorably insufficient that there was no accurate means of ascertaining the precise quantity of controlled substances that the Respondent pharmacy was handling. *See Bill Lloyd Drug,* 64 Fed. Reg. 1823, 1824 (1999) (''The shortages and overages revealed by the accountability audit show that Respondent does not keep complete and accurate records of its controlled substance handling as required by 21 U.S.C. 827 and 21 CFR 1304.21.''); *see also Alexander Drug Company, Inc.,* 66 Fed. Reg. 18299, 18303 (2001) (shortages or overages constitute violations of 21 C.F.R. § 1304.21 and 21 U.S.C. § 827); *Ellis Turk, M.D.,* 62 Fed. Reg. 19603, 19605 (1997) (same). Where, as here, a pharmacy registrant is abjectly unable to account for ''extraordinary quantities'' of controlled substances, the Agency has held that ''it has committed acts which render its registration 'inconsistent with the public interest' [within the meaning of] 21 U.S.C. § 824(a)(4).'' *Ideal Pharmacy Care, Inc. d/b/a/Esplande Pharmacy,* 76 Fed. Reg. 51415, 51416 (2011).

As the owner of the Respondent pharmacy, Mr. Sanders is responsible for ''establish[ing] policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.'' *Id.* § 291.32(b)(5). His consistent insistence that the true fault lies with the pharmacy technician-in-training he hired is simply unavailing. Likewise, even acknowledging that the PIC has defined state-law responsibilities in the pharmacy,[69] as discussed, *supra,* a registrant pharmacy bears the responsibility for the actions of its managing pharmacist or other key employees. *EZRX,* 69 Fed. Reg. at 63181; *Plaza Pharmacy,* 53 Fed. Reg. 36910 (1988); *see Neil Labs, Inc. v. Ashcroft,* 217 F.Supp.2d 80, 87–88 (D.D.C 2002).

As a result of its abysmal recordkeeping practices, the Respondent violated both federal and Texas laws relating to controlled substances to a degree that consideration of the evidence under Factor Four gravely and negatively impacts in favor of the COR revocation sought by the Government.

DI Newkirk credibly testified that during the First DEA Visit he came across evidence that the Respondent pharmacy was ''transferring controlled substances to a pharmacy in Houston by the name of RX Max Pharmacy'' with inadequate documentation. Tr. 75. Specifically, Newkirk testified that the transfer records fell short of the regulatory requirements in that:

They didn't contain the bottle size, the full name of the product or the amount of tablets or amount of liquid in the product [and] the receipts did not annotate who received the product, the date it was received or the correct amount received.

Id.

The CSA provides that ''every registrant . . . dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each . . . substance . . . received, sold, delivered, or otherwise disposed of by [it]. . . .'' 21 U.S.C. § 827(a)(1). The DEA regulations likewise require the registrant to ''maintain on a current basis a complete and accurate record of each such substance . . . received, sold, delivered . . . or otherwise disposed of by [it]. . . .'' 21 C.F.R. § 1304.21(a). When recording the date of distribution or transfer, the regulations require the registrant to use ''the date on which the substances are actually . . . distributed . . . or otherwise transferred . . . as the date of receipt or distribution of any documents of transfer (e.g., invoices or packing slips).'' *Id.* § 1304.21(d).

In Texas, the Administrative Code mandates pharmacies authorized to distribute controlled substances to other pharmacies[70] to maintain records of the transfer of controlled substances contained in Schedules III–V.[71] 22 Tex. Admin. Code § 291.34(g)(3). These records must document: (1) ''the actual date of distribution;'' (2) ''the name, strength, and quantity of controlled substances distributed;'' (3) ''the name, address, and DEA registration number of the distributing pharmacy;'' and (4) ''the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.''

Id.

In neglecting its responsibilities in correctly completing the required transfer documents, the Respondent was in violation of both federal and Texas laws relating to controlled substances and, under Factor Four, provides additional support to the COR revocation sought by the Government.

The Government also presented testimony at the hearing regarding alleged violations of labeling regulations. DI Newkirk credibly testified that he observed unmarked bottles containing promethazine with codeine, hydrocodone, and alprazolam. Tr. 75–76. Photographs depicting unlabeled bottles of promethazine with codeine were received into the record. Gov't Ex. 6, at 2–4; Tr. 131. The record evidence clearly establishes that the investigators who entered the Respondent pharmacy encountered controlled substances in unlabeled containers. Under 21 C.F.R. § 1302.03(a), ''[e]ach commercial container of a controlled substance . . . shall have printed on the label the symbol designating the schedule in which such controlled substance is listed.'' However, the scope of this section is defined by 21 U.S.C. § 825,[72] which, by its terms, applies to distribution.

But see Paul Weir Battershell, N.P., 76 Fed. Reg. 44359, 44367 (2011) (finding practitioner dispensing controlled substances to patients to be in violation of 21 C.F.R. § 1302.03(a) by storing ''controlled substances in unlabeled prescription bottles''). However, inasmuch as the Government has not sought reliance upon 21 C.F.R. § 1302.03(a), and in light of the other violations of federal and state controlled substance regulations that were established on the record, there is no need to determine whether the discovery of controlled substances in unmarked containers at the Respondent pharmacy constituted a violation of DEA regulations.

The regulations cited by the Government[73] provide that:

The pharmacist *filling a prescription* for a controlled substance listed in Schedule III, IV, or V shall affix to the package a label showing the pharmacy name and address, the serial number and date of initial filling, the name of the patient, the name of the practitioner issuing the prescription, and directions for use and cautionary statements, if any, contained in such prescription as required by law.

21 C.F.R. § 1306.24(a) (emphasis supplied): *see also* 22 Tex. Admin. Code § 291.33 (itemizes the information required on a label at the ''time of delivery of the drug''). However unwise the practice of maintaining controlled substances languishing in bottles unencumbered by correct labels, the plain language of the DEA regulation mandates specified label requirements that ripen when the pharmacist is ''filling a prescription.'' 21 C.F.R. § 1306.24(a). Inasmuch as there is no record evidence that any controlled substances were dispensed by the Respondent pharmacy without appropriate labels, this allegation stands as unsustainable.

The evidence convincingly establishes that the Respondent pharmacy, through its owner, PIC, and its (then) directed employee, provided large amounts of controlled substances to runners (i.e., drug dealers) who supplied obviously illegitimate prescriptions. The poor recordkeeping and lack of knowledge regarding federal and state regulatory requirements predictably yielded staggering overages and shortages. The Respondent's owner and PIC did not know the amount of controlled substances on board, and had no way to ascertain how much should have been on board, for multiple audits and when completing reports of theft or loss. Even if the Respondent's dubious version of the facts were given some credence, it would only demonstrate that no one at the Respondent pharmacy knew what was going on, or what was required by federal and state regulations. This is hardly a scenario that engenders confidence. Clearly, application of Factors Two and Four militate powerfully and persuasively in favor of the COR Revocation the Government seeks.

[69] 22 Tex. Admin. Code §§ 291.29(a)(2)(E), (G), 291.32(c)(2)(E).

[70] 22 Tex. Admin. Code § 291.34(g).

[71] The Respondent's DEA COR is limited to controlled substances contained in Schedules III–V. Stip. Of Fact 1.

[72] *See* 21 C.F.R. § 1302.01 (''Requirements governing the labeling and packaging of controlled substances pursuant to sections 1305 and 1008(d) of the Act (21 U.S.C. 825 and 958(d)) are set forth generally by those sections and specifically by the sections of this part.'')

[73] Gov't Brief at 15.

Factor 5: Such Other Conduct Which May Threaten the Public Health and Safety

The fifth statutory public interest factor directs consideration of ''[s]uch *other conduct* which may threaten the public health and safety.'' [74] 21 U.S.C. § 823(f)(5) (emphasis supplied). Existing Agency precedent has long held that this factor encompasses ''conduct which creates a probable or possible threat (and not only an actual [threat]) to public health and safety.'' *Dreszer,* 76 Fed. Reg. at 19434 n.3; *Aruta,* 76 Fed. Reg. at 19420 n.3; *Boshers,* 76 Fed. Reg. 19403 n.4; *Dreszer,* 76 Fed. Reg. at 19386–87 n.3. Agency precedent has generally embraced the principle that any conduct that is properly the subject of Factor Five must have a nexus to controlled substances and the underlying purposes of the CSA. *Terese,* 76 Fed. Reg. at 46848; *Tony T. Bui, M.D.,* 75 Fed. Reg. 49979, 49989 (2010) (prescribing practices related to a non-controlled substance such as human growth hormone may not provide an independent basis for concluding that a registrant has engaged in conduct which may threaten public health and safety); *cf., Paul Weir Battershell, N.P.,* 76 Fed. Reg. 44359, 44368 n.27 (2011) (although a registrant's non-compliance with the Food, Drug, and Cosmetic Act is not relevant under Factor Five, consideration of such conduct may properly be considered on the narrow issue of assessing a respondent's future compliance with the CSA).

Similar ''catch all'' language is employed by Congress in the CSA related to the Agency's authorization to regulate controlled substance manufacturing and List I chemical distribution, but the language is by no means identical. 21 U.S.C. §§ 823(d)(6), (h)(5). Under the language utilized by Congress in those provisions, the Agency may consider ''such *other factors* as are relevant to and consistent with the public health and safety.'' *Id.* (emphasis supplied). In *Holloway Distributors,* 72 Fed. Reg. 42118, 42126 (2007), the Agency held this catch all language to be broader than the language directed at practitioners under ''other conduct which may threaten the public health and safety'' utilized in 21 U.S.C. § 823(f)(5). In *Holloway,* the Agency stated that regarding the List I catch all:

[T]he Government is not required to prove that the [r]espondent's conduct poses a threat to public health and safety to obtain an adverse finding under factor five. *See T. Young,* 71 [Fed. Reg.] at 60572 n.13. Rather, the statutory text directs the consideration of ''such other factors as are relevant to and consistent with the public health and safety.'' 21 U.S.C. § 823(h)(5). This standard thus grants the Attorney General broader discretion than that which applies in the case of other registrants such as practitioners. *See id.* § 823(f)(5) (directing consideration of ''[s]uch other conduct which may threaten the public health and safety'').

72 Fed. Reg. at 42126.[75] Thus, the Agency has recognized that, while the fifth factor applicable to List I chemical distributors—21 U.S.C. § 823(h)(5)—encompasses all ''factors,'' the Factor Five applied to practitioners—21 U.S.C. § 823(f)(5)—considers only ''conduct.'' Because section 823(f)(5) only implicates ''such *other* conduct,'' it necessarily follows that conduct considered in Factors One through Four may not be considered at Factor Five.

The Government alleged that the Respondent ''diluted the Actavis brand of promethazine [codeine] syrup before dispensing, in violation of 21 U.S.C. § 331.'' ALJ Ex. 1 at 2. 21 U.S.C. § 331(b) prohibits the ''adulteration . . . of any . . . drug . . . in interstate commerce.'' 21 U.S.C. § 351(c) provides, in turn, that ''[a] drug shall be deemed to be adulterated . . . if . . . any substance has been . . . mixed or packed therewith so as to reduce its quality or strength.'' Agency precedent has considered this conduct under Factor Five. *Dan E. Hale, D.O.,* 69 Fed. Reg. 69402, 69406 (2004) (finding evidence that ''some injectable medications were diluted below their therapeutic dosages'' to be a relevant consideration under Factor Five). The admitted evidence of record here renders it unnecessary to decide whether diluting promethazine with codeine raises diversion issues properly within the purview of these DEA enforcement proceedings. *See Judulang v. Holder,* 132 S.Ct. 476, 556 U.S. ____ (2011) (actions of a regulatory agency must bear a rational relationship to the purposes of the statute it is charged with enforcing).

To be sure, the credible testimony of Ms. Tippie supports her observations that she witnessed Mr. Sanders and Mr. Sanders, Sr. pouring promethazine into bottles that she believed to contain promethazine with codeine. Tr. 171–75, 192, 226–27. Similarly supported is Tippie's account of her conversation with Mr. Sanders wherein the latter explained that such diluting ''was cost effective because the promethazine with codeine was so expensive for a pint bottle.'' Tr. 227. Likewise credible is Ms. Tippie's testimony that she heard complaints from numerous customers who were unhappy about the strength of the promethazine dispensed to the point that customers began insisting on tasting the medicine before paying, and that this phenomenon was sufficiently prevalent that Mr. Sanders issued a policy prohibiting the practice. Tr. 172–73, 226–27. Although Mr. Sanders' unembellished, one-line denial that ''[t]here was no dilution of promethazine with codeine,'' could arguably have been enhanced by the tender of some explanation of any details that could supply a benign explanation to Ms. Tippie's credible observations, no such details were presented, and her account was the more believable one. Tr. 264. That subsequent testing of a limited subset of the promethazine with codeine on board at the Respondent pharmacy revealed no anomalies [76] does not detract from the strength of Ms. Tippie's testimony.

However, the present record does not have the benefit of expert testimony regarding the safe or appropriate strength of promethazine with codeine. Likewise, the anonymous, unsatisfied consumers of the dispensed syrup hardly can be perceived as sufficiently expert to supply relevant evidence. There is simply no record evidence from which it is possible to discern the safety implications of varying concentrations of codeine in promethazine, what concentrations (if any) were dispensed, and to the extent any promethazine with codeine was dispensed after dilution, what the label on the bottle(s) may have indicated relative to the strength of the mixture. In short, there is insufficient evidence of record to gauge the significance of Ms. Tippie's observations on the issue of whether it constituted a threat to public health and safety under Factor Five. 21 U.S.C. § 823(f)(5). Accordingly, consideration of the record evidence under Factor Five weighs neither for nor against the revocation of Respondent's DEA COR sought by the Government.

Recommendation

Based on the foregoing, the Government has established that the Respondent has committed acts that are inconsistent with the public interest.

Because the Government has sustained its burden of showing that the Respondent committed acts inconsistent with the public interest, the burden shifts to the Respondent to show that it can be entrusted with a DEA registration. Agency precedent has consistently held that the registration of a pharmacy may be revoked as the result of the unlawful activity of the pharmacy's owners, majority shareholders, officers, managing pharmacist or other key employee. *EZRX,* 69 Fed. Reg. at 63181; *Plaza Pharmacy,* 53 Fed. Reg. 36910 (1988); *see Neil Labs, Inc. v. Ashcroft,* 217 F.Supp.2d 80, 87–88 (D.D.C 2002). A long line of consistent Agency precedent has established that ''to rebut the Government's *prima facie* case, [the Respondent is] required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 Fed. Reg. at 8236; *Hoxie v. DEA,* 419 F.3d 477, 483 (6th Cir. 2005); *Ronald Lynch, M.D.,* 75 Fed. Reg. 78745, 78749 (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.,* 75 Fed. Reg. 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 Fed. Reg. 17529, 17543 (2009); *Steven M. Abbadessa, D.O.,* 74 Fed. Reg. 10077, 10078 (2009); *Jayam Krishna-Iyer, M.D.,* 74 Fed. Reg. 459, 463 (2009); *Medicine Shoppe-Jonesborough,* 73 Fed. Reg. 364, 387 (2008). The acceptance of responsibility is a condition precedent for the Respondent to prevail once the Government has established its *prima facie* case. *Matthew,* 75 Fed. Reg. at 66140. This feature of the Agency's interpretation of its statutory mandate on the

[74] Inexplicably, that portion of the Government's post-hearing brief designated as a discussion of Factor Five deals exclusively with the exercise of discretion. Gov't Brief at 16–18.

[75] In *Bui,* the Agency clarified that ''an adverse finding under [Factor Five did not require a] showing that the relevant conduct actually constituted a threat to public safety.'' 75 Fed. Reg. 49888 n.12.

[76] Tr. 95–96.

exercise of its discretionary function under the CSA has been sustained on review. *Mackay,* 664 F.3d at 822.

The Respondent's owner, Mr. Sanders, has accepted no measure of responsibility for the established misconduct in the record. The preponderant evidence that the Respondent's owner and PIC had actual knowledge that the pharmacy was providing large amounts of dangerous controlled substances to drug-dealer runners presenting illegitimate scrips and photocopied driver's licenses on a regular basis. That actual knowledge, which was supplied, not by an anonymous source, but by an employee, was met with a dismissive rejection at the time it was provided and at the hearing. There is nothing in the record to rebut the persuasive record evidence that the conduct of the owner and PIC exceeded inaction and rose to the level of willing complicity in controlled substance diversion on a massive scale. The equally persuasive evidence that multiple audits demonstrated alarming shortages and overages, profound recordkeeping issues, and pervasive incompetence was met in these proceedings with an attempt to deflect the blame to subordinates. Based on his testimonial performance at the hearing, a decision to rely upon the expertise of PIC Grape to ensure that the Respondent pharmacy fulfilled its obligations as a DEA registrant (to the extent that the *bona fides* of such reliance is accepted) is patently unreasonable. Mr. Sanders' inconsistent positions as to whether an initial inventory ever existed have amplified the probative value of this recordkeeping shortcoming in support of the Government's case. The Respondent pharmacy did not have the paperwork required for inventory control or transfer, and its personnel were bereft of any means to discern how much controlled substance the enterprise should have on board when the audits took place and when theft/loss reports were prepared. The evidence here does not show a reduced level of control demonstrated by imperfect paperwork, but rather an absence of any measure of control. Indeed, the most credible aspect of Mr. Sanders' testimony is that he has no training or expertise in the field of pharmacy. Tr. 262–63; *see also,* Resp't Brief at 11. The continuation of the Respondent's COR under the circumstances is untenable.

On the issue of remedial steps, Mr. Sanders offered a new computer software system and a new PIC.[77] Regrettably, the software system addresses none of the pernicious issues related to supplying runners with controlled substances that the Respondent (through its owner and PIC) knew were authorized on a large scale through illegitimate prescriptions. Regarding the replacement of PIC Grape, Mr. Sanders' testimony made it clear that he does not acknowledge that PIC Grape was ever part of the problem. Tr. 264, 287–88. Thus, his replacement cannot be perceived as a cognizable remedial step.

[77] In his post-hearing brief, the Respondent states that a new PIC has been hired. Resp't Brief at 3. This fact is not a matter of record, and, based on the posture of the case wherein the Respondent has consistently embraced PIC Grape's qualifications and abilities, would be unavailing in any event.

To be clear, this is not a case like *Terese,* where recordkeeping violations were acknowledged and addressed with alacrity. 76 Fed. Reg. at 46848. There has been no acceptance of responsibility or any demonstration of genuine attempts at remedial action. The Respondent's owner, Mr. Sanders, has consistently claimed that the runners did not exist, that his employees should have known better, or (in the case of Ms. Tippie) have fabricated lies against him, and that any auditing issues were a natural result of the hiccups associated with a nascent pharmacy. In short, the posture taken by Mr. Sanders has made it virtually impossible for the Agency to continue to entrust the Respondent pharmacy with a DEA registration.

Accordingly, in view of the fact that the Government has established its *prima face* case by a preponderance of the evidence, and the Respondent has declined to accept responsibility, the Respondent's Certificate of Registration should be REVOKED and any pending applications for renewal should be DENIED.

Dated: November 8, 2012

s/John J. Mulrooney, II

Chief Administrative Law Judge

[FR Doc. 2013–10550 Filed 5–2–13; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities: Submission to OMB for Revision to a Currently Approved Information Collection; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for comment.

SUMMARY: The NCUA intends to submit the following information collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). This information collection is published to obtain comments from the public. NCUA is proposing a data collection change to the credit union Profile as well as the 5300 Call Report. NCUA is proposing to add fields to the General, Information Systems and Technology, Regulatory, Disaster Recovery, Member Services and Grant sections of the Profile. This data will assist NCUA in monitoring and supervising credit unions. On the 5300 Call Report, NCUA is proposing to add fields to the Miscellaneous Loan Information, Additional Share Information, Miscellaneous, Delinquency, Loan Charge Off and Recoveries, Liquidity, Commitments and Sources, Purchased Credit Impaired Loans, and Supplemental Investment Information sections. The new data collection provides more detailed delinquent, charge off and recovery loan information. Additionally, these fields provide information for offsite monitoring of risks to the National Credit Union Share Insurance Fund.

DATES: Comments will be accepted until June 3, 2013.

ADDRESSES: Interested parties are invited to submit written comments to the NCUA Contact and the OMB Reviewer listed below:

NCUA Contact: Tracy Crews, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428, Fax No. 703–837–2861, Email: *OCIOPRA@ncua.gov.*

OMB Contact: Office of Management and Budget, ATTN: Desk Officer for the National Credit Union Administration, Office of Information and Regulatory Affairs, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Requests for additional information, a copy of the information collection request, or a copy of submitted comments should be directed to Tracy Crews at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, or at (703) 518–6444.

SUPPLEMENTARY INFORMATION:

I. Abstract and Request for Comments

NCUA is amending the currently approved collection for 3133–0004. Two specific forms are used, NCUA Form 5300 and NCUA Profile Form 4501A, also known as the Call Report and Profile, respectively. Section 741.6 of the NCUA Rules and Regulations requires all federally insured credit unions to submit a Call Report quarterly. 12 CFR 741.6. The information enables the NCUA to monitor credit unions whose share accounts are insured by the National Credit Union Share Insurance Fund. NCUA uses the information collected from these Call Reports to fulfill its mission of supervising credit unions and the Federal Reserve Board uses it to monitor and control the nation's money supply and the system of financial institutions. Congress and various state legislatures use this information to monitor, regulate, and control credit unions and financial institutions. The changes made to the Profile and Call Report form for June 2013 will provide data to assist the National Credit Union Administration in assessing regulatory compliance and financial and operational risks. There is a decrease of 6,045 hours from the last submission

(2012). The decrease is a result of an adjustment to the number of credit unions completing the Call Report from 7,093 to 6,864. This decline is from credit union mergers and liquidations.

The NCUA requests that you send your comments on this collection to the location listed in the addresses section. Your comments should address: (a) The necessity of the information collection for the proper performance of NCUA, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility, and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents such as through the use of automated collection techniques or other forms of information technology. It is NCUA's policy to make all comments available to the public for review.

II. Data

Proposal for the following collection of information:

OMB Number: 3133–0004.

Form Number: NCUA 5300.

Type of Review: Revision to the currently approved collection.

Title: Revisions to NCUA Call Reports.

Description: The financial and statistical information is essential to NCUA in carrying out its responsibility for the supervision of federally insured credit unions. The information also enables NCUA to monitor all federally insured credit unions whose share accounts are insured by the National Credit Union Share Insurance Fund (NCUSIF).

Respondents: All Credit Unions.

Estimated No. of Respondents/ Recordkeepers: 6,864

Estimated Burden Hours per Response: 6.6 hours.

Frequency of Response: Quarterly.

Estimated Total Annual Burden Hours: 181,210.

Estimated Total Annual Cost: $5,318,513.

By the National Credit Union Administration Board on April 30th, 2013.

Mary Rupp,

Secretary of the Board.

[FR Doc. 2013–10544 Filed 5–2–13; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: National Credit Union Administration (NCUA).

ACTION: 30-day notice of submission of information collection approval from the Office of Management and Budget and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, NCUA has submitted a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery '' to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et. seq.).

DATES: Comments must be submitted June 3, 2013.

ADDRESSES: Written comments may be submitted to NCUA and OMB Contacts as listed below:

NCUA Contact: Tracy Crews, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, Fax No. 703–837–2861, Email: *OCIOPRA@ncua.gov*

OMB Contact: Desk Officer for National Credit Union Administration, Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: To request additional information, please contact Tracy Crews at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428 or at (703) 518–6444.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

The Agency received no comments in response to the 60-day notice published in the **Federal Register** of December 22, 2010 (75 FR 80542).

Below we provide NCUA's projected average estimates for the next three years: [1]

Current Actions: New collection of information.

Type of Review: New Collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Average Expected Annual Number of Activities: 22,500.

Respondents: 7,500.

Annual Responses: 3.

[1] The 60-day notice included the following estimate of the aggregate burden hours for this generic clearance federal-wide:

Average Expected Annual Number of activities: 25,000

Average number of Respondents per Activity: 200.

Annual responses: 5,000,000.

Frequency of Response: Once per request.

Average minutes per response: 30.

Burden hours: 2,500,000.

Frequency of Response: Once per request.

Average Minutes per Response: 10 minutes.

Burden Hours: 2,250 hours.

By the National Credit Union Administration Board on April 30, 2013.

Mary Rupp,

Secretary of the Board.

[FR Doc. 2013–10549 Filed 5–2–13; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities: Submission to OMB for a New Collection; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for comment.

SUMMARY: The NCUA intends to submit the following information collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). This information collection notice is published to obtain comments from the public. The NCUA is proposing a new information collection related to its solicitation of proposals for outside legal counsel (outside counsel) to assist and advise the NCUA in its various capacities. The information will assist the NCUA in further: (i) Standardizing the data it uses to select outside counsel; (ii) considering additional criteria in making its selections; and (iii) improving efficiency and recordkeeping related to its selection process.

DATES: Comments will be accepted until June 3, 2013.

ADDRESSES: Interested parties are invited to submit written comments to the NCUA Contact and the OMB Reviewer listed below:

NCUA Contact: Tracy Crews, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428, Fax No. 703–837–2861, Email: *OCIOPRA@ncua.gov*.

OMB Contact: Office of Management and Budget, ATTN: Desk Officer for the National Credit Union Administration, Office of Information and Regulatory Affairs, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Requests for additional information, a copy of the information collection request, or a copy of submitted comments should be directed to Tracy Crews at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, or at (703) 518–6444.

SUPPLEMENTARY INFORMATION:

I. Abstract and Request for Comments

The NCUA has developed two forms for collecting information from prospective outside counsel. One form relates to a budget or estimate of the legal fees, costs, and expenses that outside counsel would expect to invoice with respect to a particular legal matter. The other form includes representations and certifications, covering matters such as firm profile and expertise, malpractice insurance, price determination and contract solicitation methods, equal opportunity, lobbying, invoices, and conflicts of interest. The information will enable the NCUA to further standardize the data it uses to select outside counsel, consider additional criteria in making its selections, and improve efficiency and recordkeeping related to its selection process. In connection with seeking proposals from outside counsel, the NCUA's collections of information, in any of its capacities, are not subject to the Paperwork Reduction Act.[1] Nevertheless, the NCUA intends to voluntarily comply with the Paperwork Reduction Act in collecting this information.

The NCUA's estimates of the average number of respondents, burden, and total annual cost appear below. The estimated number of respondents is the NCUA's approximation of the average number of requests for proposals or inquiries for legal services it processes in any given calendar year. The estimated burden is the NCUA's assessment of the aggregate time prospective outside counsel will need to respond to the information on both the budget form and the representations and certifications form. The NCUA estimated the total annual cost by multiplying its estimate of the number of respondents (100) by the burden (2 hours) and multiplying that total by an estimated national average hourly billing rate for attorneys of $284.

The NCUA requests that you send your comments on this collection to the location listed in the addresses section. Your comments should address the following subjects: (a) The necessity of the information collection for the proper performance of the NCUA, including whether the information will have practical utility; (b) the accuracy of the NCUA's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways the NCUA could enhance the quality, utility, and clarity of the information to be collected; and (d) ways the NCUA could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology. It is the NCUA's policy to make all comments available to the public for review.

II. Data

Proposal for the following new collection of information:

OMB Number: 3133–New.

Form Number: N/A.

Type of Review: New collection.

Title: Contractor Budget, Representations, and Certifications.

Description: Standardized information from prospective outside counsel is essential to the NCUA in carrying out its responsibility as regulator, conservator, and liquidating agent for federally insured credit unions.

Respondents: Prospective outside legal counsel.

Estimated No. of Respondents/ Recordkeepers: 100.

Estimated Burden Hours per Response: 2 hours.

Frequency of Response: Periodically, in response to solicitations.

Estimated Total Annual Burden Hours: 200.

Estimated Total Annual Cost: $56,800.

By the National Credit Union Administration Board on April 30th, 2013.

Mary Rupp,

Secretary of the Board.

[FR Doc. 2013–10541 Filed 5–2–13; 8:45 am]

BILLING CODE 7535–01–P

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[1] *See* 12 U.S.C. 1766(i)(2) (''In addition to the authority conferred upon it by other sections of this chapter, the [NCUA] Board is authorized in carrying out its functions under this chapter . . . to expend such funds, enter into such contracts with public and private organizations and persons, make such payments in advance or by way of reimbursement, acquire and dispose of, by lease or purchase, real or personal property, *without regard to the provisions of any other law applicable to executive or independent agencies of the United States,* and perform such other functions or acts as it may deem necessary or appropriate to carry out the provisions of this chapter, in accordance with the rules and regulations or policies established by the Board not inconsistent with this chapter . . . .) (emphasis added); *see also* 12 U.S.C. 1787(b)(2)(A) (providing that when the NCUA Board acts as conservator or liquidating agent, by operation of law, it succeeds to the legally distinct rights, titles and powers of relevant credit unions, which are not subject to the Paperwork Reduction Act).

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities: Submission to OMB for Revision to a Currently Approved Collection; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for comment.

SUMMARY: The NCUA intends to submit the following information collection to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). This information collection is published to obtain comments from the public. NCUA is proposing to streamline the Community Development Revolving Loan Fund (CDRLF)—Loan Program collection to include the CDRLF Technical Assistance (Grant) Program. Both the CDRLF—Loan Program and the CDRLF—Technical Assistance (Grant) Program are administered under the NCUA Rules and Regulations Section 705. 12 CFR Part 705. This request seeks to merge elements of both the loan and grant programs into the same collection and application in order to increase program accessibility and internal and external efficiencies. The newly combined application will soon be available on-line and low-income designated credit unions will be able to apply for either a CDRLF loan or grant by accessing the same on-line application system.

DATES: Comments will be accepted until June 3, 2013.

ADDRESSES: Interested parties are invited to submit written comments to the NCUA Contact and the OMB Reviewer listed below:

NCUA Contact: Tracy Crews, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428, Fax No. 703–837–2861, Email: *OCIOPRA@ncua.gov.*

OMB Contact: Office of Management and Budget, ATTN: Desk Officer for the National Credit Union Administration, Office of Information and Regulatory Affairs, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Requests for additional information, a copy of the information collection request, or a copy of submitted comments should be directed to Tracy Crews at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428, or at (703) 518–6444.

SUPPLEMENTARY INFORMATION:

I. Abstract and Request for Comments

NCUA is amending the currently approved collection for 3133–0138. The CDRLF Loan and Technical Assistance (Grant) Programs are both administered under the NCUA Rules and Regulations Section 705. 12 CFR Part 705. Previously, two specific forms were used, one application for loans and one application for grants. NCUA is seeking to streamline the CDRLF Program application to include both the loan and the grant section into one interactive, on-line application in order to recognize internal and external efficiencies. With the merger of the grant documents to this collection, the burden will increase by 1,276 hours to include the additional calculations from low-income designated credit unions seeking grants. This increase is due strictly to the merger of grant application documents. The burden hours and cost related to the loan documents have not changed from the previous submission.

The NCUA requests that you send your comments on this collection to the locations listed in the addresses section. Your comments should address: (a) The necessity of the information collection for the proper performance of the CDRLF Loan and Technical Assistance (Grant) Programs, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility, and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of information on the respondents such as through the use of automated collection techniques or other forms of information technology. It is NCUA's policy to make all comments available to the public for review. 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.

II. Data

Proposal for the following collection of information:

OMB Number: 3133–0138.

Type of Review: Revision, with change, of a currently approved collection.

Title: Community Development Revolving Loan Fund (CDRLF) Program.

Description: NCUA requests this information from participants in the Community Development Revolving Loan Fund (CDRLF) Loan and Technical Assistance (Grant) Programs. The information will allow NCUA to assess a credit union's capacity to repay the funds and ensure that the funds were used as intended to benefit the institution and community it serves.

Estimated No. of Respondents/Recordkeepers: 343.

Estimated Burden Hours Per Response: 4, 8, or 16 per response, dependent on application type.

Frequency of Response: Reporting, on occasion and semi-annually.

Estimated Total Annual Burden Hours: 2,259 hours.

Estimated Total Annual Cost: 0.

By the National Credit Union Administration Board on April 30, 2013.

Mary Rupp,

Secretary of the Board.

[FR Doc. 2013–10551 Filed 5–2–13; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL LABOR RELATIONS BOARD

Sunshine Act Meetings: May 2013

TIME AND DATES:

All meetings are held at 2:00 p.m.

Wednesday, May 1;
Thursday, May 2;
Wednesday, May 8;
Thursday, May 9;
Wednesday, May 15;
Thursday, May 16;
Wednesday, May 22;
Thursday, May 23;
Wednesday, May 29;
Thursday, May 30.

PLACE: Board Agenda Room, No. 11820, 1099 14th St. NW., Washington DC 20570.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider ''the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto.'' See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION: *Henry Breiteneicher,* Associate Executive Secretary, (202) 273–2917.

DATED: May 1, 2013.

Henry Breiteneicher,

Associate Executive Secretary.

[FR Doc. 2013–10686 Filed 5–1–13; 4:15 pm]

BILLING CODE 7545–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0270]

Content Specifications and Shielding Evaluations for Type B Transportation Packages

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory issue summary; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Regulatory Issue Summary (RIS) 2013–04, ''Content Specifications and Shielding Evaluations for Type B Transportation Packages.'' This RIS clarifies the NRC's use of staff guidance in NUREG–1609, ''Standard Review Plan for Transport Packages for Radioactive Material,'' for the review of content specifications and shielding evaluations included in the Certificates of Compliance (CoC) and safety analysis reports (SARs) for Type B transportation packages. The RIS does not impose any additional regulatory requirements on NRC licensees.

ADDRESSES: Please refer to Docket ID NRC–2012–0270 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–2012–0270. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *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 document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

The RIS is available in ADAMS under Accession No. ML13036A135 and on the NRC's public Web site at *http://www.nrc.gov/reading-rm/doc-collections/gen-comm/reg-issues/.* NUREG–1609 is available on the NRC's public Web site at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1609/final/index.html.*

FOR FURTHER INFORMATION CONTACT: Ms. Veronica Wilson, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–492–3278; email: *Veronica.Wilson@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Public Comments

This RIS clarifies the U.S. Nuclear Regulatory Commission's (NRC's) use of staff guidance in NUREG–1609, ''Standard Review Plan for Transport Packages for Radioactive Material,'' for the review of content specifications and shielding evaluations included in the CoC and safety analysis reports for Type B transportation packages under 10 CFR part 71. This information will assist the NRC in the regulatory process and aid the addresses in developing thorough submittals.

The NRC issued this RIS as a draft for public comment on November 13, 2012 (77 FR 67678), for a 45-day comment period. The staff received three comment letters containing a total of 3 comments from Nuclear Information and Resource Service. The NRC staff considered all comments. The NRC staff's evaluation of the comments is publicly available in ADAMS under Accession No. ML13035A235. As a result of the comments received, the NRC did not make any changes to the final version of RIS 2013–04.

II. Backfitting and Issue Finality

There are no backfitting or issue finality provisions in 10 CFR part 71; therefore, these addresses—in their status as applicants for or holders of 10 CFR part 71 CoCs—are not protected by any backfitting or issue finality requirements.

This RIS does not impose on the addresses in their status as licensees or holders of NRC regulatory approvals under 10 CFR parts 50, 52, 70, 72, or 76 either backfitting (as defined in those parts) or actions which are inconsistent with the issue finality requirements in 10 CFR part 52. Consequently, the NRC staff did not address the documentation requirements of the backfitting provisions or the issue finality provisions of those parts.

III. Congressional Review Act

Under the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

Dated at Rockville, Maryland, this 23rd day of April 2013.

For the Nuclear Regulatory Commission.

Mark Lombard,

Director, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2013–10499 Filed 5–2–13; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Data to Study Multiemployer Plan Guaranty Program

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intention to request OMB approval.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) intends to request that the Office of Management and Budget (OMB) approve, under the Paperwork Reduction Act, a voluntary collection of information for a survey to assist PBGC in modeling potential outcomes of pension plans insured under its multiemployer program. This notice informs the public of the PBGC's intent and solicits public comment on the collection of information.

DATES: Comments should be submitted by July 2, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *Email: paperwork.comments@pbgc.gov.*
- *Fax:* 202–326–4224.
- *Mail or Hand Delivery:* Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026.

Comments received will be posted to *www.pbgc.gov.*

Copies of the collection of information may be obtained without charge by writing to the Disclosure

Division of the Office of the General Counsel of PBGC at the above address or by visiting the Disclosure Division or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Dan Liebman Attorney, Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026, *liebman.daniel@pbgc.gov* or 202–326–4400, ext. 6510. (For TTY and TDD, call 800–877–8339 and request connection to 202–326–4000, ext. 6779.)

SUPPLEMENTARY INFORMATION: The Pension Protection Act of 2006 (Pub. L. 109–280) (PPA) requires the actuary of a multiemployer plan in effect on July 16, 2006 to certify the plan's status within certain zones established under PPA to the plan's trustees and the Secretary of the Treasury within 90 days after the beginning of each plan year. The certification must state whether or not the plan meets any of the tests to be in critical status or endangered status and for a plan already in critical or endangered status, whether the plan is progressing as scheduled toward the applicable statutory target for improved funding. Plans in endangered and critical status are restricted with respect to the types of actions they may take and the types of amendments they may adopt, as well as required to follow special rules during the adoption period of collective bargaining agreements.

PBGC is researching the effects of potential changes to its multiemployer program. PBGC's objective is to quantify the effect of potential policy proposals on multiemployer plans that are or could enter critical status with respect to projected dates of insolvency, amount of financial assistance that PBGC would be required to provide, and the benefit changes plan participants would experience. To assist in this research PBGC intends to request that OMB approve a survey of multiemployer pension plans, their actuarial service providers, and their stakeholders, including unions and relevant professional and trade organizations.

PBGC would request the following types of information:

- The most recent actuarial valuation report.
- The most recent cash flow projections that the plan actuary developed in connection with the plan's rehabilitation plan annual update and a summary of the actuarial assumptions utilized in the projections.
- Participant census data, including accrued benefit, date of birth, date credited service began (for both active and inactive participants, if available), gender, form of payment and other data for participants in pay status, and any plan specific data needed to replicate actuarial valuation results.

PBGC believes the data requested would be readily available and there would be no need to assemble new information. PBGC would not ask for any personally identifiable information (such as name, address, social security number, etc.) in the participant census data.

This information collection would be voluntary on the part of respondents and any information provided in response to this request would not be used for any PBGC enforcement activities. Instead, such information will be used only for research into policy alternatives and would be subject to PBGC's standard confidentiality agreement. The names of the plans submitting data in support of PBGC's research would not appear in any report distributed outside of PBGC.

PBGC intends to request that OMB approve this collection of information for three years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that between 40 to 50 plans would respond to this collection of information. PBGC further estimates that the average burden of this collection of information would be four hours and $1,280 per plan, with an average total burden of 180 hours and $57,600.

PBGC is soliciting public comments to—

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Issued in Washington, DC, this 29th day of April 2013.

Judith Starr,

General Counsel, Pension Benefit Guaranty Corporation.

[FR Doc. 2013–10479 Filed 5–2–13; 8:45 am]

BILLING CODE 7709–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30495]

Notice of Applications for Deregistration Under the Investment Company Act of 1940

April 26, 2013.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of April 2013. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on May 21, 2013, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Exemptive Applications Office, 100 F Street NE., Washington, DC 20549–8010.

2009 Dole Food Automatic Common Exchange Security Trust [File No. 811–22342]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On November 1, 2012 and November 29, 2012, applicant made liquidating distributions to its shareholders, based on net asset value.

Expenses incurred in connection with the liquidation were paid by David H. Murdock as trustee of the David H. Murdock Living Trust.

Filing Dates: The application was filed on March 13, 2013, and amended on April 2, 2013.

Applicant's Address: c/o U.S. Bank National Association, Corporate Trust Services, 633 West 5th St., 24th Floor, LM–CA T24T, Los Angeles, CA 90071.

Ameristock Mutual Fund Inc. [File No. 811–9090]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Drexel Hamilton Centre American Equity Fund, a series of Drexel Hamilton Mutual Funds, and on January 11, 2013, made a final distribution to its shareholders based on net asset value. Expenses of approximately $1,247,282 incurred in connection with the reorganization were paid by Drexel Hamilton Investment Partners, LLC, investment adviser to the acquiring fund, and Ameristock Corporation, applicant's investment adviser.

Filing Dates: The application was filed on February 19, 2013, and amended on April 11, 2013.

Applicant's Address: 1320 Harbor Bay Pwky., Suite 145, Alameda, CA 94502.

Morgan Stanley Mid Cap Growth Fund [File No. 811–3639]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Mid Cap Growth Portfolio, a series of Morgan Stanley Institutional Fund Trust, and on October 29, 2012, applicant made a final distribution to its shareholders based on net asset value. Expenses of approximately $326,809 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on March 22, 2013.

Applicant's Address: c/o Morgan Stanley Investment Management Inc., 522 Fifth Ave., New York, NY 10036.

Morgan Stanley Global Strategist Fund [File No. 811–5634]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to Global Strategist Portfolio, a series of Morgan Stanley Institutional Fund Trust and, on October 29, 2012, made final distribution to its shareholders based on net asset value. Expenses of approximately $399,385 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on March 22, 2013.

Applicant's Address: c/o Morgan Stanley Investment Management Inc., 522 Fifth Ave., New York, NY 10036.

Morgan Stanley International Fund [File No. 811–9081]; Morgan Stanley International Value Equity Fund [File No. 811–10273]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. The applicants have transferred their assets to Active International Allocation Portfolio and International Equity Portfolio, each a series of Morgan Stanley Institutional Fund, Inc. and, on October 29, 2012, made a final distribution to their shareholders based on net asset value. Expenses of approximately $224,591 and $375,957, respectively, incurred in connection with the reorganizations were paid by applicants.

Filing Date: The applications were filed on March 22, 2013.

Applicant's Address: c/o Morgan Stanley Investment Management Inc., 522 Fifth Ave., New York, NY 10036.

Central Park Group Multi-Event Fund [File No. 811–21984]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 31, 2012, applicant made a final liquidating distribution to its shareholders, based on net asset value. Expenses of $11,000 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on March 25, 2013.

Applicant's Address: c/o Central Park Advisers, LLC, 805 Third Ave, New York, NY 10022.

Excelsior Multi-Strategy Hedge Fund of Funds (TI 2), LLC [File No. 811–22317]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On March 15, 2013, applicant made a final liquidating distribution to its shareholders, based on net asset value. Expenses of $25,000 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on April 5, 2013.

Applicant's Address: 225 High Ridge Rd., Stamford, CT 06905.

John Hancock Flexible Income Opportunities Fund [File No. 811–22587]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to engage in business of any kind.

Filing Date: The application was filed on April 8, 2013.

Applicant's Address: 601 Congress St., Boston, MA 02210.

Diamond Hill Financial Trends Fund, Inc. [File No. 811–5734]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On March 22, 2013, applicant made a liquidating distribution to its shareholders, based on net asset value. Applicant represents that fewer than one percent of its shareholders have not yet received distributions in complete liquidation of their interests. The paying agent, Computershare Share Owners Services, LLC, is holding funds for these shareholders until they surrender their physical share certificates. Expenses of $202,616 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on April 10, 2013.

Applicant's Address: 325 John H. McConnell Blvd., Suite 200, Columbus, OH 43215.

Performance Funds Trust [File No. 811–6603]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. The applicant has transferred its assets to corresponding series of Money Market Obligations Trust, Federated Equity Funds, Federated Total Return Series, Inc. and Federated U.S. Government Securities Fund: 1–3 Years and, on September 21, 2012, made a final distribution to its shareholders based on net asset value. Expenses of $666,121 incurred in connection with the reorganization were paid by Trustmark Investment Advisors, Inc., applicant's investment adviser.

Filing Date: The application was filed on April 2, 2013.

Applicant's Address: 3435 Stelzer Rd., Columbus, OH 43219.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–10483 Filed 5–2–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69470; File No. SR–FICC–2013–02]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Include Options on Interest Rate Futures Contracts With Maturities Not Longer Than Two Years In The One-Pot Cross-Margining Program Between the Government Securities Division and New York Portfolio Clearing, LLC

April 29, 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 April 15, 2013, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by FICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would allow FICC to include options on interest rate futures contracts with maturities not longer than two years in the one-pot cross-margining program between FICC's Government Securities Division (''GSD'') and New York Portfolio Clearing, LLC (''NYPC'').[3]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FICC 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. FICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[4]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(i) The purpose of the proposed rule change is to include options on interest rate futures contracts with maturities not longer than two years in the one-pot cross-margining program between the GSD and NYPC.

Background on NYPC and the FICC–NYPC One-Pot Cross-Margining Program

NYPC is registered with the Commodity Futures Trading Commission (''CFTC'') as a derivatives clearing organization (''DCO'') pursuant to Section 5b of the Commodity Exchange Act and Part 39 of the CFTC regulations. NYPC launched operations on March 21, 2011, and currently clears U.S. dollar-denominated interest rate futures contracts. It plans to add options on interest rate futures to its set of products.

Pursuant to FICC Rule Filing 2010–09,[5] FICC offers ''single pot'' cross margining of certain positions cleared at NYPC and the GSD. This arrangement is reflected in a cross-margining agreement (''FICC–NYPC Cross-Margining Agreement'') between FICC and NYPC, which is a part of the GSD's rules. Specifically, certain GSD members may opt to combine within a single margin portfolio their positions at the GSD and their positions (or those of certain permitted affiliates) cleared at NYPC. Joint GSD–NYPC members or GSD members and their permitted affiliates who wish to participate in the one-pot program must execute the requisite cross-margining participant agreements, which are exhibits to the FICC–NYPC Cross-Margining Agreement.[6]

As noted in FICC Rule Filing 2010–09, FICC is responsible for performing the margin calculations in its capacity as the ''Administrator'' under the terms of the FICC–NYPC Cross-Margining Agreement. Specifically, FICC determines the combined FICC Clearing Fund and NYPC Original Margin [7] requirement for each cross-margining participant. The FICC–NYPC one-pot margin requirement for each participant is then allocated between FICC and NYPC in proportion to each clearing organization's respective ''stand-alone'' margin requirements—in other words, an amount reflecting the ratio of what each clearing organization would have required from that member if it were not participating in the cross-margining program (referred to as the ''Constituent Margin Ratio'' in the FICC–NYPC Cross-Margining Agreement). The FICC–NYPC Cross-Margining Agreement provides that either FICC or NYPC may, at any time, require additional margin to be deposited by a participant (above what is calculated under the FICC–NYPC Cross-Margining Agreement) based upon the financial condition of the participant, unusual market conditions or other special circumstances. The standards that FICC proposed in Rule Filing 2010–09 to use for these purposes are the standards contained within the GSD's rules currently, so that notwithstanding the calculation of a participant's Clearing Fund requirement pursuant to the FICC–NYPC Cross-Margining Agreement, FICC still retains the rights contained within the GSD's rules to require an additional Clearing Fund deposit under the circumstances specified in the GSD's rules. For example, the GSD's rules currently provide that, if a Dealer Netting Member [8] falls below its minimum financial requirement, it shall be required to make an additional Clearing Fund deposit equal to the greater of (i) $1 million or (ii) 25 percent of its Required Fund Deposit.[9] In the event of the insolvency or default of a member that participates in the one-pot cross-margining arrangement, the positions in such member's FICC–NYPC one-pot portfolio (including, where applicable, the positions of its permitted margin affiliate at NYPC) will be liquidated by FICC and NYPC as a single portfolio, and the liquidation proceeds will be applied to the defaulting member's obligations to FICC and NYPC in accordance with the provisions of the FICC–NYPC Cross-Margining Agreement. The FICC–NYPC Cross-Margining Agreement provides for the sharing of losses by FICC and NYPC in the event that the one-pot portfolio margin deposits of a defaulting participant are not sufficient to cover the losses resulting from the liquidation of that participant's trades and positions, which is covered in detail in FICC Rule Filing 2010–09, and is reflected in the terms of the FICC–NYPC Cross-Margining Agreement.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NYPC is jointly owned by NYSE Euronext and The Depository Trust & Clearing Corporation.

[4] The Commission has modified the text of the summaries prepared by FICC.

[5] The Commission approved this rule filing on February 28, 2011. *See* Exchange Act Release No. 34–63986 (February 28, 2011); 76 FR 12144–02 (March 4, 2011) (SR–FICC–2010–09).

[6] GSD members and NYPC members are also permitted to cross margin in the single pot the activity of their market professional customers. *See* Exchange Act Release No. 34–66989 (May 15, 2012); 77 FR 30032–02 (May 21, 2012) (SR–FICC–2012–03).

[7] Original Margin is the NYPC equivalent of the Clearing Fund.

[8] The GSD's rules define the term ''Dealer Netting Member'' as ''a Registered Government Securities Dealer that is admitted to membership in the Netting System pursuant to these Rules, and whose membership in the Netting System has not been terminated . . .'' GSD Rulebook, Rule 2A, Section 2.

[9] The GSD's rules define the term ''Required Fund Deposit'' as ''the amount a Netting Member is required to deposit to the Clearing Fund.'' GSD Rulebook, Rule 1.

The addition of options on interest rate futures to the one-pot cross-margining arrangement does not require any changes to the terms of the FICC–NYPC Cross-Margining Agreement. FICC will continue to act as the Administrator for purposes of margin calculations. The sharing of loss provisions in the FICC–NYPC Cross-Margining Agreement that would apply in the event of a participant's default will remain unchanged under this proposal.

Proposal To Include Options on Interest Rate Futures in the One-Pot Cross-Margining Arrangement

FICC proposes to add options on interest rate futures contracts with maturities not longer than two years to the one-pot cross-margining arrangement. NYPC will act as the DCO for such products.

Options on interest rate futures are a long-standing, standardized product traded and cleared by futures exchanges [10] around the globe, including the Chicago Mercantile Exchange (''CME'').[11] The key risks associated with adding options on interest rate futures to the one-pot cross-margining arrangement relate to the ability of FICC and NYPC to properly model, test and monitor the risks that options on interest rate futures present to the clearing organizations. Consistent with FICC's quantitative policy for new initiatives, any new models or enhancements are subject to external review before they are utilized. The options proposal has followed this protocol, and the team of external reviewers has tested the models and validated their methodology.

In the case of options on interest rate futures that are physically deliverable, the addition of options on interest rate futures to the one-pot cross-margining arrangement will not alter the manner in which physical deliveries occur. Upon exercise or assignment of an option, the resulting futures position will be treated as a traded futures contract, with the same delivery obligations if the resulting futures position is not closed out prior to delivery. In general, delivery of U.S. Treasury futures can be submitted to FICC by NYPC on a locked-in basis and processed in accordance with FICC's rules (when these are submitted to FICC, they are no longer futures contracts but rather are in the form of buy-sells eligible for processing at the GSD).

FICC will submit a separate rule filing to the Commission for the inclusion in the single pot of longer-dated interest rate options products. FICC will also conduct appropriate testing and analysis of the options model and, consistent with FICC's quantitative policy for new initiatives, submit the model for external review.

Risk Considerations Regarding the Proposal To Include Options on Interest Rate Futures in the One-Pot Cross-Margining Arrangement

The methodology for managing risk for options on interest rate futures to be included in the one-pot cross-margining arrangement has three pillars: (i) Value-at-Risk (''VaR'') with historical simulation, (ii) the Barone-Adesi & Whaley (''BAW'') approximation, and (iii) the Stochastic Alpha, Beta, Rho (''SABR'') Volatility Model.

The historical-simulation-based VaR model proposed for options on interest rate futures to be included in the one-pot cross-margining arrangement is the same model utilized in the current one-pot cross-margining arrangement between NYPC and the GSD described in FICC Rule Filing 2010–09. The backbone of this VaR model—namely, the three-day/one-day liquidation period assumption for cash and derivatives positions, respectively; the 99th percentile confidence level; and the one-year look-back period and the use of a linear interpolation/front-weighting mechanism to arrive at the 99 percent threshold from simulated profits and losses—will remain the same when options on interest rate futures are added to FICC–NYPC one-pot portfolios.

The BAW approximation is the pricing function that FICC and NYPC will use to estimate analytically the value of options on interest rate futures within the Black-Scholes-Merton framework. The SABR volatility model will be used to estimate volatility curves for various options series.

As stated above, a three-day liquidation period is assumed for cash positions cleared by FICC, whereas a one-day liquidation period is assumed for futures positions cleared by NYPC. Options on interest rate futures in the one-pot cross-margining arrangement will also be subject to a one-day liquidation requirement due to the similar liquidity of these products compared to futures. This is also consistent with CFTC requirements. In addition, each cross-margining participant's FICC–NYPC one-pot margin requirement is subject to a daily back test, and a ''coverage component'' is applied and charged to the participant in the event the daily back test reflects insufficient coverage. Options on interest rate futures in the one-pot cross-margining arrangement will be subject to this daily testing.

The one-pot FICC–NYPC VaR model will account for the non-linear risk posed by the addition of options on interest rate futures to the one-pot cross-margining arrangement by performing full revaluation of such options using BAW and SABR. As options on interest rate futures can exhibit magnified exposure in extreme market conditions, FICC is proposing to employ the additional tools described below:

1. Minimum Margin Charge for Portfolios Including Options

Similar to the practice that FICC's Mortgage-Backed Securities Division uses to address potential mark-to-market offset of margin requirements, FICC and NYPC are proposing to apply a floor margin charge of five basis points of the gross market value of positions in options on interest rate futures to the unadjusted Required Fund Deposit of GSD Netting Members with one-pot portfolios that include options on interest rate futures. Therefore, for GSD Netting Members with one-pot portfolios that include options on interest rate futures, their minimum Required Fund Deposit will be the greater of: (i) The current minimum Required Fund Deposit as prescribed in GSD Rule 4, Section 2; or (ii) the proposed floor margin charge.

2. Short Option Minimum Charge

To address the risk associated with short positions in deep out-of-the-money (''OTM'') options, FICC and NYPC propose to introduce a short option minimum (''SOM'') for options on interest rate futures in the one-pot cross-margining arrangement. The SOM will apply only to options on interest rate futures with a settlement price of ''cabinet.'' [12] These options demonstrate minimum price volatility in normal market conditions, but may potentially become volatile when market conditions change dramatically. In light of the losses that such options may cause, an

[10] Exchanges that list options on interest rate futures include the following: (i) CME (US); (ii) CBOT (a subsidiary of CME); (iii) BM&F (Brazil); (iv) NYSE LIFFE (UK); (v) Eurex (Germany); (vi) ASX (Australia); (vii) Montreal Exchange (Canada); (viii) SGX (Singapore); and (ix) TFX (Japan).

[11] Options on interest rate futures are currently included in the ''two-pot'' cross-margining arrangement between FICC and the CME. The cross-margining agreement between FICC and the CME is incorporated in the GSD's Rules and may be found on the DTCC Web site, *www.dtcc.com*.

[12] The minimum price increment for futures or options on futures is normally referred to as a ''tick.'' For options on futures whose value is less than one tick, trading and settlement in the options are allowed at a price that is less than a tick. This latter price is known as ''cabinet.''

SOM charge will be applied to any short position in these options.

3. Out-of-the-Money Options Surcharge

FICC and NYPC also propose to impose a surcharge on all OTM options positions in the one-pot cross-margining arrangement in order to address any potential biases in the BAW options pricing model described above. The amount of the surcharge will be determined by the moneyness of the options position.

4. Options Stress Testing

In addition to the regular stress testing practices utilized by FICC and NYPC, monthly hypothetical implied volatility stress tests of FICC–NYPC one-pot portfolios, including options on interest rate futures, will be conducted in order to analyze specifically the non-linear tail risks associated with options products.

Proposed Rule Changes

FICC's proposal to add options on interest rate futures to the one-pot cross-margining arrangement requires that Rule 4, Section 2 of the GSD's rulebook be changed to include a reference to the proposed minimum margin charge discussed above. Technical clarifications to certain GSD rules are also required in order to make it clear that options on interest rate futures will be included in the arrangement. Specifically, FICC is proposing to make technical clarifications to the following: (i) The definitions of ''CFTC-Recognized Clearing Organization'' and ''Eligible Positions'' set forth in Rule 1; (ii) Section 5a of GSD Rule 13, and (iii) subsection (b) of GSD Rule 29. As noted above, no changes are required to be made to the FICC–NYPC Cross-Margining Agreement itself.

(ii) FICC believes that the proposed rule change is consistent with the Act and the rules and regulations promulgated thereunder because it may further the available offsets among positions held at FICC and NYPC, thereby allowing a more efficient use of member collateral and promoting additional efficiencies in the marketplace. FICC believes the proposed rule change is therefore consistent with the Act and the rules and regulations promulgated thereunder because it supports the prompt and accurate clearance and settlement of securities transactions. FICC further believes that, as it will implement this proposed rule change using the enhanced risk-management measures discussed above, the proposed rule change will also be consistent with the Act because it will assure the safeguarding of the securities and funds in FICC's custody and control.

(B) Clearing Agency's Statement on Burden on Competition

FICC does not believe that the proposed rule change will have any negative impact, or impose any burden, on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Participants, Members, or Others

Written comments relating to the proposed rule change have not yet been solicited or received. FICC will notify the Commission of any written comments received by FICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.[13] The clearing agency shall post notice on its Web site of proposed changes that are implemented.

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 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–FICC–2013–02 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–FICC–2013–02. 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 of submission. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at *http://dtcc.com/downloads/legal/rule_filings/2013/ficc/SR_FICC_2013_02.pdf.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–FICC–2013–02 and should be submitted on or before May 24, 2013.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–10508 Filed 5–2–13; 8:45 am]

BILLING CODE 8011–01–P

[13] FICC also filed the proposals contained in this proposed rule change as an advance notice pursuant to Section 806(e)(1) of the Clearing Supervision Act and Rule 19b–4(n)(1)(i) thereunder. 12 U.S.C. 5465(e)(1); 17 CFR 240.19b-4(n)(1)(i). Proposed rule changes filed under the Clearing Supervision Act may be implemented either: at the time the Commission notifies the clearing agency that it does not object to the proposed rule change and authorizes its implementation, or, if the Commission does not object to the proposed rule change, within 60 days of the later of (i) the date that the advance notice was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. *See* 12 U.S.C. 5465(e)(1)(G).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69471; File No. SR–Phlx–2013–09]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving Proposed Rule Change To Enhance the Functionality Offered on the Options Floor Broker Management System (''FBMS'') by, Among Other Things, Automating Functions Currently Performed by Floor Brokers

April 29, 2013.

I. Introduction

On February 6, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to enhance the functionality offered on the Options Floor Broker Management System (''FBMS'') by, among other things, automating functions currently performed by Floor Brokers manually. The proposed rule change was published for comment in the **Federal Register** on February 26, 2013.[3] On April 12, 2013, the Exchange extended the time for Commission action to April 29, 2013. The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Exchange options Floor Brokers are registered with the Exchange for the purpose, while on the options floor, of accepting and executing options orders received from members and member organizations.[4] Historically, Floor Brokers received orders at their booths on the trading floor and executed such orders manually and in person. The implementation of the Consolidated Options Audit Trail System (''COATS'') in 2000 required the capture of certain options order information, including the time of order receipt and execution, contemporaneously with receipt and execution.[5] As a result of these changes, the Exchange introduced FBMS, a component of the Exchange's electronic trading system, Phlx XL. FBMS enables Floor Brokers and/or their employees to enter, route, and report transactions stemming from options orders received on the Exchange. FBMS also establishes an electronic audit trail for options orders represented by Floor Brokers on the Exchange. Floor Brokers can use FBMS to submit orders, including Complex Orders,[6] to Phlx XL, rather than executing the orders in the trading crowd. Orders submitted through FBMS are processed like any other electronic order on the Exchange. Floor Brokers may use FBMS to submit orders for a variety of reasons, including that the order is far away from the market such that the Floor Broker would prefer to place it on the electronic book or that there is a contra-side order on the book with which the order can trade.

The Exchange proposes to make several changes to FBMS.

A. Order Execution in FBMS

The Exchange proposes to enhance FBMS functionalities. Currently, FBMS is a system that is primarily used by Floor Brokers to enter orders and report executed transactions. The Exchange proposes to expand FBMS such that it would become an order execution system as well.

As proposed, all options transactions on the Exchange would be executed: (1) automatically by Phlx XL; (2) by and among members in the trading crowd (as long as none of them is a Floor Broker); or (3) through the FBMS for trades involving at least one Floor Broker.[7] The Exchange proposes three exceptions that would allow Floor Brokers to execute orders manually: (1) If the Exchange determines to permit manual executions in the event of a problem with Exchange systems; (2) Floor Brokers are handling accommodation transactions[8] or FLEX trades;[9] or (3) where an order has more than 15 legs.[10] The Exchange also proposes to amend its rules to state that certain trades executed by Floor Brokers pursuant to Rule 1064—namely, crossing, facilitation, and solicited orders—must be executed through the FBMS.[11]

In connection with the proposal to add order execution functions to FBMS, the Exchange is proposing to add new subsection (g) to Exchange Rule 1000. The proposed rule would require bids and offers to either be entered electronically or made by public outcry in the trading crowd.[12] The Exchange also proposes to define public outcry. As proposed, a member shall be considered to be ''in'' on a bid or offer while the member remains at the post, unless the member distinctly and audibly states ''out.''[13] A member bidding and offering in immediate and rapid succession shall be deemed ''in'' until the member shall state ''out'' on either bid or offer.[14] Once the crowd has provided a quote, it will remain in effect until: (A) A reasonable amount of time has passed; or (B) there is a significant change in the price of the underlying security; or (C) the market given in response to the request has been improved.[15] With respect to orders involving a Floor Broker using FBMS to execute an order, a member must audibly say ''out'' before the Floor Broker submits the order into the FBMS for execution and, if the order is not executed, the member must audibly say ''out'' before each time the Floor Broker resubmits the order for execution.[16]

In connection with order execution, the Exchange also proposes to allow FBMS to execute two-sided orders entered by Floor Brokers, including multi-leg orders up to 15 legs, after the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68960 (February 20, 2013), 78 FR 13132.

[4] *See* Exchange Rule 1060. A floor broker who is the nominee of a member organization qualified to transact business with the public may accept orders from public customers of the member organization. *See id.*

[5] *See* In the Matter of Certain Activities of Options Exchanges, Administrative Proceeding File No. 3–10282, Securities Exchange Act Release No. 43268 (September 11, 2000) (Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions) (''Options Settlement Order'').

[6] Complex Orders are defined in Phlx Rule 1080.08.

[7] *See* proposed Phlx Rule 1000(f).

[8] As explained in Phlx Rule 1059, specialists—and not FBMS—execute accommodation transactions made pursuant to cabinet trading.

[9] FLEX orders will continue to be executable by Floor Brokers in the trading crowd pursuant to Exchange Rules 1079 and 1079A, rather than through FBMS because FBMS will not be able to accept FLEX orders, which have varied and complicated terms. Similarly, accommodation transactions (also known as cabinet trades) will continue to be executable by Floor Brokers in the trading crowd pursuant to Exchange Rule 1059. According to the Exchange, neither FLEX nor accommodation transactions are executed through Exchange systems today.

[10] The Exchange proposes to limit the complexity of FBMS functionality and does not believe that many orders fall into this category or that Floor Brokers would be adversely affected.

[11] In addition to making these changes to Rule 1064, the Exchange also proposes to delete Advice B–11, which generally tracks the language of Rule 1064. In addition to generally repeating the substance of Rule 1064, the Exchange noted that Advice B–11 does not contain fine schedules adopted pursuant to the Exchange's minor rule enforcement and reporting plan, unlike other Advices.

[12] *See* proposed Exchange Rule 1000(g). The proposed rule would also require all bids and offers to be general and not be specified for acceptance by particular members. *See id.*

[13] *See* proposed Exchange Rule 1000(g).

[14] *See id.*

[15] *See id.* In the case of a dispute, the term ''significant change'' would be interpreted on a case-by-case basis by an Options Exchange Official based upon the extent of the recent trading in the option and, in the case of equity and index options, in the underlying security, and any other relevant factors.

[16] *See id.*

Floor Broker has represented the orders in the trading crowd.[17] When a Floor Broker submits an order for execution through FBMS, the order would be executed based on market conditions and in accordance with Exchange rules.[18] FBMS execution functionality would assist the Floor Broker in clearing the Exchange book, consistent with Exchange priority rules.[19] If the order cannot be executed, Phlx XL would attempt to execute the order a number of times for a period of no more than one second, which period shall be established by the Exchange and announced by Options Trader Alert, after which the order would be returned to the Floor Broker on the FBMS.[20] The Floor Broker may resubmit the order for execution, as long as the quotes/orders that comprise the cross have not been withdrawn.[21] Floor Brokers are responsible for handling all FBMS orders in accordance with Exchange priority and trade-through rules, including Exchange Rules 1014, 1033 and 1084.[22]

B. Complex Calculator Function in FBMS

The Exchange proposes to provide Floor Brokers with an enhanced FBMS functionality called the complex calculator.[23] FBMS would calculate and display a suggested price of each individual component of a multi-leg order, up to 15 legs, submitted on a net debit or credit basis.[24] The Exchange stated that this functionality should substantially increase the speed with which Floor Brokers could ascertain the marketability of multi-leg orders at a specified net debit or credit price, and should result in more efficient executions in the trading crowd.

Additionally, the Exchange proposes to change the manner in which Complex Orders are entered into FBMS. Currently, Floor Brokers may enter Complex Orders, as defined in Rule 1080.08, consisting of two option legs into FBMS for execution using the Complex Order functionality of Phlx XL, pursuant to Rule 180.08(b)(iii). The Exchange proposes to allow Complex Orders consisting of up to six legs (one of which may be stock) to be entered through FBMS.[25] According to the Exchange, this functionality should assist Floor Brokers in pricing multi-leg orders for representation in the trading crowd, as well as with pricing multi-leg orders for submission for execution as a two-sided order.

C. Multi-Leg Order Spread Type Priority

The Exchange proposes to apply a new spread priority to certain multi-leg orders that are submitted to FBMS. This priority, which is the same as the priority set forth in Rule 1080.08(c)(iii) that applies to complex orders in Phlx XL, will apply to multi-leg orders that meet the definition of a Complex Order as set forth in Rule 1080.08. This priority will also apply to multi-leg orders that contain a conforming ratio that complies with the conforming ratio set forth in Rule 1080.08(a)(ix).[26]

As set forth in proposed Rule 1033(i), Spread Type Orders[27] consisting of a conforming ratio may be executed at a total credit or debit price with priority over individual bids or offers established in the marketplace (including customers) that are not better than the bids or offers comprising such total credit or debit, provided that at least one option leg is executed at a better price than the established bid or offer for that option contract and no option leg is executed at a price outside of the established bid or offer for that option contract. Because certain orders will continue to be executed on the floor and not through FBMS, the Exchange is retaining Rules 1033 (d), (e), (g), and (h), which effectively require one leg of a spread to be improved for every two legs of a multi-leg order.

D. Additional Changes

The Exchange proposes to amend Exchange Rule 1014(g)(vi) and Option Floor Procedure Advice F–2, which pertain to how trades are allocated, matched and time stamped. Currently, trades executed electronically via Phlx XL are automatically trade reported without further action required by the executing parties. As proposed, trades executed electronically through FBMS are also automatically reported.

The Exchange also proposes to amend Exchange Rule 1066, Certain Types of Orders Defined, and rename it ''Certain Types of Floor-Based (Non-Phlx XL) Orders Defined'' to make clear that the order types in the rule reflect what can be traded on the floor. The order types that are handled and executed automatically by Phlx XL appear in Exchange Rule 1080. The Exchange is also proposing introductory language specifically stating that these order types are eligible for entry by a Floor Broker for execution through FBMS and, with respect to transactions when there is no Floor Broker involved, for execution by members in the trading crowd. The Exchange also proposes to delete the following order types, because FBMS will not accept these order types:[28] multi-part order, delta order, market-on-close order, and one-cancels-the-other order.[29] The Exchange stated that these order types are being deleted because they are not easily automated and are rarely used.

The Exchange proposes to rename ''Hedge Order'' in Exchange Rule 1066(f) to ''Multi-leg Order,'' and make corresponding changes in Exchange Rules 1033(d), 1063(e) and Option Floor Procedure Advices C–2 and F–14. A synthetic options order would be re-categorized as a type of multi-leg order in Exchange Rule 1066(f)(5), rather than a separate order type in Exchange Rule 1066(g). The definition and description of an Intermarket Sweep Order would be moved from Exchange Rule 1066(i) to Exchange Rule 1080.03 because such order is (and would continue to be) only available on Phlx XL. Exchange Rule 1066(f) would also be amended to add three new definitions—Spread Type Order; Complex Order (to help distinguish between the multi-leg orders that also meet the definition of Complex Order in Exchange Rule 1080.08 from those that do not);[30] and DNA Order, which will now be submitted through FBMS. Exchange Rule 1066 would contain all of the order types available for open outcry trading on the trading floor and through FBMS; Exchange Rule 1080 continues to govern the order types available through PHLX XL.

[17] *See* proposed Exchange Rule 1063(e)(iv).

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See* proposed Exchange Rule 1063(e)(iii).

[24] *See id.* According to the Exchange, FBMS currently accepts up to 20 legs of a complex order. The Exchange believes that limiting the proposed complex calculator to 15 legs should be sufficient for Floor Brokers' current business needs.

[25] See proposed Exchange Rule.

[26] As set forth in Rule 1080.08(a)(ix), a conforming ratio ''is where the ratio between the sizes of the options components of a Complex Order is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00).''

[27] A spread type order includes a spread, straddle and combination order and is an order to buy a stated number of option contracts and to sell a stated number of option contracts in a different series of the same option and may be bid for or offered on a total net debit or credit basis. *See* Exchange Rule 1066(f).

[28] The Exchange is also proposing to delete Exchange Rule 1033(i), Inter-Currency Spread Priority, because FBMS will not handle multi-leg orders involving two different underlying currencies.

[29] The Exchange is also deleting this order type in Exchange Rule 1063(b).

[30] A spread type order, which can only be entered through FBMS, can have up to 15 legs, while a Complex Order entered for handling through PHLX XL can have up to six legs, each including the underlying security.

E. Implementation

The Exchange proposes to implement the enhancements with a trial period of two to four weeks, to be determined by the Exchange, during which the new FBMS enhancements and related rules would operate along with the existing FBMS and rules. The Exchange seeks to begin implementation on June 1, 2013.[31] During this period, Floor Brokers would still be able to execute orders verbally in the trading crowd and submit the execution reports through FBMS, like they do currently. Floor Brokers would also be able to use the new FBMS to execute trades.

III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities exchange.[32] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act [33] in that it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange proposes to amend its rules to, among other things, require Floor Brokers to execute orders via FBMS rather than manually on the trading floor, unless one of the enumerated exceptions applies.[34] In part, the proposal would allow Floor Brokers to use FBMS to cross orders, including multi-leg orders with up to 15 legs. The Commission believes that such automation may benefit the Exchange, its members and users, and other market participants by, for example, producing more accurate and timely trade reporting. The Commission believes that this proposal should allow Floor Brokers to better manage orders and is reasonably designed to increase compliance with applicable Commission rules and regulations and with Exchange rules. For example, the FBMS would prohibit an execution of a two-sided order if that cross would trade through a better price on the book or on another market.[35] Automating formerly manual trades should help ensure that trades do not violate the priority of orders on the book or trade through the NBBO.[36]

Moreover, the Commission finds that the enhanced functionality of FBMS provided by the complex calculator, which would calculate and display a suggested price of each individual component of a multi-leg order, up to 15 legs, submitted on a net debit or credit basis, will aid Floor Brokers in calculating the prices of the components of a multi-leg order, which has the potential to increase the speed with which Floor Brokers can represent such orders. Taken together, the Commission believes that these changes will be beneficial to the market as a whole by contributing to the efficient functioning of the securities markets and the price discovery process and by contributing to the efficient functioning of the securities markets.

The Commission also finds that the proposed Spread Type Order priority is consistent with the requirements of the Act. The FBMS would validate that a multi-leg order meets the definition of Complex Order (as defined in Exchange Rule 1080.08) and would apply the new spread priority provision. If a multi-leg order does not meet the definition of Complex Order because the multi-leg order has more than six legs, then the proposed spread priority provision would nevertheless apply if the multi-leg order has a conforming ratio (as defined in Exchange Rule 1080.08(a)(ix)). The Commission believes that the proposed Spread Type Order priority could improve Floor Brokers' ability to execute multi-leg orders, which could benefit investors and other market participants. The Commission notes that other options exchanges have similar complex order priority provisions for Complex Orders that do not limit the number of legs and that require only one leg to be improved.[37]

Additionally, the Commission finds that the Exchange's proposal to amend Exchange Rule 1014(g)(vi) and Option Floor Procedure Advice F–2 so that trades executed electronically through FBMS will be automatically reported (without further action required by executing parties) is consistent with the requirements of the Act. Currently, trades executed electronically via Phlx XL are automatically reported, and the proposed change would ensure automatic reporting for trades executed via FBMS. The Commission believes that this proposal will benefit investors and other market participants by providing quicker and more reliable confirmation of trade executions.

The Commission also finds that the Exchange's proposed changes and deletions to Exchange Rules 1033, 1063, 1066, and 1080 are consistent with the Act. The Exchange is renaming Rule 1066 from ''Certain Types of Orders Defined'' to ''Certain Types of Floor-Based (Non-Phlx XL) Orders Defined,'' which the Commission believes will make clear to investors and other market participants that the order types in the rule reflect what can be traded on the floor. The Exchange is also amending Rule 1080, which lists the order types that are handled and executed automatically by Phlx XL, to provide introductory language that specifically states that the listed order types are eligible either for entry by a Floor Broker for execution through FBMS or for execution by members in the trading crowd where the transaction does not involve a Floor Broker. Additionally, the Exchange is deleting from Rule 1066 several order types (multi-part order, delta order, market-on-close order, and one-cancels-the-other order [38]) that are not easily automated and rarely used. The Exchange is deleting from Rule 1033(i) the ''Inter-Currency Spread Priority'' because FBMS will not handle multi-leg orders involving two different underlying currencies. The Exchange is also renaming ''Hedge Order'' in Rule 1066(f) to ''Multi-leg Order,'' and making corresponding changes in Exchange Rules 1033(d), 1063(e), and the Option Floor Procedure Advices C–2 and F–14. Additionally, a synthetic options order would be re-categorized as a type of multi-leg order in Exchange Rule 1066(f)(5), rather than a separate order type in Exchange Rule 1066(g). The definition and description of an Intermarket Sweep Order would be

[31] Phlx confirmed that the implementation of FBMS will begin on June 1, 2013. *See* email from Edith Hallahan, Phlx, to Dhawal Sharma, Attorney Advisor, Division of Trading and Markets, Commission.

[32] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[33] 15 U.S.C. 78f(b).

[34] As part of these changes, the Exchange will delete Advice B–11, which generally tracks the language of Rule 1064, which the Exchange proposes to amend.

[35] The Exchange noted that Floor Brokers may choose not to execute the cross if orders exist on the book that would prevent the cross from executing. In this scenario, the FBMS would notify the Floor Brokers that such orders on the book exist, and the Floor Broker would have to exercise his discretion as to whether to proceed.

[36] Also of relevance is Rule 155, which requires that ''a Floor Broker handling an order is to use due diligence to execute the order at the best price or prices available to him in accordance with the Rules of the Exchange.'' The Commission notes that, with the changes made to the FBMS and to the manner in which Floor Brokers handle orders, Floor Brokers will still be obligated to adhere to the principles articulated in Rule 155.

[37] *See, e.g.,* ISE Rule 722(b)(2).

[38] The ''one-cancels-the-other order'' type is also being deleted from Exchange Rule 1063(b).

moved from Exchange Rule 1066(i) to Exchange Rule 1080.03 because such order is (and would continue to be) only available on Phlx XL. Exchange Rule 1066(f) would also be amended to add three new definitions—Spread Type Order; Complex Order and DNA Order. The Commission believes that these changes are consistent with and necessary in light of the changes being made to FBMS, and are appropriate and beneficial to investors because they update the Exchange's Rules and provide the investing public with clearer information on order types available for execution on the Exchange.

The Commission also finds that the addition of new subsection (g) to Exchange Rule 1000 is consistent with the Act. Exchange Rule 1000(g) would require bids and offers to either be entered electronically or made by public outcry in the trading crowd. As described above, public outcry is defined in Rule 1000(g). The Commission believes that the additional clarity provided by Rule 1000(g) on how bids and offers are made and maintained on the trading floor is appropriate because, in light of the elimination of most Floor Broker verbal executions, additional emphasis will be placed on how long a bid/offer is in effect.

The Commission finds that it is consistent with the Act for the Exchange to begin implementation of the new FBMS enhancements and related rules on June 1, 2013, with a two to four week trial period. The Commission believes that this will provide Floor Brokers and other market participants with an appropriate amount of time to familiarize themselves with the changes, and, similarly, a trial period of two to four weeks will allow the Exchange and market participants to work together in making a transition from floor based executions to FBMS.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [39] that the proposed rule change (SR–Phlx–2013–09) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–10445 Filed 5–2–13; 8:45 am]

BILLING CODE 8011–01–P

[39] 15 U.S.C. 78s(b)(2).

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

In the Matter of Biopharm Asia, Inc., China Organic Agriculture, Inc., and Guilin Paper, Inc.; Order of Suspension of Trading

April 19, 2013.

Correction

In notice document 2013–09635, appearing on page 23970, in the issue of Tuesday, April 23, 2013, make the following correction:

On page 23970, in the first column, the Subject in the heading is corrected to read as set forth above.

[FR Doc. C1–2013–09635 Filed 5–2–13; 8:45 am]

BILLING CODE 1505–01–D

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60 Day Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intention to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before July 2, 2013.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Ariel Teichman, Management Analyst, Office of Entrepreneurial Development, Small Business Administration, 409 3rd Street SW., Room 6043, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACTS: Ariel Teichman, Management Analyst, 202–205–6592 *edmis@sba.gov* or Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.gov.*

Title: ''Entrepreneurial Development Management Information System (EDMIS) Client Intake Form & Management Training Form''

Abstract: SBA Forms 641 (*Client Intake Form*) and 888 (*Management Training Form)* are used to collect counseling, training and economic impact information from SBA partners and District Offices. Revisions will eliminate redundancy, provide for greater transparency and accountability for program performance, and improve SBA's ability to remain responsive to requests for information from the public, Congress, and program oversight agencies.

Description of Respondents: The SBA Resource Partners, including Small Business Development Centers (SBDC), Women's Business Centers (WBC), and SCORE. In addition, Veterans Business Outreach Centers (VBOCs) and Regional Clusters.

Form Number's: 641,888.

Annual Responses: 1.4 million.

Annual Burden: 160,000.

Curtis Rich,

Management Analyst.

[FR Doc. 2013–10500 Filed 5–2–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Notice Seeking Exemption Under the Small Business Investment Act, Conflicts of Interest; VPC SBIC I, LP; License No. 05/05–0308

Notice is hereby given that VPC SBIC I, LP, 227 West Monroe Street, Suite 3900, Chicago, IL, 60606, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 101730). VPC SBIC I, LP proposes to provide debt financing to Global Employment Holdings, Inc., 10375 Park Meadows Drive, Suite 475, Littleton, CO, 80124 (''GEYH''). The proceeds will be used to redeem maturing debt and fund an acquisition.

The financing is brought within the purview of § 107.730(a) of the Regulations because Victory Park Credit Opportunities, L.P., Victory Park Credit Opportunities Intermediate Fund, L.P., and Victory Park Capital Advisors, LLC, Associates of the Licensee, are majority owners of and control GEYH, and because portions of the financing will be used to repay obligations to additional Associates of the Licensee, VPC Fund II, L.P. and VPC Intermediate Fund II (Cayman), L.P.; this transaction is considered Financing an Associate and Providing Financing to discharge an obligation to an Associate requiring prior SBA approval.

Notice is hereby given that any interested person may submit written comments on the transaction within 15

days of the date of this publication to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

Dated: April 17, 2013.

Harry E. Haskins,

Acting Associate Administrator for Investment.

[FR Doc. 2013–10124 Filed 5–2–13; 8:45 am]

BILLING CODE 8025–01–M

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13551 and #13552]

New York Disaster #NY–00134

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of New York FEMA—4111—DR), dated 04/23/2013.

Incident: Severe Winter Storm and Snowstorm.

Incident Period: 02/08/2013 through 02/09/2013.

Effective Date: 04/23/2013.

Physical Loan Application Deadline Date: 06/24/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 01/23/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/23/2013, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Suffolk.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-profit Organizations with Credit Available Elsewhere ...	2.875
Non-profit Organizations without Credit Available Elsewhere ...	2.875
For Economic Injury:	
Non-profit Organizations without Credit Available Elsewhere ...	2.875

The number assigned to this disaster for physical damage is 13551B and for economic injury is 13552B

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Joseph P. Loddo,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2013–10501 Filed 5–2–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13547 and #13548]

Alabama Disaster #AL–00050

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Alabama dated 04/23/2013.

Incident: Severe Storms.

Incident Period: 03/18/2013 through 03/19/2013.

Effective Date: 04/23/2013.

Physical Loan Application Deadline Date: 06/24/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 01/23/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Walker.

Contiguous Counties:

Alabama: Blount, Cullman, Fayette, Jefferson, Marion, Tuscaloosa, Winston.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere ...	3.375
Homeowners Without Credit Available Elsewhere ...	1.688
Businesses With Credit Available Elsewhere ...	6.000
Businesses Without Credit Available Elsewhere ...	4.000
Non-Profit Organizations With Credit Available Elsewhere ...	2.875
Non-Profit Organizations Without Credit Available Elsewhere ...	2.875
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere ...	4.000
Non-Profit Organizations Without Credit Available Elsewhere ...	2.875

The number assigned to this disaster for physical damage is 13547 B and for economic injury is 13548 0.

The State which received an EIDL Declaration #is Alabama.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: April 23, 2013.

Karen G. Mills,

Administrator.

[FR Doc. 2013–10506 Filed 5–2–13; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 8312]

Advisory Committee on the Secretary of State's Strategic Dialogue With Civil Society; Notice of the Renewal of an Advisory Committee

This is notice of the renewal of the Advisory Committee on the Secretary of State's Strategic Dialogue with Civil Society (hereinafter ''the Committee''). The Committee provides advice and assistance in the formulation of U.S. policies, proposals, and strategies for engagement with, and protection of, civil society worldwide. Functions of the Committee include, but are not limited to: (a) Providing information and advice on the effective integration of civil society into overall foreign policy; and (b) providing information and advice on the Department of State's role in advancing, promoting, and protecting freedom of association and expression. The objective of the Committee is to bring to the United States government a source of expertise, knowledge, and insight not available within the Department or elsewhere in the government on these issues. The Committee serves in a solely advisory capacity.

The membership of the Committee consists of representatives who are leaders of U.S. and foreign civil society and U.S. and foreign businesses engaged with civil society. They may include: leaders of independent public policy advocacy organizations, non-profit organizations that defend human rights and promote democracy, humanitarian organizations, private foundations and funds, charitable trusts, societies, associations and non-profit corporations. The Department affirms that this advisory committee is necessary and in the public interest.

For further information, please contact the Office of the Senior Advisor for Civil Society and Emerging Democracies, U.S. Department of State, at *civilsociety@state.gov.*

Dated: April 29, 2013.

Tomicah S. Tillemann,

Senior Advisor for Civil Society and Emerging Democracies, U.S. Department of State.

[FR Doc. 2013–10560 Filed 5–2–13; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 8310]

In the Matter of the Review of the Designation of Real Irish Republican Army and Other Aliases; As a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Records assembled in these matters pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2008 decision to maintain the designation of the aforementioned organization as a foreign terrorist organization has not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of RIRA as foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated:April 26, 2013.

John F. Kerry,

Secretary of State.

[FR Doc. 2013–10552 Filed 5–2–13; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 8311]

Scoping Period Extended for the Proposed Enbridge Energy Partners, Line 67 Capacity Expansion Project

April 30, 2013.

AGENCY: Department of State.

ACTION: Notice of decision to extend the scoping period for the proposed Enbridge Energy Partners, Line 67 Capacity Expansion Project to May 13, 2013.

SUMMARY: The Department has decided to extend by two weeks the scoping period for the Supplemental Environmental Impact Statement for the proposed Enbridge Energy, Limited Partnership (Enbridge), Line 67 Capacity Expansion Project. Scoping will now end at midnight EDT on May 13th, 2013.

The Department received a Presidential Permit application from Enbridge to amend the August 3, 2009 Presidential Permit issued to Enbridge by the Department authorizing the construction, operation, and maintenance of the Line 67 Pipeline across the U.S.-Canada border. Enbridge requests an amendment to its permit in order to operate Line 67 up to its full design capacity of 880,000 barrels per day (bpd) of crude oil with an average annual capacity of 800,000 bpd of heavy crude.

DATES: The Department invites interested agencies, organizations, and members of the public to submit comments or suggestions to assist in identifying significant environmental issues, measures that might be adopted to reduce environmental impacts, and in determining the appropriate scope of the SEIS. The public scoping period began with the publication of a Notice of Intent to Prepare a Supplemental Environmental Impact Statement in the **Federal Register** on March 14, 2013 and will continue until May 13, 2013. Written, electronic, and oral comments will be given equal weight and the Department will consider all comments received or postmarked by, May 13, 2013 in defining the scope of the SEIS. Comments received or postmarked after that date may be considered to the extent practicable.

Public scoping periods are designed to provide opportunities to offer comments on the environmental review for the proposed project. Interested individuals and groups are encouraged to present comments on the environmental issues they believe should be addressed in the SEIS consistent with NEPA and its implementing regulations.

During this public scoping period, the Department also plans to use the scoping process to help identify consulting parties and historic preservation issues for consideration consistent with Section 106 of the National Historic Preservation Act and its implementing regulations (36 CFR part 800).

ADDRESSES: Written comments or suggestions on the scope of the SEIS should be addressed to: Genevieve Walker, OES/EQT Room 2726, U.S. Department of State, 2201 C Street NW., Washington, DC 20520. Comments may be submitted electronically to *EnbridgeLine67permit@state.gov.* Public comments may be posted on the Web site identified below.

FOR FURTHER INFORMATION CONTACT: For information on the proposed project or to receive a copy of the draft SEIS when it is issued, contact Genevieve Walker at the address listed in the **ADDRESSES** section of this notice by electronic or regular mail as listed above, or by telephone (202) 647–9798 or by fax at (202) 647–5947.

Project details and environmental information on the Enbridge Energy, Limited Partnership application for a Presidential Permit, as well as the Presidential Permit process, are downloadable from the following Web site: *http://www.state.gov/e/enr/applicant/applicants/index.htm*

Dated: April 30, 2013.

George N. Sibley,

Director, Office of Environmental Quality and Transboundary Issues, Department of State.

[FR Doc. 2013–10563 Filed 5–2–13; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2012–0087]

Advisory Committee for Aviation Consumer Protection

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice of fourth meeting of advisory committee.

SUMMARY: This notice announces the fourth meeting of the Advisory Committee for Aviation Consumer Protection.

DATES: The fourth meeting of the advisory committee is scheduled for May 21, 2013, from 9:00 a.m. to 5:00 p.m., Eastern Time.

ADDRESSES: The meeting will be held in the Federal Aviation Administration's auditorium on the 3rd floor of the FAA Headquarters building at 800 Independence Avenue SW., Washington, DC 20591. Attendance is open to the public up to the room's capacity; however, since access to the FAA headquarters building is controlled for security purposes, any member of the general public who plans to attend this meeting must notify the Department contact identified below at least five (5) calendar days prior to the meeting date.

FOR FURTHER INFORMATION CONTACT: To register to attend the meeting, please contact Jessica Payne, Principal Research Analyst, (703) 894–6560, or Amanda Stokes, Associate Research Analyst (703) 894–6529, Centra Technology, Inc., *ACACP@centratechnology.com.* For other information please contact Nicholas Lowry, Senior Attorney, Office of Aviation Enforcement and Proceedings, *nick.lowry@dot.gov;* U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC, 20590; 202–366–9342 (phone), 202–366–7152 (fax).

SUPPLEMENTARY INFORMATION: On May 24, 2012, the Secretary, as mandated by Section 411 of the FAA Modernization and Reform Act of 2012 (Pub. L. 112–95, 126 Stat. 11 (2012)), established the Advisory Committee on Aviation Consumer Protection and announced those persons appointed as members. The committee's charter, drafted in accordance with the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2, sets forth policies for the operation of the advisory committee and is available on the Department's Web site at *http://www.dot.gov/affairs/2012/dot5912.html.*

The fourth meeting of the committee is scheduled for Tuesday, May 21, 2013, from 9:00 a.m. to 5:00 p.m. Eastern Time in the auditorium of the Federal Aviation Administration at its headquarters building, 800 Independence Ave. SW., Washington, DC 20591. At the meeting, staff members from the DOT's Office of Aviation Enforcement and Proceedings (Enforcement Office) will describe the steps taken by the Department to implement the committee's first set of recommendations to the Secretary and provide an update on the status of on-going rulemaking and enforcement initiatives affecting consumer protection in air travel. The meeting will also address privacy of personally identifiable information collected in connection with the purchase of air travel from airlines and travel agents. Issues to be addressed are: what information is collected and by whom; who retains information (airlines, travel agents, including on-line travel agents (OTAs), and global distribution systems (GDSs)); what privacy policies are in place and is information used consistent with those policies; and what security measures are in place to protect against unauthorized access? We plan on hearing from government representatives, as well as speakers from the airline and travel agent industry, including GDSs, online travel agents, and consumer groups on the privacy issue. In addition, the committee expects to discuss possible agenda items and the scheduling of future meetings.

As announced in the notices of previous meetings of the committee, the meeting will be open to the public, and written and, time permitting, oral comments by members of the public are invited. Members of the public may present written comments at any time. The docket number referenced above (OST–2012–0087, available at *https://www.regulations.gov*) has been established for committee documents including any written comments that may be filed. At the discretion of the Chairperson and time permitting, after completion of the planned agenda, individual members of the public may provide oral comments. Any oral comments presented must be limited to the objectives of the committee and will be limited to five (5) minutes per person. Individual members of the public who wish to present oral comments must notify the Department contact noted above via email that they wish to present oral comments at least five (5) calendar days prior to the meeting. Also, since access to the FAA headquarters building is controlled for security purposes, we ask that any member of the general public who plans to attend this meeting notify the Department contact noted above no later than five (5) calendar days prior to the meeting date (i.e., by May 16). Attendance will be necessarily limited by the size of the meeting room.

Persons with a disability who plan to attend the meeting and require special accommodations, such as an interpreter for the hearing impaired, should notify the Department contact noted above at least seven (7) calendar days prior to the meeting. Persons attending with a service animal should also advise us of that fact so that it can be taken into account in connection with space and possible allergy issues.

Notice of this meeting is being provided in accordance with the FACA and the General Services Administration regulations covering management of Federal advisory committees. (41 CFR part 102–3.)

Issued in Washington, DC, on April 29, 2013.

Samuel Podberesky,

Assistant General Counsel for Aviation Enforcement & Proceedings, U.S. Department of Transportation.

[FR Doc. 2013–10505 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Termination of Environmental Impact Statement for the Friedman Memorial Replacement Airport, Hailey, ID

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its decision to terminate the Environmental Impact Statement (EIS) for the Friedman Memorial Replacement Airport.

FOR FURTHER INFORMATION CONTACT: Dave Stelling, by mail at Federal Aviation Administration, Airports Division, Attn: Dave Stelling, Helena Airports District Office, FAA Building Suite 2, 2725 Skyway Drive, Helena, MT 59602–1213, email at *dave.stelling@faa.gov,* or by telephone (406) 449–5271.

SUPPLEMENTARY INFORMATION: On November 1, 2007, the FAA issued a Notice of Intent in the **Federal Register** [72 FR 61945] to prepare an EIS for a replacement airport for Friedman Memorial Airport, Hailey, ID. The FAA proceeded with the EIS process in accordance with the National Environmental Policy Act of 1969, as amended. On August 23, 2011, FAA suspended the EIS process due to issues related to wildlife impacts and increased development costs associated with the identified potential sites for the proposed replacement airport. For these same reasons, FAA is announcing its decision today to terminate the EIS. The FAA will continue working with the Friedman Memorial Airport Authority to identify and evaluate alternative means of addressing the issues associated with the existing Friedman Memorial Airport.

Issued in Renton, Washington, on April 26, 2013.

Carolyn T. Read,

Acting Airports Division Manager—Northwest Mountain Region, ANM–600.

[FR Doc. 2013–10511 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Standard Operating Procedure (SOP) of the Aircraft Certification Service (AIR) Project Prioritization and Resource Management

ACTION: Notice of availability and request for public comment.

SUMMARY: This notice announces the availability of, and request for public comments on, the Aircraft Certification Service (AIR) standard operating procedure (SOP) describing the process used to prioritize certification projects and manage certification project resources when local resources are not available.

DATES: Comments must be received on or before July 2, 2013.

ADDRESSES: Send all comments on the SOP to: Federal Aviation Administration (FAA) Aircraft Certification Service, Aircraft Engineering Division, 950 L'Enfant Plaza SW., 5th Floor, SW., Washington, DC 20024. Attn: Graham Long, AIR–103. You may deliver comments to: Federal Aviation Administration, 950 L'Enfant Plaza, 5th Floor, SW., Washington, DC 20024, or electronically submit comments to the following Internet address: *9-AWA-AVS-AIR-103-SOP@faa.gov.* Include in the subject line of your message the following: *SOP: AIR–100–001; Standard Operating Procedure—Aircraft Certification Service Project Prioritization.*

FOR FURTHER INFORMATION CONTACT: Graham Long, Aerospace Engineer, Federal Aviation Administration, Aircraft Certification Service, Aircraft Engineering Division, Technical and Administrative Support Branch, AIR–103, 950 L'Enfant Plaza, 5th Floor, SW., Washington, DC 20024. Telephone (202) 385–6319, FAX (202) 385–6475.

SUPPLEMENTARY INFORMATION:

Comments Invited

You are invited to comment on the SOP for the prioritization of certification projects listed in this notice by sending such written data, views, or arguments to the above listed address. Please identify ''SOP: AIR–100–001 Standard Operating Procedure—Aircraft Certification Service Project Prioritization'' as the subject of your comments. You may also examine comments received on the SOP before and after the comment closing date at the FAA's Aircraft Engineering Division office located at 950 L'Enfant Plaza, 5th Floor, SW., Washington, DC 20024, weekdays except Federal holidays, between 8:30 a.m. and 4:30 p.m. The Director of the Aircraft Certification Service will consider all communications received on or before the closing date before issuing the final document.

Background

In 2005, the Federal Aviation Administration instituted a project sequencing process to manage our limited resources to address both continued operational safety and certification project work. In 2011, the existing SOP for Project Sequencing was made available for public comment. As a result of comments received, a completely new SOP has been developed that is intended to replace the existing SOP. This SOP documents the process used for all certification projects worked in AIR's Aircraft Certification Offices (ACOs). The certification programs include: Type certificate (TC), Amended Type Certificate (ATC), Supplemental Type Certificated ATC), Amended Supplemental Type Certificate (ASTC), and Parts Manufacturer Approval (PMA) accomplished by test and computation. This SOP defines that all projects are initiated in the geographical ACO when the application is received. The FAA applies this process to determine the project priority, and identifies related task response time. Lower priority projects may have task response time extended within limits when AIR resources are unable to support. The SOP provides for a national forum for AIR managers to identify and obtain support to accomplish specific project tasks while not diverting resources from activities supporting our safety mission of ensuring continued operational safety of the existing fleet. The FAA is publishing the SOP to ensure transparency of the existing sequencing process and to solicit feedback on how the process can be improved.

How To Obtain Copies

You can get an electronic copy of the Standard Operating Procedure—Aircraft Certification Service Project Prioritization, via the Internet at *http://www.faa.gov/aircraft/draft_docs/,* and then select Policy, or by contacting the person named in the paragraph **FOR FURTHER INFORMATION CONTACT**.

Issued in Washington, DC, on April 29, 2013.

Susan J.M. Cabler,

Assistant Manager, Aircraft Engineering Division, Aircraft Certification Service.

[FR Doc. 2013–10433 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Release Certain Properties From All Terms, Conditions, Reservations and Restrictions of a Quitclaim Deed Agreement Between the City of Zephyrhills and the Federal Aviation Administration for the Zephyrhills Municipal Airport, Zephyrhills, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for public comment.

SUMMARY: The FAA hereby provides notice of intent to release certain airport properties 33 acres at the Zephyrhills Municipal Airport, Zephyrhills, FL from the conditions, reservations, and restrictions as contained in a Quitclaim Deed agreement between the FAA and the City of Zephyrhills, dated May 15, 1947. The release of property will allow the City of Zephyrhills to dispose of the property for other than aeronautical purposes. The property is located on the southeast corner of airport property. The parcel is currently designated as non-aeronautical use. The property will be released of its federal obligations for municipal purposes. The fair market value of this parcel has been determined to be $500,000.

Documents reflecting the Sponsor's request are available, by appointment only, for inspection at the Zephyrhills Municipal Airport and the FAA Airports District Office.

SUPPLEMENTARY INFORMATION: Section 125 of The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21) requires the FAA to provide an opportunity for public notice and comment prior to the ''waiver'' or ''modification'' of a sponsor's Federal obligation to use certain airport land for non-aeronautical purposes.

DATES: Comments are due on or before June 3, 2013.

ADDRESSES: Documents are available for review at the Zephyrhills Municipal Airport, and the FAA Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, FL 32822. Written comments on the Sponsor's request

must be delivered or mailed to: Richard Owen, Program Manager, Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, FL 32822–5024.

FOR FURTHER INFORMATION CONTACT: Richard Owen, Program Manager, Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, FL 32822–5024.

Bart Vernace,

Manager, Orlando Airports District Office, Southern Region.

[FR Doc. 2013–10513 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on OR 62: I–5 to Dutton Road (Medford) Project: Jackson County, OR

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of limitations on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces final environmental actions taken by the FHWA, National Marine Fisheries Service (NMFS), United States Fish and Wildlife Service (USF&WS), and other Federal agencies that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to a proposed highway project, OR 62: I–5 to Dutton Road (Medford) in Jackson County, Oregon. This action grants approval for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before September 30, 2013. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For FHWA: Michelle Eraut, Program Development Team Leader, Federal Highway Administration, 530 Center Street NE., Suite 420, Salem, Oregon 97301, Telephone: (503) 316–2559. For NMFS: Marc Liverman, National Marine Fisheries Service, 1201 Lloyd Boulevard, Suite 1100, Portland, Oregon 97232, Telephone: (503) 231–2336. For US&FWS: Joe Zisa, United States Fish and Wildlife Service, 2600 SE 98th Avenue Suite 100, Portland, OR 97266, Telephone: (503) 231–6179. The OR62: I–5 to Dutton Road Environmental Impact Statement (EIS) is available upon written request from the Federal Highway Administration at the address shown above. Comments or questions concerning this proposed action and the OR 62: I–5 to Dutton Road (Medford) should be directed to the FHWA at the address provided above.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA, has taken final agency action subject to 23 U.S.C. 139 (*l*)(1) by issuing approval for the following highway project in the State of Oregon: OR62: I–5 to Dutton Road (Medford). The project will build a 7.5 mile, four-lane, access controlled expressway to serve as a bypass of existing OR 62 from Interstate 5/OR 62 Interchange in Medford to approximately Dutton Road north of White City in Jackson County, Oregon. The project includes the bypass, four interchanges, and changes to local streets and roads to accommodate the bypass. The actions by the Federal agencies and the laws under which such actions were taken are described in the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for the project, approved on April 22, 2013. The FEIS, ROD and Biological Opinions issued by NMFS and USF&WS are available by contacting the FHWA at the address provided above. The FEIS, ROD and Biological Opinions issued by NMFS and USF&WS can also be viewed and downloaded from the project Web site at: *http://www.oregon.gov/ODOT/HWY/REGION3/pages/hwy62_index.aspx*. This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C 4321–4347]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [23 U.S.C. 138 and 49 U.S.C. 303]; Section 6(f) of the Land and Water Conservation Fund Act (LWCF) [16 U.S.C. 460*l*–4–460*l*–11.]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Section 7 of the Endangered Species Act [16 U.S.C. 1531–1544]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667 (e)]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470aa–mm]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)].

6. *Social and Economic:* Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act [33 U.S.C. 1251–1376]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j–26)]; Emergency Wetlands Resources Act, [16 U.S.C. 3921, 3931]; Wetlands Mitigation [23 U.S.C. 103(b)(6)(M) and 133 (b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites, E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1).

Issued On: April 22, 2013.

Phillip A. Ditzler,

Division Administrator, Salem, Oregon.

[FR Doc. 2013–10004 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0069]

Hours of Service of Drivers: Application for Exemption; Timberdoodle Company

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that Timberdoodle Company (Timberdoodle)

has applied for an exemption from a provision of the ''Hours of Service [HOS] of Drivers'' regulations (49 CFR part 395). Timberdoodle seeks exemption from section 395.3(b)(1) which prohibits drivers of commercial motor vehicles (CMVs) from driving after accumulating 60 hours on duty in a period of 7 days. Timberdoodle asks that its drivers be exempted from including on-duty time that is not driving time in this calculation. Timberdoodle states that CMV operations under its proposed rules are likely to achieve a level of safety equivalent to or greater than the level of safety as would be obtained in the absence of the exemption.

DATES: Comments must be received on or before June 3, 2013.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2013–0069 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12–140, Washington DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, DOT Building, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information on the exemption process, see the *Public Participation* heading below. Note that all comments received will be posted without change to *www.regulations.gov,* including any personal information provided. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov* at any time and in the box labeled ''SEARCH for'' enter FMCSA–2013–0069 and click on the tab labeled ''SEARCH.''

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines by clicking on the word ''Help'' at the top of the Portal home page. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division; Office of Bus and Truck Standards and Operations; Telephone: 202–366–4325. Email: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

FMCSA has authority under 49 U.S.C. 31315 and 31136(e) to grant exemptions from certain parts of the FMCSRs. The Agency is required to publish a notice of each exemption request in the **Federal Register** [49 CFR 381.315(a)]. FMCSA must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request. FMCSA reviews safety analyses and public comments, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level of safety that would be obtained in the absence of the exemption (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** with the reasons for denying or granting the application, and if granted, the name of the person or class of persons receiving the exemption, and the regulatory provisions from which the exemption is granted [49 CFR 381.315(b) and (c)]. The notice must specify the effective period of the exemption, and its terms or conditions. The exemption may be renewed [49 CFR 381.300(b)].

The HOS Rules

Part 395 of volume 49 of the Code of Federal Regulations, ''Hours of Service of Drivers,'' prescribes various maximums, such as driving time, as well as minimums, such as the amount of off-duty time, that the driver of a property-carrying CMV must obtain before beginning a duty period. Section 395.3 prohibits driving after a driver has been on duty for 60 hours in a period of 7 consecutive days, or 70 hours in 8 consecutive days if a company operates every day of the week. On-duty time includes both time spent operating a CMV, recorded as ''on duty/driving'' time, and time spent at the employer's behest on matters other than driving, recorded as ''on duty/not driving'' time.

Application for Exemption

Timberdoodle uses its CMVs to travel to conferences and conventions, where it sets up sales displays. The CMV drivers staff the display booth, which consumes more of their time than driving.

Timberdoodle is asking that two of its drivers be exempt from the HOS rule prohibiting driving after drivers accumulate a total of 60 hours of on-duty time in any period of 7 consecutive days. Timberdoodle requests that, instead, its drivers be subject to the prohibition after 60 hours of driving time in any 7 consecutive day period. ''On duty/not driving'' time would be removed from the calculation of total hours on duty. Timberdoodle drivers would comply with all other HOS regulations.

A copy of Timberdoodle's application for exemption is in Docket FMCSA–2013–0069.

Request for Comments

In accordance with 49 U.S.C. 31315(b)(4) and 31136(e), FMCSA requests public comment on Timberdoodle's application for exemption from section 395.3(b)(1). The Agency will consider all comments received by close of business on May 23, 2013. Comments will be available for examination in the docket as explained in the **ADDRESSES** section of this notice under the term ''Docket.'' The Agency will consider to the extent practicable comments received in the public docket after the closing date of the comment period.

Issued on: April 24, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–10525 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No FMCSA–2011–0097]

Pilot Program on NAFTA Trucking Provisions

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice; correction.

SUMMARY: The FMCSA published a document in the **Federal Register** of April 24, 2013 concerning request for public comment on data and information concerning the Pre-Authorization Safety Audit (PASA) for RAM Trucking SA de CV (RAM) with U.S. Department of Transportation (USDOT) number 2063285. The notice is missing a date in Table 2, line one, column H.

FOR FURTHER INFORMATION CONTACT: Marcelo Perez, Telephone: (512) 916–5440 Ext. 228 or email *marcelo.perez@dot.gov.*

Correction

In the **Federal Register**, Volume 78, No. 79 of Wednesday, April 24, 2013, in the FR Doc. 2013–09691, on page 24295 in Table 2, correct Table 2, line one, column H, which is empty, to read:

TABLE 2—SUCCESSFUL PRE-AUTHORIZATION SAFETY AUDIT (PASA) INFORMATION

[See also Tables 3 and 4]

Column A—row No.	Column B—name of carrier	Column C—US DOT No.	Column D—FMCSA register No.	Column E—PASA initiated	Column F—PASA completed	Column G—PASA results	Column H—FMCSA register	Column I—US drivers	Column J—US vehicles
1	RAM Trucking SA de CV	2063285	MX–721816	07/23/2012	08/08/2012	Pass	4/22/2013	1	1

Issued on: April 26, 2013.

Larry W. Minor,

Associate Administrator, Policy.

[FR Doc. 2013–10528 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7165; FMCSA–2000–8398; FMCSA–2002–12294; FMCSA–2002–13411; FMCSA–2004–17984; FMCSA–2005–20027; FMCSA–2005–20560; FMCSA–2007–27333; FMCSA–2008–0340; FMCSA–2009–0054; FMCSA–2011–0024]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 20 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective May 31, 2013. Comments must be received on or before June 3, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. [Docket No. FMCSA–2000–7165; FMCSA–2000–8398; FMCSA–2002–12294; FMCSA–2002–13411; FMCSA–2004–17984; FMCSA–2005–20027; FMCSA–2005–20560; FMCSA–2007–27333; FMCSA–2008–0340; FMCSA–2009–0054; FMCSA–2011–0024], using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 20 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 20 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Robert A. Casson (KY)
Charles C. Chapman (NC)
Jeffery W. Cotner (OR)
Fredrick M. DeHoff (IN)
Everett A. Doty (AZ)
John K. Fank (IL)
Bobby G. Fletcher (TX)
Heather M.B. Gordon (NH)
Raymond G. Hayden (LA)
Robert E. Hendrick (IL)
Gene A. Lesher, Jr. (WV)
Anthony R. Miles (NV)
Eric E. Myers (MD)
Kenneth L. Nau (MD)
Barbara C. Pennington (FL)
Manuel H. Sanchez (TX)
George D. Schell (IL)
David M. Stout (OR)
Kenneth E. Suter, Jr. (OH)
Thaddeus E. Temoney (DC)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 20 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 33406; 65 FR 57234; 65 FR 78256; 66 FR 16311; 67 FR 46016; 67 FR 57267; 67 FR 76439; 68 FR 10298; 68 FR 13360; 69 FR 33997; 69 FR 61292; 69 FR 62741; 70 FR 2701; 70 FR 7545; 70 FR 12265; 70 FR 14747; 70 FR 16887; 70 FR 17504; 70 FR 30997; 71 FR 62147; 72 FR 7812; 72 FR 11426; 72 FR 12665; 72 FR 12666; 72 FR 25831; 72 FR 27624; 73 FR 75803; 74 FR 6209; 74 FR 9329; 74 FR 11988; 74 FR 15586; 74 FR 19270; 74 FR 21427; 76 FR 17481; 76 FR 21796; 76 FR 25762; 76 FR 28125). Each of these 20 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements.

These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by June 3, 2013.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 20 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: April 24, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–10521 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2013–0014]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 19 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective May 3, 2013. The exemptions expire on May 3, 2015.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov*.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316).

Background

On March 13, 2013, FMCSA published a notice of receipt of Federal diabetes exemption applications from 19 individuals and requested comments from the public (78 FR 16032). The public comment period closed on April 12, 2013 and one comment was received.

FMCSA has evaluated the eligibility of the 19 applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441), **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777), **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These 19 applicants have had ITDM over a range of 1 to 42 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the March 13, 2013, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comments

FMCSA received one comment in this proceeding. The comment is considered and discussed below.

The Pennsylvania Department of Transportation commented in favor of granting an exemption to Larry L. Eberly after reviewing his driving history.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the 19 exemption applications, FMCSA exempts Christopher W. Bailey (OH), Kent S. Bills (IN), Bobby B. Brown (VA), Maryland A. Chandler (KY), Ronald D. Clark (AR), Larry L. Eberly (PA), Steven J. Fessler (IL), Michael R. Fisher (IA), Mark A. Krause (PA), Jeffrey G. Morford (WA), Patrick L. Morningstar (MD), Charles R. Plummer (OH), Grady W. Reed (DC), Russell L. Stiley (CO), Gary A. Stoutamyer (VA), Thomas M. Van Camp (IA), Jack K. Webster (KY), Harry V. Wilhite, Jr. (AL), and Robert G. Young (OK) from the ITDM requirement in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the 1/exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C.

31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: April 24, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–10526 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0121]

Qualification of Drivers; Application for Exemptions; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces that 9 individuals have applied for a medical exemption from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). In accordance with the statutory requirements concerning applications for exemptions, FMCSA requests public comments on these requests. The statute and implementing regulations concerning exemptions require that exemptions must provide an equivalent or greater level of safety than if they were not granted. If the Agency determines the exemptions would satisfy the statutory requirements and decides to grant theses requests after reviewing the public comments submitted in response to this notice, the exemptions would enable 9 individuals to operate CMVs in interstate commerce.

DATES: Comments must be received on or before June 3, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2013–0121] using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316).

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

The Federal Motor Carrier Safety Administration has authority to grant exemptions from many of the Federal Motor Carrier Safety Regulations (FMCSRs) under 49 U.S.C. 31315 and 31136(e), as amended by Section 4007 of the Transportation Equity Act for the 21st Century (TEA–21) (Pub. L. 105–178, June 9, 1998, 112 Stat. 107, 401). FMCSA has published in 49 CFR part 381, subpart C final rules implementing the statutory changes in its exemption procedures made by section 4007, 69 FR 51589 (August 20, 2004).[1] Under the rules in part 381, subpart C, FMCSA must publish a notice of each exemption request in the **Federal Register**. The Agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted and any research reports, technical papers and other publications referenced in the application. The Agency must also provide an opportunity to submit public comment on the applications for exemption.

The Agency reviews the safety analyses and the public comments and determines whether granting the exemption would likely achieve a level of safety equivalent to or greater than the level that would be achieved without the exemption. The decision of the Agency must be published in the **Federal Register**. If the Agency denies the request, it must state the reason for doing so. If the decision is to grant the exemption, the notice must specify the person or class of persons receiving the exemption and the regulatory provision or provisions from which an exemption is granted. The notice must also specify the effective period of the exemption (up to 2 years) and explain the terms and conditions of the exemption. The exemption may be renewed.

The current provisions of the FMCSRs concerning hearing state that a person is physically qualified to drive a CMV if that person

> First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951.

49 CFR 391.41(b)(11). This standard was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

FMCSA also issues instructions for completing the medical examination report and includes advisory criteria on the report itself to provide guidance for medical examiners in applying the hearing standard. See 49 CFR 391.43(f). The current advisory criteria for the hearing standard include a reference to a report entitled ''Hearing Disorders and Commercial Motor Vehicle Drivers'' prepared for the Federal Highway

[1] This action adopted as final rules the interim final rules issued by FMCSA's predecessor in 1998 (63 FR 67600 (Dec. 8, 2008)), and adopted by FMCSA in 2001 (66 FR 49867 (Oct. 1, 2001)).

Administration, FMCSA's predecessor, in 1993.[2]

FMCSA Requests Comments on the Exemption Applications

FMCSA requests comments from all interested parties on whether a driver who cannot meet the hearing standard should be permitted to operate a CMV in interstate commerce. Further, the Agency asks for comments on whether a driver who cannot meet the hearing standard should be limited to operating only certain types of vehicles in interstate commerce, for example, vehicles without air brakes. The statute and implementing regulations concerning exemptions require that the Agency request public comments on all applications for exemptions. The Agency is also required to make a determination that an exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption before granting any such requests. 49 U.S.C.

Information on Individual Applicants

Michael Desarmeaux

Mr. Desarmeaux holds a driver's license from Ohio. He would like to drive any type of CMV, if he is granted an exemption.

Daniel I. Grossinger

Mr. Grossinger holds a driver's license from Maryland. His family owns a landscaping business and if granted the exemption, he would like to drive heavy equipment for the business.

David W. Hoffman

Mr. Hoffman holds a class A Commercial driver's license (CDL) from South Dakota. He has been driving a range of different trucks in intrastate commerce for more than 5 years. He would like to continue to drive a range of different trucks if granted an exemption.

Christopher A. Jayne

Mr. Jayne holds a class A Commercial driver's license (CDL) from Missouri. He has experience driving a tractor trailer until recently when he lost his hearing. He would like to resume driving tractor trailer trucks in interstate commerce, if granted an exemption.

Jayson Lawson

Mr. Lawson holds a driver's license from Arkansas. He would like to drive a CMV in interstate commerce, if he is granted an exemption.

Jeffrey Pagenkopf

Mr. Pagenkopf holds a driver's license from Minnesota. He would like to drive a CMV in interstate commerce, if he is granted an exemption.

Gilbert Partida

Mr. Partida holds a class A Commercial driver's license from Texas. He has over 20 years of driving experience and currently drives a tractor trailer. He would like to resume driving a tractor trailer in interstate commerce, if he is granted an exemption.

Jacob Paullin

Mr. Paullin holds a driver's license from Wisconsin. He would like to drive a semi-truck in interstate commerce, if he is granted an exemption.

Fernando Ramirez-Savon

Mr. Ramirez-Savon holds a class A Commercial driver's license from New Mexico. He has been driving a CMV in interstate commerce until recently when he failed to pass the hearing test. He would like to resume driving in interstate commerce, if he is granted an exemption.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b)(4), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business June 3, 2013. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: April 23, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–10516 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–EX–P

[2] This report is available on the FMCSA Web site at *http://www.fmcsa.dot.gov/facts-research/research-technology/publications/medreport_archives.htm.*

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Safety Advisory 2013–03]

Kicking Cars and Going Between Rolling Equipment During Flat Switching Operations

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

ACTION: Notice of Safety Advisory.

SUMMARY: A fatality occurred during a railroad switching operation that involved a railroad employee kicking cars and subsequently going between rolling equipment. In response, FRA is publishing this Safety Advisory 2013–03 to make recommendations to railroads regarding the adoption of car-handling procedures during flat switching operations at certain locations and to re-emphasize the importance of following procedures when going between rolling equipment due to the hazards involved. FRA previously made related recommendations to railroads and their employees regarding going between rolling equipment in Safety Advisory 2011–02.

FOR FURTHER INFORMATION CONTACT: Ron Hynes, Director, Office of Safety Assurance and Compliance, Office of Railroad Safety, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590, telephone (202) 493–6404; Douglas H. Taylor, Staff Director, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590, telephone (202) 493–6255; or Joseph St. Peter, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590, telephone (202) 493–6047.

SUPPLEMENTARY INFORMATION: The overall safety of railroad operations has improved in recent years. However, in July 2012, a fatal event occurred during a switching operation which involved a railroad employee going between rolling equipment after kicking[1] two loaded tank cars up a 0.2-percent ascending grade. This 2012 incident illustrates the safety risks that are present when railroads allow the kicking of cars in flat switching operations at locations where the cars will likely roll back out toward the employees conducting such operations if the cars do not couple to secured standing equipment as

[1] As referenced in 49 CFR 218.99(a)(2), kicking cars refers to the common railroad switching practice of shoving or pushing rolling equipment and then uncoupling the equipment and allowing it to roll free.

intended. This incident also highlights the need for the railroad industry to again focus its attention on compliance with safety rules and procedures that apply to employees who, in the course of their work, must place themselves between rolling equipment.

As background, FRA previously published a safety advisory regarding the importance of following procedures when going between rolling equipment. Safety Advisory 2011–02 [2] was issued in response to a series of fatal switching accidents that also involved employees placing themselves between rolling equipment. As discussed in that safety advisory, FRA previously established a group of industry stakeholders to examine and address a past trend of increasing deaths occurring during railroad switching operations. The group included representatives from both industry and labor organizations, and was named the Switching Operations Fatality Analysis (SOFA) Working Group. In 1999, the SOFA Working Group issued a report that contained five major findings with an accompanying recommendation and discussion for each finding.[3] The first of these five recommendations is directly applicable to situations where employees go between rolling equipment, or otherwise foul track or equipment. That recommendation reads as follows:

> Any crew member intending to foul track or equipment must notify the locomotive engineer before such action can take place. The locomotive engineer must then apply locomotive or train brakes, have the reverser centered, and then confirm this action with the individual on the ground. Additionally, any crew member that intends to adjust knuckles/drawbars, or apply or remove EOT device, must insure that the cut of cars to be coupled into is separated by no less than 50 feet. *Also, the person on the ground must physically inspect the cut of cars not attached to the locomotive to insure that they are completely stopped and, if necessary, a sufficient number of hand brakes must be applied to insure the cut of cars will not move.* [Emphasis added]

Most railroads have procedures similar to those described in this SOFA recommendation, and other railroads have adopted or modified their procedures to be utilized when going between rolling equipment to respond to this recommendation. However, as discussed further below, in flat switching operations where cars are kicked into a coupling rather than shoved, it may be more difficult for railroad employees engaged in such operations to make the determination that cars not attached to the locomotive are stopped and secured in compliance with this SOFA recommendation. That difficulty in making the determination that cars are stopped and secured is heightened at locations where grade or other conditions can cause kicked cars to roll back out towards crews conducting switching operations, and correspondingly can lead to increased safety risks when employees then have to place themselves between rolling equipment.

Incident Summary

As noted above, Safety Advisory 2011–02 discussed the circumstances surrounding five switching fatalities that occurred between 2009 and 2011. The following is an overview of the circumstances surrounding the most recent fatal switching incident that occurred in July 2012. Information regarding this incident is based on FRA's preliminary investigatory findings. The probable cause of this incident has not yet been established. Accordingly, nothing in this safety advisory is intended to attribute a definitive cause to this incident, or place responsibility for the incident on the acts or omissions of any specific person or entity.

• On July 31, 2012, at approximately 2:30 a.m., a conventional three-person crew, consisting of an engineer, a footboard yardmaster, and a conductor/switchman (switchman) were conducting switching operations. The crew kicked—rather than shoved—two loaded tank cars southward into a yard track with the goal of coupling them to other cars that had been previously placed into the yard track and secured. The yard track had a 0.2-percent ascending grade (southward). The switchman had originally positioned himself to verify that the cars kicked into the track coupled to the standing equipment. However, after the footboard yardmaster was not able to uncouple the cars and kick them into the track, he shoved the cars toward the switchman's location so that the switchman could make the cut and kick the cars into the standing equipment. After the two tank cars were kicked into the yard track by the switchman, he noticed that the knuckle on the last car of the block of cars still attached to the crew's locomotive had fallen to the ground and needed to be reinserted. The switchman then informed the crew that the knuckle pin was missing. Following applicable railroad rules, prior to reinserting and adjusting the knuckle, the switchman first requested and received ''Red Zone'' protection. However, the two loaded tank cars that had previously been kicked into the yard track did not couple to the standing cars on that track as intended, and the uncoupled cars rolled back northward. As the switchman adjusted the knuckle, the two loaded tank cars struck him and the standing equipment attached to the locomotive. The conductor sustained fatal injuries.

In the incident discussed above, the switchman did not physically inspect the cut of cars to verify that they were stopped and secured prior to going between them and the cars still attached to the locomotive. Further, because the tank cars were kicked toward the standing equipment rather than shoved into a coupling, and, thus, not stretched as is standard railroad operating practice to ensure that a coupling is made, it may have been more difficult for the switchman to ascertain whether the cars had coupled. These factors became particularly significant because the switching operation occurred on a track with a 0.2-percent grade, and because the sloshing action that typically occurs in loaded tank cars can cause the cars to roll in the opposite direction after they have stopped. Environmental factors such as the time of day (light) and noise interference from a refrigerated car standing approximately 50 feet away from the incident location on an adjacent track may have also interfered with the employee's ability to see and hear the two approaching free rolling tank cars. In addition, during flat switching operations when cars are kicked into a coupling, and, thus, have to roll free for a certain distance, employees are often physically located farther from the location where a coupling is to be made than if the cars are shoved into a coupling, dependent on the number of cars to be cut off and distance that the cars have to travel into a track. The farther an employee is from the location of an intended coupling, the more difficult it may be to make a proper determination that cars are stopped and secured.

As a result, in such situations, it is imperative that railroad employees adhere to—and the railroads require—verification that the cars the employees go between are completely stopped, and, if necessary, secured with handbrakes. Depending on a track's grade and the type of equipment being switched, kicking cars rather than shoving them into a coupling increases

[2] 76 FR 62894 (Oct. 11, 2011).

[3] See ''Findings and Recommendations of the SOFA Working Group''; available online at: *http://www.fra.dot.gov/eLib/details/L03078*. More recently, in March 2011, the SOFA Working Group issued a report titled ''Findings and Advisories of the SOFA Working Group''; available online at: *http://www.fra.dot.gov/eLib/details/L03071*.

safety risks because if the kicked cars fail to couple, there is a likelihood that the equipment may roll backward toward employees who have to place themselves between rolling equipment in the course of conducting switching operations. Thus, one of FRA's recommendations below is that railroads adopt procedures to prohibit crews from kicking cars in flat switching operations at locations where the physical characteristics make it likely that such cars will roll back out toward the crew if a proper coupling is not made.

The discussion contained in this safety advisory is not intended to place blame on or assign responsibility to individuals or railroads, but rather to emphasize the fact that a culture of safety and rules compliance is everyone's responsibility. FRA encourages railroad management to adopt and adhere to policies that promote the safest course of action in conducting switching operations, particularly by taking into account unique characteristics that exist at different locations when adopting those policies. Further, a culture of performing each task safely and as instructed in training in accordance with applicable railroad operating rules must be reinforced not only by management, but by railroad employees as well. Railroad management must positively reinforce, via job briefings and other appropriate means, safe job performance in accordance with established rules and procedures. Support from railroad management and positive peer pressure from fellow railroad employees encouraging individuals to perform each task in a safe manner via the proper procedures will help railroad employees maintain responsibility for their own safety.

Recommended Railroad Action: In light of the above discussion, and in an effort to maintain a heightened sense of vigilance among railroads and their employees who conduct switching operations, FRA recommends that railroads:

(1) Review with their employees the circumstances of the fatal incident described in this Safety Advisory 2013–03.

(2) Evaluate locations where flat switching operations are conducted and identify those where the physical characteristics and the types of cars being switched heighten the possibility that cars will roll out toward the employees conducting such operations. After identifying such locations, FRA recommends that railroads adopt procedures requiring that cars be shoved into couplings rather than kicked during such operations in an effort to lessen the potential safety risks, particularly when employees have to go between equipment.

(3) Review with their employees, including management employees, SOFA Safety Recommendation # 1, *Adjusting Knuckles, Adjusting Drawbars, and installing End of Train Devices,* reproduced above, and communicate its procedures implementing that recommendation to employees working in yards or other locations where the possibility of entering between rolling equipment exists. FRA recommends that railroads place emphasis on the portion of SOFA Safety Recommendation #1 discussing the need to ensure that equipment not attached to the locomotive is stopped, and is secured with handbrakes when necessary, before employees go between rolling equipment. Inherent in complying with SOFA Safety Recommendation #1 is recognition of the physical characteristics of the track on which switching operations are being conducted and the rolling characteristics of the type of equipment being switched, particularly as related to the handling of loaded tank cars.

(4) Re-emphasize the recommendations contained in previous Safety Advisory 2011–02 with all of their employees, including railroad management.

FRA encourages railroad industry members to take actions that are consistent with the preceding recommendations, and to take other complementary actions to help ensure the safety of the Nation's railroad employees. FRA may modify this Safety Advisory 2013–03, issue additional safety advisories, or take other appropriate actions necessary to ensure the highest level of safety on the Nation's railroads, including pursuing other corrective measures under its rail safety authority.

Issued in Washington, DC, on April 29, 2013.

Joseph C. Szabo,

Administrator.

[FR Doc. 2013–10545 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Limitation on Claims Against Proposed Public Transportation Projects; Correction

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice; correction.

SUMMARY: The Federal Transit Administration (FTA) published a notice in the **Federal Register** on April 22, 2013, concerning a limitation on claims for certain specified public transportation projects. The notice contained an incorrect description of one project.

FOR FURTHER INFORMATION CONTACT: Nancy-Ellen Zusman, Assistant Chief Counsel, Office of Chief Counsel, (312) 353–2577 or Terence Plaskon, Environmental Protection Specialist, Office of Human and Natural Environment, (202) 366–0442. FTA is located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 9:00 a.m. to 5:30 p.m., Monday through Friday, except Federal holidays.

Correction

In the **Federal Register** notice dated April 22, 2013, FR Doc. E6–14314, on page 23817, in the third column, the Crenshaw/LAX Transit Corridor Project was incorrectly described as a *heavy rail* project; a corrected project description should read:

Project description: The project will extend *light rail transit* from the existing Metro Exposition Line at Crenshaw and Exposition Boulevards to the Metro Green Line's Aviation/LAX Station. LACMTA proposes three modifications to the project. These modifications resulted from refinements to design and efforts to reduce cost, to respond to community concerns, reduce right-of-way acquisition, and to improve circulation. The proposed modifications and refinements include reconfiguration of a mid-block at-grade pedestrian crossing to an undercrossing at Faithful Central Bible Church; reconfiguration of a below-grade trench to an aerial guideway over La Brea Avenue; and elevation of the planned at-grade Florence/La Brea Station to street level. This notice only applies to the discrete actions taken by FTA at this time, as described below. Nothing in this notice affects FTA's previous decisions, or notice thereof, for this project.

This correction does not alter the statute of limitations (SOL) for modifications to the Crenshaw/LAX Transit Corridor Project previously noticed on April 22, 2013, and described above. The SOL on claims still will expire on September 19, 2013.

Issued On: April 30, 2013.

Lucy Garliauskas,

Associate Administrator for Planning and Environment, Washington, DC.

[FR Doc. 2013–10512 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Research and Innovative Technology Administration

Advisory Council on Transportation Statistics; Notice of Meeting

AGENCY: Research and Innovative Technology Administration (RITA), U.S. Department of Transportation.

ACTION: Notice.

This notice announces, pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (FACA) (Pub. L. 72–363; 5 U.S.C. app. 2), a meeting of the Advisory Council on Transportation Statistics (ACTS). The meeting will be held on Monday, June 10 from 8:30 a.m. to 3:00 p.m. E.S.T. in the DOT Conference Center at the U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC. Section 52011 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) directs the U.S. Department of Transportation to establish an Advisory Council on Transportation Statistics subject to the Federal Advisory Committee Act (5 U.S.C., App. 2) to advise the Bureau of Transportation Statistics (BTS) on the quality, reliability, consistency, objectivity, and relevance of transportation statistics and analyses collected, supported, or disseminated by the Bureau and the Department. The following is a summary of the draft meeting agenda: (1) USDOT welcome and introduction of Council Members; (2) Discussion of the usefulness and visibility of current BTS products; (3) Strategies for assuring and enhancing quality of BTS products; (4) Preparations for reauthorization; (5) Public Comments and Closing Remarks. Participation is open to the public. Members of the public who wish to participate must notify Courtney Freiberg at *Courtney.Freiberg@dot.gov*, not later than May 13, 2013. Members of the public may present oral statements at the meeting with the approval of Patricia Hu, Director of the Bureau of Transportation Statistics. Noncommittee members wishing to present oral statements or obtain information should contact Courtney Freiberg via email no later than May 13, 2013.

Questions about the agenda or written comments may be emailed (*Courtney.Freiberg@dot.gov*) or submitted by U.S. Mail to: U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, *Attention:* Courtney Freiberg, 1200 New Jersey Avenue SE., Room # E34–429, Washington, DC 20590, or faxed to (202) 366–3640. BTS requests that written comments be received by May 13, 2013. Access to the DOT Headquarters building is controlled, therefore all persons who plan to attend the meeting must notify Courtney Freiberg at 202–366–1270 prior to May 13, 2013. Individuals attending the meeting must report to the main DOT entrance on New Jersey Avenue SE. for admission to the building. Attendance is open to the public, but limited space is available. Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Courtney Freiberg at 202–366–1270 at least seven calendar days prior to the meeting.

Notice of this meeting is provided in accordance with the FACA and the General Services Administration regulations (41 CFR part 102–3) covering management of Federal advisory committees.

Issued in Washington, DC, on the 26th day of April 2013.

Rolf Schmitt,

Deputy Director, Bureau of Transportation Statistics.

[FR Doc. 2013–10507 Filed 5–2–13; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL DEPOSIT INSURANCE CORPORATION

Information Collection Renewal; Comment Request; Transfer Agent Registration and Amendment Form

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; and Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint notice and request for comment.

SUMMARY: The OCC and FDIC, as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995.

Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information and to allow 60 days for public comment in response to the notice.

In accordance with the requirements of the PRA, the OCC and FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC and FDIC are soliciting comment concerning renewal of its information collection titled, ''Transfer Agent Registration and Amendment Form.''

DATES: Comments must be submitted on or before July 2, 2013.

ADDRESSES:

OCC: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0124, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FDIC: You may submit comments, which should refer to ''Transfer Agent Registration and Amendment Form, 3064–0026'' by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@FDIC.gov.* Include ''Transfer Agent Registration and Amendment Form, 3064–0026'' in the subject line of the message.
- *Mail:* Gary A. Kuiper (202.898.3877), Attn: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., NYA–5046, Washington, DC 20429.

• *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/notices.html* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For further information about the information, collection discussed in this notice, please contact any of the agency clearance officers whose names appear below.

OCC: Johnny Vilela or Mary H. Gottlieb, OCC Clearance Officers, (202) 649–5490, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

FDIC: Gary A. Kuiper, 202–898–3877, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC and FDIC are publishing notice of the proposed collection of information set forth in this document.

The OCC and FDIC are proposing to extend for three years, without revision, the uniform interagency Transfer Agent Registration and Amendment Form.

Report Title: Transfer Agent Registration and Amendment Form.

Form Number: TA–1.

Frequency of Response: On occasion.

Affected Public: Business or other for-profit.

Estimated Time per Response: 1.25 hours: registration, 10 minutes: amendment.

OCC

OMB Number: 1557–0124.

Estimated Number of Respondents: 2 registrations, 15 amendments.

Estimated Total Annual Burden: 6 hours.

FDIC

OMB Number: 3064–0026.

Estimated Number of Respondents: 2 registrations, 13 amendments.

Estimated Total Annual Burden: 5 hours.

Abstract

The Securities Exchange Act of 1934 (the Act) requires any person acting as a transfer agent to register as such and to amend registration information when it changes. Section 17A(c) of the Act requires all transfer agents for securities registered under section 12 of the Act to register ''by filing with the appropriate regulatory agency . . . an application for registration in such form and containing such information and documents . . . as such appropriate regulatory agency may prescribe as necessary or appropriate in furtherance of the purposes of this section.'' In general, an entity performing transfer agent functions for a security is required to register if the security is registered on a national securities exchange and if the issuer has total assets of $10 million or more and a class of equity security held of record by 500 or more persons.

General Description of Reports

This information collection is mandatory pursuant to Sections 17A(c), 17(a)(3), and 23(a) of the Act, as amended (15 U.S.C. §§ 78q–1(c), 78q(a)(3), and 78w(a)) (FDIC). Sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Act, as amended (15 U.S.C. 781, 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p (OCC). Additionally, § 341.3 of the FDIC's Rules and Regulations implement the provisions of the Act. The registrations are public filings and are not considered confidential.

Request for Comment

The Agencies invite comment on:

(a) Whether the collections of information are necessary for the proper performance of the Agencies' functions, including whether the information has practical utility;

(b) The accuracy of the Agencies' estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of information collections 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 shared among the Agencies. All comments will become a matter of public record.

Dated: April 26, 2013.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

Dated at Washington, DC, this 17th day of April, 2013.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–10436 Filed 5–2–13; 8:45 am]

BILLING CODE 4810–33–P; 6714–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Proposed New Information Collection Request; Comment Request; OCC Supplier Registration Form

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a new information collection, as required by the Paperwork Reduction Act of 1995.

Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information and to allow 60 days for public comment in response to the notice.

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning its proposed new information collection titled, ''OCC Supplier Registration Form.''

DATES: Comments must be submitted on or before July 2, 2013.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are

encouraged to submit comments by email if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–NEW, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *regs.comments@occ.treas.gov*. You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: You may request additional information of the collection from Johnny Vilela or Mary H. Gottlieb, OCC Clearance Officers, (202) 649–5490, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the proposed collection of information set forth in this document.

The OCC is proposing OMB approval of the following information collection:

Title: OCC Supplier Registration Form.

OMB Number: 1557–NEW.

Frequency of Response: On occasion.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 1000.

Estimated Burden Hours per Response: 10 minutes.

Estimated Total Annual Burden Hours: 167 hours.

Abstract: Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires the Office of the Comptroller of the Currency (OCC) to develop and implement standards and procedures to ensure, to the maximum extent possible, the fair inclusion and utilization of minorities, women, and minority-owned and women-owned businesses in all business and activities of the agency at all levels, including in procurement, insurance, and all types of contracts [1] and to develop standards for coordinating technical assistance to such business.[2]

In order to comply with the Congressional mandates to develop standards for the fair inclusion and utilization of minority- and women-owned businesses and to provide effective technical assistance to these businesses, the OCC needs to develop an on-going system to collect up-to-date contact information and capabilities statements from potential suppliers. This information will allow the OCC to update and enhance its internal database of interested minority- and women-owned businesses. This information will also allow the OCC to measure the effectiveness of its technical assistance and outreach efforts and target areas and needs where additional outreach efforts are necessary.

Request for Comment

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Unless otherwise afforded confidential treatment pursuant to Federal law, all comments will become a matter of public record. The Agency invites comment on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information shall have practical utility;

(b) The accuracy of the OCC'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.

Dated: April 25, 2013.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division.

[FR Doc. 2013–10438 Filed 5–2–13; 8:45 am]

BILLING CODE 4810–33–P

[1] 12 U.S.C. 5452(c)(1).

[2] 12 U.S.C. 5452(b)(2)(B).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8909

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 Form 8909, Energy Efficient Appliance Credit.

DATES: Written comments should be received on or before July 2, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to LaNita Van Dyke, at (202) 622–3215, or at Internal Revenue Service, room 6513, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Energy Efficient Appliance Credit.

OMB Number: 1545–2055.

Form Number: Form 8909.

Abstract: Form 8909, Energy Efficient Appliance Credit, was developed to carry out the provisions of Code section 45M. The form provides a means for the

eligible manufacturer/taxpayer to compute the amount of, and claim, the credit.

Current Actions: There are changes being made to the form at this time.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit organizations

Estimated Number of Respondents: 10.

Estimated Time per Respondent: 12 hours, 12 minutes.

Estimated Total Annual Burden Hours: 122.

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: April 24, 2013.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2013–10514 Filed 5–2–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

United States Mint

Pricing for the 2013 America the Beautiful Quarter Five Ounce Silver Uncirculated Coins™

AGENCY: United States Mint, Department of the Treasury.

ACTION: Notice.

SUMMARY: The United States Mint is announcing the price of the 2013 America the Beautiful Quarter Five Ounce Silver Uncirculated Coins™.

The coins will be offered for sale at a price of $179.95.

FOR FURTHER INFORMATION CONTACT: J. Marc Landry, Acting Associate Director for Sales and Marketing; United States Mint; 801 9th Street NW., Washington, DC 20220; or call 202–354–7500.

Authority: 31 U.S.C. 5111, 5112 & 9701.

Dated: April 29. 2013.

Richard A. Peterson,

Acting Director, United States Mint.

[FR Doc. 2013–10475 Filed 5–2–13; 8:45 am]

BILLING CODE 4810–37–P

FEDERAL REGISTER

Vol. 78 Friday,

No. 86 May 3, 2013

Part II

Department of Commerce

National Oceanic and Atmospheric Administration
50 CFR Part 648

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Framework Adjustment 48; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120814336–3408–02]

RIN 0648–BC27

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Framework Adjustment 48

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

ACTION: Interim final rule; request for comments.

SUMMARY: Through this interim final rule, NMFS announces that it partially approves Framework Adjustment 48 to the NE Multispecies Fishery Management Plan (FMP) and implements the approved measures in the regulations. Framework 48 is the first of two parallel and related actions developed by the New England Fishery Management Council (Council) to respond to updated stock status information and to adjust other management measures in the NE multispecies (groundfish) fishery beginning in fishing year (FY) 2013. This action implements new status determination criteria for Gulf of Maine (GOM) cod, Georges Bank (GB) cod, Southern New England/Mid-Atlantic (SNE/MA) yellowtail flounder, and white hake based on new benchmark assessments completed for these stocks in 2012 and 2013. NMFS is approving and implementing updated status determination criteria for white hake through this interim final rule and accepting further comment on this measure since it was not available for comment in the Framework 48 proposed rule. NMFS will publish a subsequent final rule to respond to any comments received, if necessary. Through this action, NMFS has also approved and is implementing the following Framework 48 measures: Elimination of dockside monitoring requirements for the groundfish fishery; lower minimum fish sizes for several groundfish stocks; clarified goals and performance standard for groundfish monitoring programs; revisions to the allocation of GB yellowtail flounder to the scallop fishery; and establishment of sub-annual catch limits (ACLs) of GB yellowtail flounder and SNE/MA windowpane flounder for the scallop and other non-groundfish fisheries. NMFS also approved revisions to recreational and commercial accountability measures (AMs), including amendments to existing AMs for windowpane flounder, ocean pout, and Atlantic halibut, and new ''reactive'' AMs for Atlantic wolffish and SNE/MA winter flounder, to address a remand by the U.S. District Court of Appeals. NMFS disapproved some measures in Framework 48: A provision for cost-sharing of monitoring costs between the industry and NMFS; a provision to delay industry-funded monitoring to FY 2014; finer scale discard rate strata for GB yellowtail flounder; and a provision to remove requirements for groundfish trawlers to stow their gear when transiting closed areas. Through this interim final rule, NMFS also withdraws a proposed correction to the regulations specific to monitoring of the Eastern U.S./Canada quotas, and will be accepting additional public comment on this issue. These measures are necessary to meet the requirements of the FMP and the Magnuson-Stevens Act, most notably preventing overfishing, ensuring that management measures are based on the best available science, and mitigating, to the extent practicable, potential negative economic impacts from reductions in catch limits anticipated for fishing year FY 2013.

DATES: Effective May 1, 2013, except for the amendment to § 648.84, which is effective July 1, 2013. Comments on the interim final status determination criteria for white hake or U.S./Canada quota monitoring methods must be received by June 3, 2013.

ADDRESSES: You may submit comments on the new status determination criteria for white hake or U.S./Canada quota monitoring, identified by NOAA–NMFS–2013–0050, 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-2013-0050*, click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930.
- *Fax:* (978) 281–9135; Attn: Melissa Hooper.

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.

Copies of Framework 48, its Regulatory Impact Review (RIR), the environmental assessment (EA) prepared for this action, and the Final Regulatory Flexibility Analysis (FRFA) prepared by the Council are available from Thomas Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The FRFA assessing the impacts of the measures on small entities and describing steps taken to minimize any significant economic impact on such entities consists of the Initial Regulatory Flexibility Analysis (IRFA), preamble, and the summary of impacts and alternatives contained in the Classification section of this final rule and Framework 48. The Framework 48 EA/RIR/IRFA are also accessible via the Internet at *http://www.nefmc.org/nemulti/index.html* or *http://www.nero.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Melissa Hooper, Fishery Policy Analyst, phone: 978–281–9166, fax: 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

The FMP specifies management measures for 16 species of groundfish in Federal waters off the New England and Mid-Atlantic coasts, including both large-mesh and small-mesh species. Small-mesh species include silver hake (whiting), red hake, offshore hake, and ocean pout; and large-mesh species (also referred to as ''regulated species'') include Atlantic cod, haddock, yellowtail flounder, pollock, American plaice, witch flounder, white hake, windowpane flounder, Atlantic halibut, winter flounder, redfish, and Atlantic wolffish. Large-mesh species, which are referred to as ''regulated species,'' are divided into 19 fish stocks, and along with ocean pout, comprise the groundfish complex of 20 stocks managed under the NE Multispecies FMP.

Amendment 16 to the FMP (Amendment 16) established a process for setting acceptable biological catches (ABCs) and ACLs for regulated species and ocean pout, as well as distributing the available catch among the various components of the groundfish fishery. Amendment 16 also established AMs for these 20 groundfish stocks in order to prevent overfishing of these stocks and correct or mitigate any overages of the ACLs. Framework 44 to the FMP (Framework 44) set the ABCs and ACLs for FYs 2010–2012. In 2011, Framework 45 to the FMP (Framework 45) revised the ABCs and ACLs for five stocks for FYs 2011–2012. Framework 47 to the FMP (Framework 47) updated specifications for most stocks for FYs 2012–2014 and modified management measures in the fishery after more than 1 year under ACLs and AMs.

Framework 48 is one of two actions developed by the Council to respond to benchmark and assessment updates completed for all groundfish stocks in 2012 and 2013. Updated information in these assessments requires revisions to the status determination criteria for GOM cod, GB cod, SNE/MA yellowtail flounder, and white hake and implementation of updated ABCs and ACLs for most stocks for FYs 2013–2015. These measures are necessary to prevent overfishing and facilitate the rebuilding of groundfish stocks as required by the FMP. In Framework 48, the Council proposed administrative changes to the FMP to make way for Framework 50, which specifies ABCs and ACLs for all stocks for FY 2013–2015. The Council also included several measures in Framework 48 intended to mitigate negative economic impacts to the groundfish fishery anticipated from the substantial reductions in catch limits proposed in Framework 50 to end overfishing. Framework 48 also implements AMs for Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder in response to a Court Order and remand in *Oceana* v. *Locke et al.* 831 F.Supp.2d 95 (D.D.C. 2011) that held that so-called ''reactive'' AMs had not been developed for the 6 stocks not allocated to sectors (''non-allocated stocks'') in Amendment 16. Framework 48 recommended reactive AMs for 3 of these stocks, for which reactive AMs had not been established since Amendment 16. A more extensive discussion of the development of Frameworks 48 and 50 is available in the proposed rules for these two actions (78 FR 18188; March 25, 2013 and 78 FR 19368; March 29, 2013, respectively) and is not repeated here. NMFS also proposed several corrections to the NE multispecies regulations through the Framework 48 proposed rule under the authority of section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), which allows the Secretary of Commerce to implement regulations necessary to ensure that fishery management plans or amendments are carried out consistent with the Magnuson-Stevens Act. These changes are not part of Framework 48, but are necessary to clarify existing regulations and achieve the objectives of the FMP.

Public comments were accepted on the Framework 48 proposed rule through April 9, 2013. After review of public comments, NMFS has partially approved Framework 48 as consistent with the goals and objectives of the NE Multispecies FMP, and the requirements of the Magnuson-Stevens Act and other applicable law.

Disapproved Measures

This section summarizes the Framework 48 measures NMFS has disapproved as not consistent with goals and objectives of the NE Multispecies FMP or the requirements of the Magnuson-Stevens Act and other applicable law. NMFS also withdraws a correction to the NE multispecies regulations that NMFS proposed in the Framework 48 proposed rule regarding accounting of catch against quotas established for the Eastern U.S./Canada Management Area, for reasons discussed below.

1. Delay Industry At-Sea Monitoring Cost Responsibility

Framework 48 proposed to delay sectors' responsibility to implement and pay for their own at-sea monitoring programs to FY 2014. The Council included this measure in Framework 48 out of concern that the industry would not be able to support this cost burden in FY 2013 due to the substantial catch reductions proposed in Framework 50. Coverage levels would instead be set at the level that NMFS can fund. The Council proposed a similar measure in Framework 45, which NMFS disapproved due to concerns that there would not be Federal funds to ensure adequate monitoring of sector operations. A complete description of the development this measure was included in the Framework 48 proposed rule (Item 8) and is not repeated here.

NMFS is disapproving this measure as it did in Framework 45 because it is inconsistent with the requirements of the FMP and the Magnuson-Stevens Act. However, due to fishermen's concerns about their ability to pay for at-sea monitoring costs in FY 2013, NMFS intends to cover 100 percent of the costs of sector at-sea monitoring once again in FY 2013 using the NMFS At-sea Monitoring Program. But, relying on NMFS appropriations to determine an at-sea monitoring coverage rate does not ensure that coverage will be sufficient to monitor sector annual catch entitlements (ACEs) or to meet the purpose and goals for sector monitoring described in Amendment 16 and Framework 48. Because NMFS funding depends on Congressional appropriations, funding levels fluctuate, and NMFS cannot guarantee sufficient funding to meet the coverage levels required by the FMP to monitor ACLs and sector ACEs. If sector at-sea monitoring depended on NMFS funding alone and that funding fell short of required coverage levels, NMFS may not be able to reliably estimate total catch, undermining the effectiveness of ACLs and sector ACEs to prevent overfishing and facilitate the rebuilding of groundfish stocks as required by National Standard 1 and section 303(a)(1) of the Magnuson-Stevens Act. NMFS was able to locate funding to provide the NMFS At-sea Monitoring Program again in FY 2013, but such funding is not certain. Without additional appropriations to support sector monitoring specifically, relying solely on the Federal Government to provide sector at-sea monitoring coverage could also undermine other programs. Inadequate funding could potentially force NMFS to spread existing resources too thin, undermining the Standard Bycatch Reporting Methodology (SBRM) coverage requirements of section 303(a)(11) and information used to assess Northeast fish stocks. Thus, NMFS has disapproved this measure in Framework 48. Sectors will be responsible for any costs of at-sea monitoring that are not covered by Federal funding in FY 2013.

2. At-Sea Monitoring Cost-Sharing

To serve as a more long-term solution to the cost burden of at-sea monitoring to sectors, Framework 48 proposed a mechanism for sharing of at-sea monitoring costs between sectors and NMFS. Framework 48 proposed that the industry would only ever be responsible for paying the direct costs of at-sea monitoring, specifically the daily salary of the at-sea monitor. All other programmatic costs would be the responsibility of NMFS, including, but not limited to: Briefing, debriefing, training and certification costs (salary and non-salary); sampling design development; data storage, management and security; data quality assurance and

control; administrative costs; maintenance of monitoring equipment; at-sea monitor recruitment, benefits, insurance and taxes; logistical costs associated with deployment; and at-sea monitor travel and lodging. This measure was intended to reduce the cost burden of at-sea monitoring to sectors and thereby increase their profitability.

NMFS has disapproved this cost-sharing measure because it is not consistent with other applicable laws as developed. Specifically, the Anti-Deficiency Act and other appropriations law prohibits Federal agencies from obligating the Federal government except through appropriations and from sharing the payment of government obligations with private entities. Framework 48 proposed to require NMFS to pay for some portion of the costs of at-sea activities, such as logistical costs generated by deployment, which are outside its statutory obligations under the Magnuson-Stevens Act. As written, this measure would also have required NMFS and sectors to share payment of obligations defined as belonging to one or the other. For example, Framework 48 proposed to require NMFS to pay some costs related to at-sea activities, such as benefits and insurance for at-sea monitors, while sectors would pay other portions of at-sea costs, like the salary for at-sea monitors. Because such action would be prohibited under the law, NMFS has disapproved this measure in Framework 48.

Although this measure was not approvable as developed, NMFS shares the Council and industry's concern about the ability of sectors to bear the full costs of monitoring in future fishing years. NMFS believes this approach to cost sharing, which defines the items that NMFS versus sectors should be responsible for, could be viable if restructured and may be worth pursuing in a future action. NMFS is already working with the New England and Mid-Atlantic Councils' joint Herring-Mackerel Plan Development Team (PDT)/Fishery Management Action Team (FMAT) to pursue cost-sharing options such as this one for those fisheries for FY 2014. The Council could consider including the NE Multispecies FMP in this joint effort to develop a workable and consistent cost-sharing mechanism for the Northeast region.

3. GB Yellowtail Flounder Management Measures

Framework 48 proposed to change the stratification of discard estimates for sectors for GB yellowtail flounder, by splitting the GB yellowtail flounder trawl discard strata between statistical area 522 and statistical areas 525/561/562. This measure was intended to revise sector discard rates to more closely reflect actual discards of yellowtail flounder in different areas of Georges Bank and potentially lengthen the fishing season for sector vessels in those areas. Based on public comment, NMFS has disapproved this measure in Framework 48, because it would complicate and increase the cost and burden of monitoring and potentially increase uncertainty of catch estimates without any measurable benefits for sectors. Accordingly, this measure is inconsistent with or may lead to inconsistency with National Standards 5 and 7 of the Magnuson Stevens Act. As more fully discussed below, because of the added complications of administering this measure, it may increase costs more than it provides benefits to the fishing industry or the efficient management and monitoring of catches. Although finer scale strata would allow discard rates to more closely reflect actual discard rates of yellowtail flounder in different parts of Georges Bank, NMFS does not believe this measure would have any real benefits for sectors that could not be achieved with existing discard rate strata. A separate discard rate in statistical area 522 could benefit an individual vessel with a lower GB yellowtail flounder discard rate that would not be influenced by higher discards by other vessels in its sector fishing elsewhere on Georges Bank. However, the sector's fishing season on GB would still be limited by the total catch of GB yellowtail flounder by all its member vessels. A finer stratum would not eliminate the need for a sector to manage discards of yellowtail flounder by all its vessels on Georges Bank to prevent an early end to their fishing season.

In contrast, the proposed measure could have real effects on the administrative burden for both NMFS and sectors that NMFS believes are not justified in light of the lack of real benefits from this measure. Some sector representatives and members of sectors raised these concerns in public comments on the Framework 48 proposed rule. Both sectors and NMFS would have to modify and reprogram quota monitoring programs and reports to accommodate the new strata, increasing the administrative burden for sector managers and NMFS, without any corresponding benefits for sectors, which could reduce efficiency inconsistent with National Standards 5 and 7. Some sectors have developed software to calculate and manage catch and compile sector weekly reports to NMFS. These sectors would have to retain programmers to reprogram this software to accommodate the new strata and method. The administrative burden to generate sector weekly reports could be even greater for sector managers that do not use software to compile their sector's reports, but rather calculate catch manually on a weekly basis. NMFS is also concerned about how this revised strata, combined with other changes to the discard rate method in FY 2013, will affect the variance of discard rates and thereby affect our ability to reliably estimate catch to ensure that overfishing is not occurring. Concerns that this measure could further complicate monitoring and increase uncertainty of catch estimates by creating an incentive to misreport catches of GB yellowtail flounder is also justified. There is a potential for this measure to create an incentive for sector vessels fishing inside and outside statistical area 522 without an observer to misreport GB yellowtail catch from outside area 522 as from inside area 522 in order to get a lower discard rate, thereby jeopardizing NMFS's ability to ensure that catches are consistent with preventing overfishing and rebuilding fish stocks. This could potentially inflate area 522 GB yellowtail discard estimates and negate any benefit of this measure. Thus, out of concern that this measure could increase the uncertainty of catch estimates and the costs of monitoring and administration of sectors without any corresponding benefits to sectors, NMFS has disapproved this measure in Framework 48.

4. Requirement to Stow Trawl Gear While Transiting

The regulations currently specify that fishing gear must be stowed in a specific way, as described at 50 CFR 648.23(b), when transiting closed areas to facilitate the enforcement of closed areas at sea. Framework 48 proposed to remove this requirement for only trawl vessels on a groundfish trip because the Council believed that these measures are no longer necessary with the use of the vessel monitoring system (VMS) on all limited access multispecies vessels.

After consideration of public comments received on this measure, NMFS has disapproved this measure in Framework 48 and is maintaining the requirements for all vessels to stow their gear when transiting closed areas on the basis that it may lead to difficulties in detecting and prosecuting unlawful fishing in closed areas, which would undermine the effectiveness of these areas to achieve the objectives for which

they were established as conservation and management measures in the FMP, including the protection of spawning and juvenile fish, habitat, and protected species. To the extent that closed areas were established to comply with sections 303(a)(1) and (7), and National Standard 9 of the Magnuson-Stevens Act to rebuild or ensure the long-term sustainability of fish stocks and fisheries, to minimize the adverse effects of fishing on habitat, or minimize bycatch of certain stocks or protected species, undermining these measures would be inconsistent with these provisions. This measure also would have been inconsistent with National Standard 4 of the Magnuson-Stevens Act requiring measures to be fair and equitable because it does not extend the safety benefits to other fisheries without a clear reason for doing so. There is insufficient justification in Framework 48 explaining why these measures were no longer necessary to enforce the prohibition on fishing in closed areas or why VMS data is a sufficient alternative. As the U.S. Coast Guard (USCG) noted in its comments on this measure, VMS is an effective tool to enforce closed areas when transiting is prohibited, but is not sufficient to document possible fishing activity in a closed area when transiting is allowed. The gear stowage requirements are designed to increase the time required to set and recover gear and hide fishing activity. The combination of gear stowage and VMS requirements are useful for prosecution of closed area incursions. Thus, NMFS and the USCG are seriously concerned that eliminating trawl gear stowage requirements for only groundfish vessels would undermine enforcement of the prohibition on fishing in closed areas and thereby the conservation benefits of closed areas. By eliminating the gear stowage requirements for only groundfish vessels, this measure would complicate enforcement for the USCG and enforcement personnel, and compliance with these requirements for vessels fishing in multiple fisheries, thereby potentially further undermining enforcement efforts. Abuse of this exemption by groundfish vessels or vessels participating in other fisheries without effective enforcement would undermine the conservation objectives of closed areas, which would undermine the goals and objectives of the FMP and the requirements of the Magnuson-Stevens Act for effective conservation and management measures to rebuild overfished stocks and to minimize the adverse effects of fishing on habitat. Although this measure would have some safety benefits, the proposed measure does not meet the criteria of a measure that reduces risk while meeting the needs of conservation and management, as required by National Standard 10. The Council also had available to it alternative modifications to the gear stowage requirements, recommended by its VMS/Enforcement Committee, that would have addressed safety issues for all vessels, while maintaining the integrity of gear stowage requirements for enforcement of the prohibition on fishing in closed areas. However, the Council chose to recommend these modifications only for other FMPs, and instead to eliminate the requirements entirely for groundfish trawlers, without addressing the continued need of these measures to satisfy requirements of the Magnuson-Stevens Act. For these reasons, NMFS has disapproved this measure in Framework 48.

Although NMFS must disapprove this measure in Framework 48, NMFS does remain concerned about the safety risks of the existing trawl gear stowage requirements and believes these issues should be addressed for all vessels. NMFS believes that the modifications put forward by the Council's VMS/Enforcement Committee would address these safety issues, while meeting the needs of conservation and management. NMFS is considering initiating a separate rulemaking, working with both the New England and Mid-Atlantic Councils, which would propose modifications to the gear stowage requirements to make them safer for all vessels in all FMPs. The regulations at § 648.23(b)(5) allow the Regional Administrator to specify a method of stowage in writing and in a **Federal Register** notice. NMFS believes that this approach would be the most expeditious method to address the safety issues as soon as possible, as opposed to a joint Council action.

5. Correction to Eastern U.S./Canada Quota Monitoring

In the Framework 48 proposed rule, NMFS proposed a correction to the regulations governing fishing activity in the Eastern U.S./Canada Area under 305(d) authority of the Magnuson-Stevens Act based on its determination that the correction was needed to bring the measure into compliance with the perceived Council intent in Amendment 16. The regulations at § 648.85(a)(3)(ii)(A) currently state that all catch of cod, haddock, and yellowtail flounder caught on a trip that fishes both inside and outside of the Eastern U.S./Canada Area shall apply to the U.S./Canada total allowable catches (TACs) (in the case of cod and haddock, the Eastern U.S./Canada TACs). This method for quota monitoring was implemented through Framework 42 as a precautionary way to estimate catch to ensure U.S./Canada TACs would not be exceeded, while allowing vessels the flexibility to fish both inside and outside the Eastern U.S./Canada Area on the same trip. Amendment 16 allocated each sector and the common pool a portion of the Eastern U.S./Canada TACs, but did not specifically address whether these allocations should still be monitored using the precautionary Framework 42 method. NMFS's perceived interpretation was that Amendment 16 intended statistical areas reported on VMS catch reports and vessel trip reports (VTRs) to be used to apportion catch to specific stock allocations. This is how NMFS has been monitoring sector and common pool catch of GB cod, haddock, and yellowtail since FY 2010. Despite being clear about NMFS's perceived interpretation in the Amendment 16 preamble, the original provision implemented by Framework 42 was inadvertently left in the regulations at § 648.85(a)(3)(ii)(A) by the Amendment 16 final rule. In deeming the regulations to be consistent with the Amendment, however, the Council did not object to the old language, presumably because it reflected its actual intent, as confirmed by the Council's comments on this action. Through the Framework 48 proposed rule, NMFS proposed to revise the regulations to remove the text that states all cod, haddock, and yellowtail flounder on multi-area trips must be applied to Eastern U.S./Canada allocations.

During the public comment period, NMFS received a letter from the Council opposing NMFS's proposed change to the regulations. The Council questioned NMFS's authority to make this change without explicit Council action, and asked NMFS to disapprove this change, particularly in light of continued concerns of misreporting of catches of Eastern GB stocks. At the request of the Council, NMFS is withdrawing this change to the regulations and will return to the Framework 42 method of quota monitoring because it reflects the Council's intent. Thus, for common pool vessels fishing both inside and outside the Eastern U.S./Canada Area, all catch of cod and haddock on that trip will be counted against the applicable Eastern U.S./Canada TAC. For sector vessels fishing both inside and outside the Eastern U.S./Canada Area, all catch of cod and haddock will be counted against its sector's allocations for Eastern GB cod and haddock. How GB

yellowtail flounder should be handled is less clear. Framework 42 and, subsequently, the regulations specify all yellowtail flounder caught on trips into the Eastern U.S./Canada area should be applied to the GB yellowtail flounder TAC. Based on a strict reading of Framework 42, yellowtail flounder caught on trips into the Western U.S./Canada Area and the Gulf of Maine or Southern New England would appear to be allocated according to the vessel's VTRs. At the time Framework 42 was developed trips limits were lower in the CC/GOM and SNE/MA yellowtail flounder stock areas and if a vessel fished in either area and the Georges Bank area the more restrictive trip limit applied. As a result, there was little incentive to fish in both the Western U.S./Canada Area and these other stock areas on the same trip. Although these incentives may have changed, this provision was not explicitly revised by Amendment 16, so NMFS believes it must only count all GB yellowtail flounder on trips into the Eastern U.S./Canada Area against the applicable U.S./Canada TAC, and yellowtail flounder on trips into the Western U.S./Canada Area would continue to be allocated according to the vessel's VTRs.

It is also not clear how discard rates should be applied in these situations. At the time Framework 42 was developed, there were no sector-stock-gear specific discard rates and so Framework 42 and its implementing regulations did not address how these rates should be applied on trips into the Eastern U.S./Canada Area. Amendment 16 also did not provide any explicit guidance on this matter. Since the Framework 42 measure was intended to address possible misreporting of vessel-reported data, NMFS believes it is appropriate to apply observed discards and kept catch from these trips in the computation of discard rates according to the area fished as recorded in observer data. However, NMFS is still exploring how discard rates should be applied on unobserved trips.

Amendment 16, and the regulations implementing Amendment 16 at § 648.87(b)(1)(iii), requires that NMFS use all available information, including the Interactive Voice Response system (IVR), VTR, VMS, at the end of the fishing year to determine whether a sector exceeded any of its ACEs. NMFS must reconcile this measure with the requirement in Framework 42 to count all catch on trips into the Eastern U.S./Canada Area against U.S./Canada TACs. In absence of any explicit language in Amendment 16 as to how to handle this, NMFS believes it would be consistent with both provisions to count all cod, haddock, and yellowtail on trips declared into the Eastern U.S./Canada Area on VMS against the U.S./Canada TACs inseason for the purposes of determining whether the Eastern U.S./Canada Area should be closed, or that a sector has reached its ACE and must stop fishing. For the purposes of year-end reconciliation of sector catches, NMFS will use VMS activity data to determine whether a vessel that declared into the Eastern U.S./Canada Area actually may have fished there and catch from a trip with no VMS activity indicative of fishing in the Eastern U.S./Canada Area would be reapportioned according to the vessel's VTRs. NMFS is still exploring what criteria should be used to define fishing activity from VMS data and is interested in public comment on this measure.

Because these details were not available for the public to comment on in the Framework 48 proposed rule, NMFS is publishing this measure as an interim final rule and will be collecting additional public comment on it.

Approved Measures

This section summarizes the Framework 48 measures NMFS has approved as consistent with goals and objectives of the NE Multispecies FMP, and the requirements of the Magnuson-Stevens Act and other applicable law. This section also contains corrections to inadvertent errors in the NE multispecies regulations, under the authority of section 305(d) of the Magnuson-Stevens Act, that are necessary to accurately and effectively implement the requirements of the NE Multispecies FMP.

6. Status Determination Criteria for GOM and GB Cod, and SNE/MA Yellowtail Flounder

An assessment for SNE/MA yellowtail flounder was completed in June 2012. New assessments were also completed for GOM and GB cod in December 2012. The results of both models accepted in the December 2012, GOM cod assessment indicated that overfishing is occurring and the stock is overfished. In addition, the assessment for GB cod indicated that overfishing is occurring and the stock is overfished. The status of SNE/MA yellowtail flounder was less clear from the June 2012 assessment. The assessment considered two recruitment scenarios that resulted in very different pictures about the stock's status, but favored the recent recruitment scenario, which indicated that the stock was not experiencing overfishing and was rebuilt. A more detailed discussion of the assessment for these three stocks can be found in Item 1 of the preamble of the proposed rule.

NMFS has approved the proposed status determination criteria for these three stocks, because the results of these assessments represent the best scientific information available for management. Incorporating this information into the FMP will allow the specification of appropriate ABCs and ACLs and other management measures beginning in FY 2013 to prevent overfishing, and continue rebuilding GOM and GB cod, as required by the Magnuson-Stevens Act. The final revised status determination criteria are presented in Table 1. Numerical estimates of these criteria are presented in Table 2. There are two sets of status determination criteria approved for GOM cod because two models were accepted at the benchmark assessment in December 2012, as described above. Although two assessment models were approved, there is only one numerical estimate for the maximum fishing mortality threshold for GOM cod.

TABLE 1—REVISED STATUS DETERMINATION CRITERIA FOR SNE/MA YELLOWTAIL FLOUNDER, GOM AND GB COD

Stock	Biomass target	Minimum biomass threshold	Maximum fishing mortality threshold
SNE/MA yellowtail flounder	$SSB_{40\%MSP}$	½ B_{target}	$F_{40\%MSP}$
GOM cod	$SSB_{40\%MSP}$	½ B_{target}	$F_{40\%MSP}$
GB cod	$SSB_{40\%MSP}$	½ B_{target}	$F_{40\%MSP}$

SSB = spawning stock biomass; MSP = maximum spawning potential; B = biomass; F = fishing mortality rate; MSY = maximum sustainable yield.

TABLE 2—NUMERICAL ESTIMATES OF THE REVISED STATUS DETERMINATION CRITERIA FOR SNE/MA YELLOWTAIL FLOUNDER, GOM AND GB COD

Stock	Biomass target (mt)	Maximum fishing mortality threshold	MSY (mt)
SNE/MA yellowtail flounder	2,995	0.31	773
GOM cod (M=0.2 model)	54,743	0.18	9,399
GOM cod (M_{ramp} model)	80,200	.....	13,786
GB cod	186,535	0.18	30,622

7. Status Determination Criteria for White Hake

As discussed in Item 1 in the preamble of the Framework 48 proposed rule, a benchmark assessment for white hake was scheduled to be completed in February 2013, but the results of the assessment were not yet available at the time of proposed rule publication. This meant that NMFS could not propose new status determination criteria for white hake, even though the Council had recommended and analyzed updated status determination criteria in Framework 48 in case the assessment results became available in time for rulemaking. Thus, NMFS did not propose or solicit public comment on revised status determination criteria for white hake in the Framework 48 proposed rule, but indicated that it may take action at a later date based on the results of the assessment when they became available.

The assessment summary report for Stock Assessment Review Committee (SARC) 56 was published on April 2, 2013 (*http://www.nefsc.noaa.gov/publications/crd/crd1304/*). The results indicate that the white hake stock is not overfished or subject to overfishing. The stock is estimated to have been at 83 percent of the rebuilding biomass target in 2011, the most recent year of data incorporated into the assessment. The stock remains under a formal rebuilding program with a rebuilding target date of 2014. Current stock projections from the SARC 56 assessment indicate that the stock is projected to rebuild in 2014. The new stock status for white hake is a change from the previous benchmark assessment, conducted in 2008 as part of the Groundfish Assessment Review Meeting (GARM) III. The GARM III assessment indicated the white hake stock was both overfished and subject to overfishing. The SARC 56 assessment determined that the change in stock biomass since 2007 is the result of low fishing mortality and near long-term average recruitment. More plainly stated, the changes are not the results of changes in the assessment model or methods, but reflective of the changes in the data that has been collected and integrated in the interim since the last benchmark assessment in 2008. Additional information regarding the February assessment data, peer review proceedings, and results can be found on the Northeast Fishery Science Center's (NEFSC) Web site: *http://www.nefsc.noaa.gov/saw/*.

The results of SARC 56 represent the best scientific information available and a change from the results of the previous assessment available (GARM III). Because the Council included an alternative in Framework 48 to implement the results of SARC 56 for white hake in FY 2013, NMFS is approving and implementing the revised status determination criteria for white hake through this final rule. Although NMFS did not propose these revisions in the proposed rule because they were not yet available, the Council specifically considered and analyzed possible scenarios resulting from the assessment and recommended updating the white hake status determination criteria for FY 2013. Although the public did not have prior opportunity to comment on these measures in the Framework 48 proposed rule, the Council's analysis was available for public comment throughout the Council process. In addition, the SAW/SARC is an open and public process, allowing the public and managers to participate and, frequently, to have an indication of the results before the assessment report is final. Nevertheless, to ensure there is opportunity for public comment on this new status determination criteria, NMFS is implementing this measure as an interim final rule and collecting public comment on it. NMFS will publish another final rule, if necessary, after considering additional public comment to finalize these criteria and respond to any public comments. Implementing revised status determination criteria through this final rule is necessary in order to incorporate the best scientific information available into the FMP to allow NMFS to implement an appropriate ABC and ACL for white hake in FY 2013.

TABLE 3—UPDATED STATUS DETERMINATION CRITERIA AND NUMERICAL ESTIMATES OF THE STATUS DETERMINATION CRITERIA FOR WHITE HAKE

Criteria:			
Biomass Target	Minimum Biomass Threshold	Maximum Fishing Mortality Threshold	
$SSB_{40\%MSP}$	½ B_{target}	$F_{40\%MSP}$	
Values:			
Biomass Target (mt)	Minimum Biomass Threshold (mt)	Maximum Fishing Mortality Threshold	MSY (mt)
32,400	16,200	0.20	5,630

SSB = spawning stock biomass; MSP = maximum spawning potential; B = biomass; F = fishing mortality rate; MSY = maximum sustainable yield.

8. SNE/MA Windowpane Flounder sub-ACLs

Scallop Fishery Sub-ACL

NMFS has approved the allocation of a sub-ACL of SNE/MA windowpane flounder to the scallop fishery to better ensure that the ACL is not exceeded. The sub-ACL of SNE/MA windowpane flounder allocated to the scallop fishery would be 36 percent of the ABC. This allocation is based on the 90th percentile of scallop fishery catches (as a percent of the total catch) for calendar years 2001 through 2010. The scallop fishery's sub-ACL would be calculated by reducing the portion of the ABC allocated to the scallop fishery (sub-ABC) to account for management uncertainty. The management uncertainty buffer is determined each time the groundfish specifications are set. It is anticipated that AMs would be developed in a future management action during 2013 through the Atlantic Sea Scallop FMP in time to be effective by the start of scallop FY 2014 (i.e., March 1, 2014), and would retroactively apply to account for any overage in FY 2013. If the scallop fishery exceeds its sub-ACL for SNE/MA windowpane in FY 2013, the AMs adopted in a future management action would be triggered. Also, similar to the measure adopted in Framework 47 for the scallop fishery's SNE/MA and GB yellowtail flounder sub-ACLs, the scallop fishery AM for SNE/MA windowpane flounder would only be triggered if the total ACL is exceeded and the scallop fishery's sub-ACL is also exceeded, or if the scallop fishery exceeds its sub-ACL by 50 percent or more.

The total ACL for SNE/MA windowpane was exceeded by more than 100 percent in FY 2010 and FY 2011, resulting in the ABC and overfishing level (OFL) being exceeded. In both years, total catch by sector and common pool vessels was below the common pool sub-ACL for this stock and arguably did not contribute to the overage of the total ACL. However, because the common pool fishery was the only fishery with a sub-ACL and an AM for this stock, the overage of the total ACL triggered an AM only for the common pool. On the other hand, catch by the ''other subcomponent'' fisheries alone, including the scallop and other fisheries, exceeded the ABC in FY 2010 and the OFL in FY 2011. The large overages in FY 2010 and FY 2011 demonstrate that an AM for the groundfish fishery alone is not sufficient to ensure that the ACL for this stock is not exceeded, because it is not responsible for the majority of catches. Creating a sub-ACL and, subsequently, an AM, for the scallop fishery, which accounted for more than 25 percent of the total catch in FY 2011 and almost 50 percent of the catch in FY 2010, would create accountability for those fisheries responsible for the greatest share of the catch and most likely to cause an overage. Thus, a sub-ACL for the scallop fishery would help prevent overfishing on SNE/MA windowpane flounder as required by the National Standard 1 and Section 303(a)(1) of the Magnuson-Stevens Act and create an incentive to minimize bycatch of this stock, consistent with National Standard 9.

NMFS received comments on the proposed rule expressing concern that this measure does not maximize the overall net benefit to the nation or minimize adverse impacts to communities because it would substantially constrain scallop revenue. As further detailed in NMFS's responses to these comments later in this final rule, NMFS believes that this allocation to the scallop fishery balances the multiple factors taken into consideration in achieving optimum yield (OY), while complying with the other requirements of the Magnuson-Stevens Act and the goals and objectives of the FMP, including preventing overfishing, minimizing bycatch, and preserving a directed groundfish fishery. Economic, social and ecological factors contributed to the Council's allocation decisions for this sub-ACL. In addition to creating a greater incentive to minimize bycatch of SNE/MA windowpane flounder while maximizing the catch of scallops, as a fixed percentage of the ABC this measure ensures that allowable scallop catches of this stock adjust to increases or declines in the ABC and the relative health of the stock. This allocation is also consistent with historic catches and maintains historic participation in the SNE/MA windowpane flounder fishery, is fair and equitable, and prevents excessive accumulation of shares of this ABC by the scallop fishery as required by National Standard 4 and the goals of the FMP, because it is based on recent catch history as a proportion of the ABC. Although this allocation may constrain scallop catches in future years, depending upon the ABC, to favor the scallop industry by maximizing overall benefits to the nation would be inconsistent with National Standard 8 which requires that management measures must take into account importance of fishery resources to fishing communities in order to provide sustained participation of such communities in fishing and, to the extent practicable, minimize adverse impacts on such communities. For these reasons, NMFS has approved this measure through this final rule.

Other Sub-Components Sub-ACL

NMFS has approved the allocation of a SNE/MA windowpane sub-ACL to the other sub-component fisheries. In addition to large catches of SNE/MA windowpane flounder by the scallop fishery in recent years, other non-groundfish fisheries have accounted for approximately half of the total SNE/MA windowpane flounder catch in FY 2010 and FY 2011. Up until now, any overages of the total ACL caused by this component of the fishery have been applied only to the commercial groundfish fishery, the only fishery with a sub-ACL and AM for this stock. As a result, there have been no measures in place to constrain catches of SNE/MA windowpane flounder by other non-groundfish vessels, which has undermined the effectiveness of the ACL and AM for this stock. By adopting a sub-ACL and, subsequently, an AM for these other fisheries, those fisheries responsible for the majority of catches in recent years would be held accountable for any overages they cause of the ACL for this stock. This measure creates accountability for those fisheries most likely to cause an overage, and thereby reduces the risk of overfishing. The specific amount of this sub-ACL for FY 2013–2015 was proposed in Framework 50 and will be published in the final rule for that action. The amount of this allocation would be specified each time catch limits are set. This administrative measure makes it possible to adopt an AM that applies to those non-groundfish fisheries that fish with gear responsible for most of the catch of this stock by the ''other'' sub-component. The AM for SNE/MA windowpane flounder that would apply to commercial vessels is described in Item 12 of this preamble.

9. Scallop Fishery Sub-ACL for GB Yellowtail Flounder

NMFS has approved the revised sub-ACL of GB yellowtail flounder for the scallop fishery proposed in Framework 48. In preparation for a transition to FY 2014, 40 percent of the U.S. ABC for GB yellowtail flounder would be allocated to the scallop fishery in FY 2013 only. In FY 2014 and each year after, 16 percent of the U.S. ABC for this stock would be allocated to the scallop fishery to better reflect its historical portion of total catch of GB yellowtail flounder and to provide more predictability. The scallop fishery sub-ACL would be calculated by reducing the scallop fishery's portion of the ABC (sub-ABC)

to account for management uncertainty. The scallop fishery sub-ACL for FY 2013 based on the U.S. ABC for GB yellowtail flounder was proposed in the Framework 50 proposed rule and the final sub-ACL will be published in the final rule for that action. NMFS would still re-estimate the expected scallop fishery catch of GB yellowtail flounder for the current fishing year by January 15. If the scallop fishery is projected to catch less than 90 percent of its GB yellowtail flounder sub-ACL, the Regional Administrator may reduce the scallop fishery sub-ACL to the amount projected to be caught, and increase the groundfish fishery sub-ACL by any amount up to the amount reduced from the scallop allocation. Overages will be calculated based on the revised sub-ACLs for the commercial groundfish fishery and the scallop fishery, and any applicable AMs would be triggered. Framework 48 also clarified that the overage payback for any overage of the U.S. TAC, as required by the Transboundary Resource Sharing Understanding, would be deducted from the sub-ACL for the fishery component that caused the overage.

This measure simplifies the specification of the scallop fishery's GB yellowtail flounder allocation each year by basing it formulaically on a fixed percentage of the ABC. This would provide stability for both the scallop and groundfish fisheries by creating a more predictable allocation scheme. NMFS received comments on the proposed rule expressing concern that this measure does not maximize the overall net benefit to the nation or minimize adverse impacts to communities because it would substantially constrain scallop revenue. As discussed in NMFS's response to these comments later in this final rule, NMFS believes that this allocation to the scallop fishery balances the multiple factors taken into consideration in achieving OY, while complying with the other requirements of the Magnuson-Stevens Act and the goals and objectives of the FMP, including preventing overfishing, minimizing bycatch, and preserving a directed groundfish fishery. Economic, social and ecological factors concerning the FMP's goals of preserving fishing opportunities for groundfish vessels, minimizing negative impacts on fishing communities, and reducing bycatch of groundfish stocks, contributed to the Council's allocation decisions for this sub-ACL and the SNE/MA windowpane flounder sub-ACLs. Allocating a fixed percentage of the ABC to the scallop fishery would create a greater incentive to avoid yellowtail flounder while maximizing the catch of scallops, than an allocation based on projected catch. A fixed percentage of the ABC also ensures that allowable scallop catches of GB yellowtail flounder adjust to increases or declines in the ABC and the relative health of the stock, compared to a method based on projected catch. This allocation is also consistent with historic catches and maintains historic participation in the yellowtail flounder fishery, is fair and equitable, and prevents excessive accumulation of shares of this ABC by the scallop fishery as required by National Standard 4 and the goals of the FMP, because it is based on recent catch history as a proportion of the ABC. Although this allocation may constrain scallop catches in future years, depending upon the ABC, to favor the scallop industry by maximizing overall benefits to the nation would be inconsistent with National Standard 8 which requires that management measures must take into account importance of fishery resources to fishing communities in order to provide sustained participation of such communities in fishing and, to the extent practicable, minimize adverse impacts on such communities. For these reasons, NMFS has approved this measure through this final rule.

10. Small-Mesh Fisheries sub-ACL for GB Yellowtail Flounder

NMFS has approved a sub-ACL of GB yellowtail flounder for small-mesh fisheries. Small-mesh bottom trawl fisheries are defined as vessels fishing with bottom otter trawl gear with a codend mesh size of less than 5 inches (12.7 cm). These vessels fishing on Georges Bank typically target whiting and squid. Small-mesh fisheries would be allocated 2 percent of the U.S. ABC for GB yellowtail flounder each year, after a reduction for management uncertainty. Each time the groundfish specifications are set, the management uncertainty buffer necessary for these small-mesh fisheries would be determined. If the small-mesh fisheries catch of GB yellowtail flounder exceeds the sub-ACL, the pertinent AMs would be triggered. There was not sufficient time to develop specific AMs in this action and allow for collaboration with the respective FMPs and the Mid-Atlantic Council (e.g., Atlantic Mackerel, Squid, and Butterfish; Small-Mesh Multispecies). Although a sub-ACL for FY 2013 was needed because of the expected reduction in the GB yellowtail flounder ABC in FY 2013, the Council reasoned that allowing additional time to work with these respective FMPs to develop AMs would not increase the risk of an overage in FY 2013, as long as the AMs are developed as soon as possible and applied retroactively to be effective for any overage in FY 2013. The small-mesh fisheries have not previously caused an overage of the GB yellowtail flounder ACL, so the situation was deemed less urgent than for SNE/MA windowpane flounder.

Prior to Framework 48, the quota for GB yellowtail flounder has been allocated to only the commercial groundfish and scallop fisheries. Although small-mesh fishery catches of GB yellowtail flounder have generally been less than 100 mt in recent years, the U.S. ABC for the stock has been declining. As a result, the small-mesh fishery catches account for an increasing percentage of the total U.S. catch. Allocating a sub-ACL and, subsequently, creating an AM for these fisheries would help ensure that small-mesh fishery catches would be constrained and prevent overages of the annual quota, thereby reducing the risk of overfishing, consistent with the requirements of National Standard 1 and section 303(a)(1) of the Magnuson-Stevens Act. In addition, because GB yellowtail flounder is jointly managed with Canada, keeping U.S. catches within the U.S. TAC is important to achieve the management and conservation objectives of the Understanding. This measure would also further the goals and objectives of the FMP and National Standard 9 to minimize bycatch to the extent practicable, by creating an incentive for small mesh fisheries to reduce bycatch of this stock. A sub-ACL for small-mesh fisheries, and associated AMs, would help ensure the component of the fishery that causes an overage would be held accountable. This measure would also likely prevent inequities that would occur if the commercial groundfish and scallop fisheries were held accountable for overages caused by the small-mesh fisheries.

11. Recreational Fishery AM

Framework 48 proposed to revise the recreational AM so that the Regional Administrator may proactively adjust recreational management measures to ensure the recreational fishery will achieve, but not exceed, its sub-ACL. The recreational fishery currently only has a sub-ACL for GOM cod and for GOM haddock. To the extent possible, any changes to the recreational management measures would be made prior to the start of the fishing year and adopted through procedures consistent with the Administrative Procedure Act (APA). In addition, the Regional

Administrator would consult with the Council, or the Council's designee, and would tell the Council, or its designee, what recreational measures are under consideration for the upcoming fishing year. If time allows, the Council would also provide its Recreational Advisory Panel (RAP) an opportunity to meet and discuss the proposed management measures. These AMs require development in consultation with the Council, because the appropriate suite of measures (e.g., bag limit, minimum fish size, season) depends on the ACL specified. A default suite of measures are not automatically triggered, because the sub-ACL and, thus, appropriate measures to achieve that sub-ACL, may differ between years. Similar to trip limits for the commercial common pool fishery, a certain suite of measures are projected to achieve a certain catch. To select the appropriate suite of measures, the ACL for the fishing year in which they will be used must be known in order to ensure the projected catch does not exceed the target. The Council provided guidance on its preference of measures that NMFS should consider if additional recreational effort controls are necessary to reduce GOM cod or GOM haddock catches, though this guidance does not restrict NMFS's discretion in selecting management measures that would best achieve, but not exceed, the recreational sub-ACL. If additional effort controls are necessary to reduce cod catches, the Council's non-binding preference is that NMFS first consider increases to minimum fish sizes, then adjustments to seasons, followed by changes to bag limits. If additional effort controls are necessary to reduce haddock catches, the Council's non-binding preference is that NMFS first consider increases to minimum size limits, then changes to bag limits, and adjustments to seasons last.

NMFS has approved this measure in Framework 48 because it would improve accountability in the recreational fishery. Currently, the recreational fishery AM only allows the Regional Administrator to change recreational measures if an ACL is exceeded. In addition, due to the delay in availability of recreational catch data at this time, AMs can only be implemented late in the year following an overage, at the start of the next recreational fishing season. This measure also gives NMFS and the Council the ability to adapt to changing fishery conditions, by evaluating recreational measures before the start of the fishing year to ensure those measures facilitate a target catch consistent with the sub-ACLs specified for the recreational fishery. This would help prevent overages of the recreational sub-ACL, and prevent substantial underharvests of the recreational sub-ACL. In addition, the requirement for NMFS to consult with the Council while developing measures allows increased opportunity for public comment, and provides states more opportunity to coordinate their recreational measures with NMFS.

Through the Framework 50 proposed rule, NMFS proposed and collected public comments on adjustments to recreational measures for FY 2013. Final recreational measures for FY 2013 will be announced in the final rule for that action.

12. Commercial Groundfish Fishery AMs

Change to AM Timing for Non-Allocated Stocks

NMFS has approved the revised timing for commercial groundfish fishery AMs for stocks not allocated to sectors (GOM/GB windowpane flounder, SNE/MA windowpane flounder, ocean pout, Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder), to improve the effectiveness of AMs adopted through Frameworks 47 and 48 for these stocks. Prior to this action, the AMs for these stocks would be implemented in the second year following an overage of the total ACL. For example, if the total ACL for ocean pout was exceeded in Year 1, the AM would be implemented in Year 3. However, this delay may not be needed in all cases. For example, fishery-dependent data is available in almost real time in the commercial groundfish fishery. If information was available during Year 1 that the commercial groundfish fishery had exceeded the overall ACL for ocean pout, under the current system an AM would still not be implemented until Year 3. This action revises the timing for these AMs, so that if reliable information is available during the fishing year (Year 1) that shows the total ACL has been exceeded, as in the example above, the respective AM for the stock would be implemented at the start of the next fishing year (Year 2). After the AM is implemented, if updated catch information shows that the total ACL was not exceeded, the AM would be rescinded consistent with the APA. This measure increases the effectiveness of the AM and would help prevent overfishing in consecutive years, consistent with the requirements of National Standard 1 of the Magnuson-Stevens Act.

The Council, as well as commenters on the Framework 48 proposed rule, expressed concerns that final catch data for the non-allocated stocks, which include catch from state waters and non-groundfish fisheries, could not be reliably available in time to trigger an AM in Year 2, or earlier. NMFS has heard the Council and industry's concerns with respect to the availability of data, and believes this measure balances the need for effective AMs with the need for stability in order for fishing businesses to plan for the upcoming fishing year. This action modifies the timing of the AMs so that should reliable information be available (e.g., the commercial groundfish fishery catches exceed the total ACL for a stock) the AM could be implemented more quickly. However, to provide stability for groundfish vessels, any applicable AMs for the non-allocated stocks would only be implemented at the start of a fishing year.

The Framework 48 proposed rule stated that if this measure was approved and implemented on or before May 1, 2013, and reliable information shows that the total ACL for a non-allocated stock is exceeded in FY 2012, then the respective AM would be implemented on May 1, 2013, for sector and common pool vessels. NMFS has reviewed available catch information as of April 16, 2013 and determined that, based on reliable catch information, the overall ACLs for these stocks have not been exceeded. Thus, none of the non-allocated stock AMs will be implemented for sector and common pool vessels in FY 2013. For this determination, NMFS considered commercial groundfish catches calculated from the Data Matching and Imputation System (DMIS) reliable due to the near real-time availability to estimate discards. To estimate commercial scallop fishery catches, NMFS used audited and preliminary observer data and fleet-wide scallop data from DMIS through February 28, 2013. NMFS determined this information to be reliable based on the near real-time availability of observer data to estimate discard rates in the scallop fishery. NMFS continues to make improvements to its data collection programs to improve the timeliness of data, and would evaluate the reliability of this information for making such determinations on an annual basis. Area-Based AMs for Atlantic Halibut, Atlantic Wolffish, and SNE/MA Winter Flounder.

NMFS has approved the proposed area-based AMs for Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder through this final rule. If the

total ACL is exceeded for any of these stocks by an amount greater than the management uncertainty buffer, gear restrictions would be triggered in designated areas that have been identified as hotspots for catches of these stocks. For overages of the Atlantic halibut and Atlantic wolffish ACLs, trawl vessels would be required to use approved selective gear, and sink gillnet and longline vessels would not be allowed to fish in the applicable AM area. For overages of the SNE/MA winter flounder ACL, only trawl gear would be restricted in the applicable AM area. As previously adopted in Framework 47, possession of non-allocated stocks would also be prohibited at all times, except for Atlantic halibut, which would be reduced from one fish per trip to zero if the total ACL is exceeded by an amount greater than the management uncertainty buffer. Approved selective trawl gears include the separator trawl, Ruhle trawl, mini-Ruhle trawl, rope trawl, and other gear authorized by the Council in a management action or approved for use consistent with the process defined in § 648.85(b)(6). Currently, the effective management uncertainty buffer at the overall ACL level is 3–7 percent for non-allocated stocks, depending upon the stock. The management uncertainty buffer can be changed each time groundfish specifications are set. Because these AM areas are designed to account for an ACL overage of up to 20 percent, if the total ACL is exceeded by 20 percent or more for one of these stocks, the AM would still be implemented, but the measure would be reviewed by the Council in a future management action. In addition, should a sub-ACL be allocated to other fisheries in a future action, and AMs developed for those fisheries, the AM for any fishery would be implemented only if the total ACL for the stock is exceeded, and the fishery also exceeds its sub-ACL. A detailed description of the development of these measures was included in Item 6 of the Framework 48 proposed rule and is not repeated here.

Note that Framework 50 allocates SNE/MA winter flounder to the groundfish fishery and allows landings beginning in FY 2013. Thus, sector-specific inseason AMs will apply for any overage from a sector's allocation in the next fishing year, and this area-based AM will apply only to common pool vessels if the common pool exceeds its sub-ACL for the stock.

NMFS has approved this measure because it creates effective reactive AMs to help prevent overfishing and ensures accountability in the commercial groundfish fishery. Proactive AMs implemented by Amendment 16 and Framework 47 were intended to prevent ACLs from being exceeded. However, reactive AMs are necessary to correct or mitigate overages of ACLs if they occur, as explained in the U.S. District Court of Appeals decision in *Oceana* v. *Locke et al.,* which found that the lack of sector-specific reactive AMs for the non-allocated stocks violated the Magnuson-Stevens Act. These measures are necessary to prevent overfishing of non-allocated stocks by adjusting fishery measures to reduce the likelihood that an ACL is exceeded in consecutive years. These reactive AMs are also necessary to address a remand by the Court as a result of that litigation, and to be consistent with the National Standard 1 guidelines.

Commenters on the proposed rule expressed concern that these AMs are triggered effectively by an overage of the ABC as opposed to the ACL. As NMFS explained in the proposed rule, this trigger level is an artifact of how the AMs were designed and not out of any intent to provide additional buffers before an AM is triggered. The PDT was not able to design an AM that could account for such a small overage of 1–3 percent that would not be easily undermined by a shift of effort to other areas. Furthermore, NMFS considers this to be an issue of semantics and one that does not violate the National Standard 1 guidelines. Defining the trigger as an overage greater than the management uncertainty is in concept the same as establishing an annual catch target (ACT) and a higher ACL (e.g., an ACL set equal to the ABC) that serves as the trigger for AMs, an approach which is allowed under National Standard 1 guidelines.

Commenters were also concerned about the lack of automatic measure adjustment that would account for overages larger than 20 percent of the ACL. NMFS maintains that these AMs are to account for possible overages by non-groundfish fisheries shown to have *de minimis* catches of groundfish. It is not expected that these components themselves are likely to exceed the sub-ACL by more than 20 percent, particularly with the continued implementation of proactive AMs that appear to have been effective at constraining catch below the ACLs in recent years. If zero possession continues to be an effective proactive AM, the reactive AM will likely not be triggered.

Revised AM for SNE/MA Windowpane Flounder

NMFS has approved the revised AM for SNE/MA windowpane flounder in this final rule. The revised AM now applies to the groundfish fishery and the other sub-component fisheries, which have been allocated a sub-ACL of SNE/MA windowpane flounder through this action (see Item 8 in this preamble). If the total ACL for this stock is exceeded by an amount greater than the management uncertainty buffer, and the ''other sub-component'' sub-ACL is also exceeded, then the area-based AM, described above, would apply to all trawl vessels using a codend with a mesh size of 5 inches (12.7 cm) or larger.

Prior to Framework 48, the AM for SNE/MA windowpane flounder only applied to commercial groundfish vessels. However, the commercial groundfish fishery has typically accounted for less than 25 percent of the total SNE/MA windowpane flounder catch in recent years. A large portion of the total SNE/MA windowpane flounder catch is caught by trawl vessels in non-groundfish fisheries fishing with mesh size of 5 inches (12.7 cm) or greater. Thus, the current AM may not effectively restrict catches of this stock if the total ACL is exceeded, which increases the likelihood of consecutive overages in future fishing years. This revision helps ensure that, in the event of an overage, catches would be effectively restricted to prevent overfishing. In addition, this action would remove potential inequities that could occur if only the commercial groundfish fishery was subject to an AM for SNE/MA windowpane flounder, even though its catches represent a small portion of the total catch for this stock.

As implemented in Framework 47, the area-based AM for commercial groundfish vessels is triggered only if the commercial groundfish fishery exceeds its sub-ACL and the total ACL is also exceeded by an amount greater than the management uncertainty buffer. Similarly, the scallop fishery's AM is triggered only if the total ACL is exceeded and the scallop fishery sub-ACL is also exceeded. This ensures that each fishery is only accountable for any overages it caused and not those caused by any other fishery with a sub-ACL of this stock.

As discussed in the previous section, commenters on the proposed rule expressed concern that non-allocated stock AMs are triggered effectively by an overage of the ABC as opposed to the ACL, and that these AMs do not have

automatic adjustments sufficient to cover an overage of more than 20 percent of the ACL. As NMFS explains above and in the response to these comments, the smallest effective AM the PDT could design accounts for at the least 5 percent of the ACL. Furthermore, NMFS considers this to be an issue of semantics and one that does not violate the National Standard 1 guidelines. Defining the trigger as an overage greater than the management uncertainty is in concept the same as establishing an ACT and a higher ACL that serves as the trigger for AMs, an approach which is allowed under the National Standard 1 guidelines. NMFS also believes that these AMs are sufficient, because fisheries in the other sub-component are shown to have *de minimis* catches of groundfish. It is not expected that these components themselves are likely to exceed the ACL by more than 20 percent, given that the sub-ACL is based on estimated catch and an additional sub-ACL is being specified to constrain the catch of the scallop fishery.

Revised Handgear Permit AMs

The revised handgear AMs are approved through this final rule. This measure exempts Handgear A and Handgear B permits from the white hake trimester TAC AM. This exemption would remain effective unless a future action modified this AM. Handgear A and B common pool vessels would still be subject to the trimester TAC for cod, haddock, and pollock. This measure also authorizes the Regional Administrator to exempt Handgear A and Handgear B common pool vessels from the trimester TAC provisions for other stocks if catch by these vessels is less than 1 percent of the total common pool catch of that species or stock. This determination would be made prior to the start of the fishing year, and would be implemented through procedures consistent with the APA.

Currently, all common pool vessels, including vessels using handgear, are subject to trimester TACs for allocated stocks. When 90 percent of the trimester TAC for a stock is projected to be caught, the area where the stock is predominately caught will be closed for the remainder of the trimester to gear capable of catching that stock. The common pool trimester TAC AMs were designed to apply only to gear types that caught the pertinent stock. Prior to this action, hook gear was subject to the trimester TAC provisions for cod, haddock, white hake, and pollock, although hook gear has been shown to very rarely catch white hake, making up less than 1 percent of the total common pool catch of this stock each year. Thus, NMFS has approved this measure because it maintains the original purpose of these inseason AMs while providing flexibility to small, handgear vessels that are not responsible for much catch of this stock. In addition to the exemption for white hake approved through this final rule, this measure allows modifications to other trimester TAC AMs in the future, should new information become available that shows handgear vessels rarely catch a stock or species, or the combined catch of these vessels is less than 1 percent of the total common pool catch. This would increase the effectiveness of the common pool AMs, and would prevent potential inequities that may occur by applying an AM to vessels not responsible for catching, or exceeding, a trimester TAC.

13. Commercial Fishery Minimum Fish Sizes

NMFS has approved the reductions to the minimum fish sizes for several groundfish stocks to reduce regulatory discards and increase revenue from catch. The new minimum sizes are listed in Table 4. In the groundfish fishery, all catch, including landings and discards, are counted against ACLs. Commercial discards for most stocks are assumed to have 100-percent mortality, so 100 percent of discards for these stocks are deducted from quota allocations; thus, discards are lost revenue for groundfish vessels. Reducing the minimum size for several groundfish stocks would reduce waste and allow the commercial industry to recoup some revenue from fish that would otherwise be discarded. This small amount of additional revenue may help the groundfish industry cope with the substantial reductions in catch limits expected in FY 2013.

TABLE 4—CHANGES TO MINIMUM FISH SIZES LIMITS FOR GROUNDFISH STOCKS

Species	Current Size (inches)	Proposed FW 48 Size (inches)
Cod	22 (55.9 cm)	19 (48.3 cm)
Haddock	18 (45.7 cm)	16 (40.6 cm)
Pollock	19 (48.3 cm)	No change
Witch flounder (gray sole)	14 (35.6 cm)	13 (33 cm)
Yellowtail flounder	13 (33.0 cm)	12 (30.5 cm)
American plaice (dab)	14 (35.6 cm)	12 (30.5 cm)
Atlantic halibut	41 (104.1 cm)	No change
Winter flounder (blackback)	12 (30.5 cm)	No change
Redfish	9 (22.9 cm)	7 (17.8 cm)

NMFS received several comments on the Framework 48 proposed rule expressing concern that the revised minimum sizes may increase targeting and bycatch of small fish and impact the rebuilding of groundfish stocks. As discussed in the proposed rule, the Framework 48 EA, and in the response to comments, the biological impacts that might result from these new minimum fish sizes depend on whether selectivity in the fishery shifts to smaller fish and whether catch limits are adjusted to account for a shift, which cannot be accurately predicted. Although difficult to predict, it is possible that decent prices for smaller size classes of fish could incentivize the targeting of smaller fish at the new minimum size. According to analysis in Framework 48, this is most likely to occur for yellowtail flounder, for which there is little difference in price between size classes and a simple change in the type of codend used can modify the size of fish caught. However, the revised minimum size is only an inch smaller than the existing minimum size and still above the length at 50-percent maturity for this stock. Analysis in Framework 48 for CC/GOM yellowtail flounder showed that a shift in selectivity by one year without a corresponding change in ABCs would result in a rebuilding time that is almost the same and a higher probability of overfishing. However, if the change in selectivity is detected and ABCs are revised, these potential impacts are mitigated. In light of these concerns,

and at the request of the Council, NMFS is exploring ways to monitor the length frequency of catch in the commercial groundfish fishery beginning in FY 2013 to see if a change in selectivity could be detected. If such an analysis could be completed, NMFS could use this information to advise the Council if adjustments should be considered in a future action.

The Massachusetts Division of Marine Fisheries (MADMF) submitted a comment on the proposed rule raising concerns that if these measures are approved and state agencies do not follow suit, sector vessels would be forced to discard fish that do not meet the state minimum fish size in violation of the federal requirement for them to retain all fish of legal size. NMFS is also concerned about discrepancies between state and federal minimum fish sizes complicating compliance and enforcement of this measure. If a state does not make corresponding adjustments to fish sizes, vessels could land their catch in other states' ports. NMFS does not favor this result and the impacts it would have on the non-conforming state, and, for that reason strongly urges all affected states to match these size reductions. To address this concern, NMFS is delaying the effective date of these new minimum sizes to July 1, 2013, to allow state agencies additional time to consider and make corresponding adjustments to their minimum sizes.

14. Sector Monitoring Programs

Eliminate Dockside Monitoring

NMFS has approved the elimination of dockside monitoring requirements for the groundfish fishery. Amendment 16 required sectors and the common pool to implement a dockside monitoring program to validate dealer-reported landings beginning in FY 2010 and 2012, respectively. Framework 45 delayed the implementation of these requirements after only a year until FY 2013. Like at-sea monitoring, the Council is concerned about the industry's ability to support this cost burden in FY 2013 and in future years, particularly in light of concerns about its utility, and proposed eliminating the dockside monitoring program altogether through Framework 48.

NMFS approved this measure because it believes that dealer reporting combined with dockside intercepts by enforcement personnel are sufficient to ensure reliable landings data at this time. Dealer-reported fish weights are used as the principle source to monitor commercial landings. Thus, dockside monitor reports, which verify dealer-recorded weights, are somewhat redundant. Random dockside intercepts by enforcement personnel, facilitated by trip-end hails, provide a deterrent against misreporting of catch and illegal landings. In addition, eliminating the program would reduce costs and potentially increase the profitability of the commercial industry in future years.

It was not clear from Framework 48 whether eliminating the dockside monitoring program included removing the current dockside monitoring hail requirements. NMFS proposed maintaining hail requirements in the Framework 48 proposed rule, because they facilitate the monitoring and enforcement of sector operations and landings. NMFS did not receive any comments from the Council or members of the public opposing this proposal, thus NMFS concludes that it is justified in maintaining the hail requirements at this time. These hails will be a useful tool for both NMFS and sector managers to monitor sector vessels' activities, including the use of certain sector exemptions, and to facilitate dockside intercepts by enforcement personnel. NMFS is also clarifying the regulatory text of this proposed rule at § 648.10(k)(1), consistent with Framework 45, so that hails may be modified in the future to be streamlined with other reporting requirements that collect similar fishery data, such as VTRs and VMS catch reports.

Sector Monitoring Goals and Performance Standard

NMFS has approved the proposed revisions to the goals and objectives, and performance standard, established for sector monitoring programs and, relying in part on section 305(d) of the Magnuson-Stevens Act, implements new regulatory text to reflect these revised goals and objectives and ensure they are carried out in a manner consistent with the Act. Amendment 16 did not lay out explicit goals for sector monitoring, but described several general purposes for the programs, including to provide accurate estimates of sector catch and to verify area and gear fished, to ensure sector allocations are not exceeded. The lack of well-defined goals and purposes for sector monitoring requirements has led to confusion about how to implement these requirements and has hindered efforts to improve them. This measure and its implementing regulatory text clarify and elaborate on the goals and objectives for existing and future groundfish monitoring programs to help the Council and NMFS to implement monitoring requirements consistent with the goals of the FMP and to evaluate these programs in the future. More explicit goals and objectives would also assist NMFS and the sectors in designing and evaluating proposals to satisfy monitoring requirements in sector operations plans, ensuring the reliability of catch estimates and accountability of catches. The new goals and objectives include that groundfish monitoring programs improve documentation of catch, determining total catch and effort of regulated species, and achieve a coverage level sufficient to minimize effects of potential monitoring bias to the extent possible, while enhancing fleet viability. Monitoring programs should also reduce the cost of monitoring, streamlining data management and eliminating redundancy, exploring options for cost-sharing, while recognizing the opportunity costs of insufficient monitoring. Other goals and objectives include incentivizing reducing discards, providing additional data streams for stock assessments, reducing management and/or biological uncertainty, and enhancing the safety of the monitoring program. It is also an explicit goal of such programs to periodically evaluate them for effectiveness. The complete list of goals and objectives for groundfish monitoring programs is specified in the NE multispecies regulations at § 648.11(l) and in Framework 48.

Amendment 16 specified a performance standard that coverage levels must be sufficient to at least meet the coefficient of variation (CV) specified in SBRM (a CV of 30 percent), but was unclear as to what level the CV standard is to be applied to—discard estimates at the stock level for all sectors, or for each combination of sector and stock. This has resulted in a lack of specific direction and specification about the appropriate coverage level needed to ''accurately monitor sector operations.'' This measure in Framework 48 clarifies that the CV standard is intended to apply to discard estimates at the overall stock level for all sectors combined. As discussed in NMFS's response to comments on this measure, the Council and NMFS believe this level is sufficient as a minimum standard for monitoring sector ACEs, consistent with the goals of Amendment 16 and the FMP. Amendment 16 specified that coverage levels should be less than 100 percent, which requires that the discard portion of catch, and thus total catch, be an estimate. The level of observer coverage, ultimately, should provide confidence that the overall catch estimate is accurate enough to ensure that sector

fishing activities are consistent with National Standard 1 requirements to prevent overfishing while achieving on a continuing basis optimum yield from each fishery. NMFS's analysis of CVs achieved at the sector-stock level using a performance standard at the stock level showed that the vast majority of ACE level catch figures achieved a CV of 30 percent or better. This examination revealed that for 207 of the 256 ACE allocations, the percent of discard pounds for which the CV was greater than 30 percent was less than 1 percent. For 43 of the remaining ACE allocations, the percent of discard pounds for which the CV was greater than 30 percent ranged from 1–9.9 percent. There were 6 ACE allocations for which the percent of discard pounds with a CV greater than 30 percent ranged from 10–66 percent. A report of this analysis is available at: *http://www.nero.noaa.gov/ro/fso/reports/Sectors/ASM/FY2013_Multispecies_Sector_ASM_Requirements_Summary.pdf* Discards are only a portion of total catch, thus the majority of catch estimates are based on landings information, which is obtained by dealer reported data, verified by VTRs, and sector weekly reports. In addition, NMFS and sector managers engage in an extensive reconciliation process to quality assure and quality check data streams used to estimate and monitor sector catch toward ACEs. To further guard against possible uncertainty in these estimates resulting in an overage at the ACL level, substantial management uncertainty buffers are established before the ACL and sub-ACLs are allocated. Based on this analysis, we concluded that a CV standard at the stock level provides coverage rates that are sufficiently reliable to monitor sector ACEs. Thus NMFS has approved this measure in Framework 48.

NMFS will use this standard to help determine the minimum coverage rates for sector at-sea monitoring programs in future fishing years. Note that, although the Framework 48 document discusses the clarified standard with respect to ''allocated stocks,'' the final regulatory text applies the CV standard to all groundfish stocks, allocated and non-allocated. This was an inadvertent error in the Framework 48 document and, thus, the Council has deemed the corrected regulatory text as consistent with its intent.

This measure also makes clear what other factors should be taken into account in determining the appropriate level of coverage for groundfish monitoring programs, as described in the clarified goals and objectives for monitoring programs. NMFS interprets these provisions as guidance based on a practicability standard for determining the level of at-sea monitoring coverage that is appropriate for monitoring sector operations to help ensure that overall catch by sector vessels does not exceed ACEs and ACLs. Thus, NMFS has revised the regulatory text with respect to sector monitoring requirements to reflect the clarified goals and performance standard for sector monitoring programs, and to take into account the National Standards and other requirements of the Magnuson-Stevens Act. NMFS has revised the regulatory text at § 648.87(b)(1)(v)(B) to read that coverage levels must at least meet the CV standard at the overall stock level and be sufficient to monitor sector operations, to the extent practicable, in order to reliably estimate overall catch by sector vessels.

In addition to the revised goals and objectives in Framework 48, NMFS will specifically take into account National Standards 2, 7, and 8 in making its determination of the appropriate level of at-sea monitoring coverage for sectors on an annual basis. These National Standards specifically speak to using the best scientific information available, minimizing costs and avoiding unnecessary duplication where practicable, taking into account impacts on fishing communities, and minimizing adverse economic impacts to the extent practicable.

Reduce At-Sea Monitoring for Monkfish Trips

Framework 48 proposed to implement a lower at-sea coverage rate for sector vessels fishing on a monkfish day-at-sea (DAS) in the SNE Broad Stock Area with extra-large mesh gillnets. Currently, sector monitoring requirements are defined to apply to any trip where groundfish catch counts against a sector's ACE. Because the Skate and Monkfish FMPs require the use of a DAS, including a groundfish DAS, to target these species, sector vessels fishing for monkfish and skates are charged ACE for any landings or discards of groundfish and are subject to sector at-sea monitoring coverage on these trips. When truly targeting monkfish or skates, however, sector vessels often use gear that has little or no bycatch of groundfish. With limited resources for at-sea monitoring, covering trips targeting skate or monkfish is arguably a waste of resources and does not contribute to improving the overall precision and accuracy of discard estimates. Thus, NMFS has approved this measure in Framework 48 that exempts a subset of sector trips that are declared into the SNE Broad Stock Area on a monkfish DAS and using extra-large mesh gillnets from the standard at-sea monitoring coverage rate. This measure should reduce at-sea monitoring costs to sectors, particularly to gillnet vessels that fall in this category. It would also allow resources to be diverted to monitor trips that catch more groundfish, which could improve discard estimates for directed groundfish trips, and all other sector trips would still be required to meet the CV standard at a minimum.

NMFS will specify some lower coverage rate for these trips on an annual basis when determining coverage rates for all other sector trips. At a minimum, these trips would get Northeast Fishery Observer Program (NEFOP) coverage. As discussed in Item 8 of the Framework 48 proposed rule, NMFS has determined that NEFOP coverage is sufficient to monitor these trips in FY 2013. Because this subset of trips would have a different coverage level than other sector trips in the SNE Broad Stock Area, NMFS has determined that these trips require a separate discard strata for each stock to ensure the different coverage levels do not bias discard estimates. To facilitate deploying appropriate coverage levels, a sector vessel must notify NEFOP as to whether it intends to fish under this exemption through the Pre-Trip Notification System (PTNS). NMFS will provide specific instructions for how to declare this option in PTNS in a Fishery Bulletin sent to all sector vessels. To minimize the possibility that this measure could be used to avoid at-sea monitoring coverage, only vessels meeting the criteria and intending to fish exclusively in the SNE Broad Stock Area are eligible for lower coverage. Vessels declaring multi-Broad Stock Area trips are not eligible for the lower selection probability. In addition, a vessel is already prohibited from changing its fishing plan for a trip once a waiver from coverage has been issued. NMFS has revised the pre-trip notification regulations at § 648.11(k)(1) to make clear that a vessel's fishing plan includes the area to be fished, whether a monkfish DAS will be used, and gear type to be used.

This measure also requires that NMFS develop a method for identifying these trips in the fishery dependent datasets in order to ensure they are appropriately stratified in stock assessments. The NMFS Northeast Regional Office is working with the Northeast Fisheries Science Center to identify the appropriate method to transmit this information to assessment scientists. To assist NMFS in identifying these trips

for appropriate stratification in discard estimates, NMFS may require sector vessels intending to use this exemption to submit a trip-start hail declaring their intent to NMFS before departing port. If NMFS determines a trip-start hail is necessary, detailed instructions for submitting hails would be specified in a Fishery Bulletin distributed to all sector vessels.

15. List of Allowable Sector Exemption Requests

NMFS has approved a provision in Framework 48 to allow sectors to submit limited requests for exemption from portions of year-round closure areas. Framework 48 proposed to amend the list of regulations that sectors could not request exemption from. Amendment 16 allowed a sector to make requests to the Regional Administrator for exemption from some NE multispecies regulations as part of its annual sector operations plan. Amendment 16, and later Framework 47, identified a list of FMP measures that sectors could not request exemption from, including: Year-round closure areas; permitting restrictions (e.g., vessel upgrade limits, etc.); gear restrictions designed to minimize habitat impacts (e.g., roller gear restrictions, etc.); reporting requirements; and AMs for non-allocated stocks. Sectors were prohibited from requesting these exemptions because they serve multiple purposes and do not necessarily act exclusively as mortality controls.

Beginning in FY 2013, sectors may request exemption from the year-round groundfish mortality closures, except for where they overlap current or proposed habitat closed areas. These areas are defined as the existing habitat closed areas specified at § 648.81(h) and the Fippennies Ledge area under consideration as a potential habitat management area in the Omnibus EFH Amendment currently under development by the Council. Sectors may not request exemption from the Western GOM Closed Area, where it overlaps with a GOM Rolling Closure Area in effect. At this time, GOM Rolling Closure Area III overlaps the northeast corner of the Western GOM Closed Area, so sectors would not be allowed to request access to this portion of the Western GOM Closed Area during May. Sectors may also not request access to Closed Area I and II from February 16th through April 30th.

Council members, members of the public, the fishing industry, and environmental groups expressed a number of concerns during the development of Framework 48 and in the public comment period on the proposed rule, about allowing additional access to groundfish closed areas. Some comments concerned the potential for this measure and any proposed sector exemptions to undermine measures under consideration in the Omnibus EFH Amendment. Concerns were also raised about potential impacts to protected species, spawning groundfish, and to other commercial species, like lobsters, from opening these areas to additional fishing effort. Some commenters also raised concerns that allowing groundfish vessels into these areas, mainly Closed Area II, could increase gear conflicts between mobile and lobster gear. To address some of these issues, the Council imposed the limitations described above, excluding existing and potential habitat closed areas to preserve the process under way to evaluate these areas in the Omnibus EFH Amendment. The Council also took steps to continue protections for spawning groundfish by including seasonal restrictions on any sector exemptions. NMFS responds to specific comments submitted on the proposed rule for Framework 48 in this final rule.

As NMFS clarified in the proposed rule, Framework 48 does not actually approve the exemptions needed to fish in these closed areas. The impacts of any actual fishing effort, including the concerns raised in public comments during the development of Framework 48, would be evaluated and could be mitigated through the annual review and approval of sector operations plans and exemption requests for each fishing year. The Council has already asked that the specific issues raised during the development of Framework 48 be evaluated by NMFS in the consideration of any specific sector exemption requests. In addition, many of the issues regarding sector access to closed areas raised in public comments on the proposed rule, will be analyzed should NMFS propose granting sector exemption closed area access. The sector exemption review and approval process also provides better opportunity to address specific concerns with the potential impact of actual sector proposals. The Regional Administrator may include stipulations and constraints on specific exemptions to facilitate the monitoring and enforcement of sector operations or as mitigation measures to address specific potential impacts.

After review of public comments, NMFS has approved this measure in this final rule. The Council designed this measure to maintain the purpose of existing habitat areas to minimize the adverse effects of fishing on EFH, and preserve the consideration of additional habitat and other management areas in the Omnibus EFH Amendment. The Council also took steps to limit potential impacts of requests on spawning groundfish. This change to the list of prohibited exemptions would allow the consideration and analysis of specific sector exemption requests on a case-by-case basis. If approved, sector exemptions to portions of these areas may help mitigate the expected reductions in FY 2013 catch limits by allowing sectors to potentially increase catches of healthy groundfish stocks such as GB haddock and pollock that may be more abundant in these areas.

In anticipation of this change being approved for FY 2013, sectors submitted requests for exemptions from portions of the year-round closed areas in their FY 2013 operations plans. Due to the need for additional time to analyze these new exemptions adequately, NMFS intends to consider these sector requests in a separate rulemaking from the general approval of sector operations plans for FY 2013. The closed area exemption requests would be considered as amendments to the sector operations plans through a proposed and final rule that would be available for public comment with an accompanying National Environmental Policy Act (NEPA) analysis. Any closed area exemption requests, if approved, would not be in place until after the start of the 2013 fishing year.

16. Additional Corrections

In addition to the changes specified above, the following changes to the regulations are approved to correct incorrect references and to further clarify the intent of the Council.

In § 648.4(a)(1)(ii), this rule corrects a misspelling of the word ''multispecies.''

In § 648.80(a)(3)(vii), this rule clarifies that rockhopper and roller gear requirements of the GOM/GB Inshore Restricted Roller Gear Area apply only to groundfish vessels on a NE multispecies DAS or sector trip. This correction is made at the request of the Council, in response to a letter sent April 30, 2012.

In § 648.82(k)(2), language prohibiting sector vessels from leasing DAS is removed. This language is left over from Amendment 13 and should have been removed in the final rule implementing Amendment 16, which allowed sectors vessels to lease DAS among themselves.

In § 648.82(n)(2)(i), this rule clarifies that common pool trimester TAC area closures are intended to apply to common pool vessels using gear capable of catching groundfish only when on a

NE multispecies DAS, and not when participating in exempted fisheries.

In § 648.82(n)(2)(ii)(A), this rule corrects the coordinates for the GB Cod Trimester TAC Area. Amendment 16 defined the area as being composed of statistical areas 521, 522, 525, and 561. However, the coordinates used to define the GB Cod Trimester TAC Area were incorrectly transposed in the Amendment 16 final rule and included statistical area 562; this is rectified by this action.

In § 648.82(n)(2)(ii)(B), Points 4 and 5 incorrectly list the N. Lat. as 43°20′, and this action corrects them to read 43°10′.

In § 648.82(n)(2)(ii)(H) and (I), the original coordinate AP8 was unnecessary and is removed by this action.

In § 648.82(n)(2)(ii)(J), this rule corrects the coordinates for the GB Winter Flounder Trimester TAC Area. Amendment 16 defined the area as being composed of statistical areas 522, 525, 561, and 562. However, the coordinates used to define the GB Winter Flounder Trimester TAC Area were incorrectly transposed in the Amendment 16 final rule and did not include statistical areas 525 and 561; this is rectified by this action.

In § 648.84(e), this rule adds a regulatory definition for the rope separator trawl. The definition for the rope separator was inadvertently removed from the regulations by the Framework 47 final rule. This rule adds the regulatory definition back into the regulations.

In § 648.85(a)(3)(iv)(E), the regulations allow for the Regional Administrator to close the Eastern U.S./Canada Area to all vessels subject to a particular TAC allocation if that particular TAC allocation is projected to be caught. This rule clarifies that this is only to apply to allocations to sectors and common pool vessels, and not the scallop fishery or other ACL components. Amendment 16 and Framework 48 clarified that inseason and reactive accountability measures for sub-ACLs for non-groundfish components of ACLs are to be developed and administered by those respective FMPs.

In § 648.85(b)(7)(iv)(H), an explicit reference to possession limits for other groundfish stocks, including stocks prohibited from being landed, in § 648.86 is added in the description of landings limits for the Closed Area I Hook Gear Haddock Special Access Program (SAP).

In § 648.85(b)(8)(v)(C), the timing of the pre-trip notification to the observer program for a US/CA trip is revised from 72 hr to 48 hr. Prior to Amendment 16, vessels taking trips into the U.S./Canada were required to notify the observer program of their intent to take a trip 72 hr prior to departure. With the implementation of Amendment 16, NMFS established a standardized call-in requirement to the observer program that reduced this lead time to 48 hr.

In § 648.85(d), a period that was incorrectly inserted after ''NE'' is removed.

In § 648.86(a)(3)(ii), periods that were incorrectly inserted after ''NE'' is removed.

In § 648.86(a)(3)(ii)(A)(*3*), the table title for the GB Herring Haddock AM Area was incorrectly published as the GOM area. This rule corrects the table title.

In § 648.87(b)(1)(ii), sector stock area coordinates that were to be implemented by Framework 44 but were inadvertently left out of the regulations are added through this rule as paragraphs (A) through (F).

In § 648.90(a)(5)(iii), a period that was incorrectly inserted after ''NE'' is removed.

In § 648.201(a)(2), the prohibition on landing of haddock is clarified to apply only to the haddock stock area for which the AM has been triggered. An explicit reference is added to the haddock possession restrictions in the NE multispecies regulations at § 648.86(a)(3)(ii)(A).

Comments and Responses

NMFS received 75,393 comments during the comment period on the Framework 48 proposed rule, including 75,263 form letters opposing allowing sectors access to groundfish closed areas. Letters were also received from the Council, the USCG, MADMF, the Maine Department of Marine Resources (MEDMR), 7 environmental organizations, 3 research institutions, numerous members of the academic community, a whale watch company, 7 commercial fishing industry groups, 2 recreational fishing associations, a commercial fish dealer, and 106 individuals. Some of the comments did not address the proposed measures and thus they are not included here. Where possible, responses to similar comments on the proposed measures have been consolidated.

Comment 1: NMFS received one comment on the economic analysis in the draft Framework 48 EA and the IRFA. MADMF commented that the economic analysis of measures in Framework 48 should have focused on the individual level and that any other level of analysis would not result in accurate characterizations about the impacts of Framework 48 measures on individuals. MADMF also questioned the assumption that impacts to vessels would also be applicable to ownership entities and noted that the conclusion in the IRFA that Framework 48 measures would not have a disproportionate impact on small entities seems to contradict the conclusion elsewhere in Framework 48 that small vessels would suffer the highest percent reduction in net revenues from sector monitoring requirements.

Response: NMFS believes the commenter may be misunderstanding the economic analyses in Framework 48. It appears the commenter has misinterpreted the conclusions in the economic analysis for this action. Individual measures are analyzed independently relative to the no action alternative for each particular measure, because each measure must be approved or disapproved based on its individual merits. The cumulative impacts of an action and all other foreseeable actions are also analyzed in the cumulative effects analysis of the EA. For example, the analysis suggested that reducing the commercial minimum fish sizes could increase revenues and, thereby, serves as a mitigation measure, when compared to not reducing the minimum sizes. Extrapolating the conclusion of the economic impact of an individual measure to impacts of the entire action is not appropriate. It is not clear what MADMF defines as an ''individual'' and, therefore, what analysis it believes is missing. The term ''ownership entity,'' as opposed to a vessel, has a specific meaning in analyses under the Regulatory Flexibility Act (RFA) for Framework 48 and the proposed rule, which is where these terms are used. Similarly, small vessels are not the same as small entities. A small vessel refers to the relative size or length of the vessel itself as some measure of capacity to generate revenue. As described in the IRFA, the Small Business Administration (SBA) defines a small business as one that is: independently owned and operated; not dominant in its field of operation; has annual receipts not in excess of $4.0 million in the case of commercial harvesting entities, or $7.0 million in the case of for-hire fishing entities; or if it has fewer than 500 employees in the case of fish processors, or 100 employees in the case of fish dealers. This is the definition of a small entity used for the purposes of an RFA analysis. Thus, a small or large entity could own or control a number of small vessels. The assumptions used to aggregate vessels or permits to the ownership entity level was explained in the RFA section of Framework 48 (section 8.11.2), and conforms to NMFS

internal guidelines and the SBA's guidelines for economic analyses to comply with the RFA. The RFA does not require an analysis of comparative impacts between small entities, although this has been done to a degree for this action, but rather the comparative impact between large and small entities and alternatives that may reduce those comparative impacts, if they disproportionately affect small entities. NMFS's methods for predicting outcomes do not yet include agent-based models capable of predicting individual vessel-level outcomes, though NMFS is continually improving its data sources and analytical methods. In addition, the ability to report on distributional impacts at the individual vessel level is hindered by the need to protect the confidentiality of individually-reported data at this level. Thus, for some measures, such the reduced commercial minimum fish sizes, the economic impacts were addressed qualitatively.

Status Determination Criteria

Comment 2: The Island Institute commented in support of the revised status determination criteria and how these measures will make way for setting appropriate ABCs and ACLs in Framework 50.

Response: NMFS agrees that the revised status determination criteria represent the best available science and would allow the appropriate ABCs and ACLs to be set beginning in FY 2013 to end overfishing and continue the rebuilding of groundfish stocks. NMFS has approved the revised status determination criteria in this final rule.

Comment 3: The Conservation Law Foundation (CLF), MADMF, and the Northeast Seafood Coalition (NSC) raised questions related to the methods and results of the assessments for SNE/MA yellowtail flounder, and GOM and GB cod. CLF questioned NMFS and the Council's determination that the revised SNE/MA yellowtail flounder status determination criteria represent the best available science when the recruitment scenarios that were considered by the SARC were almost equally likely, but resulted in such different stock status. MADMF pointed out that NMFS proposed two numerical values for status determination criteria for GOM cod, but did not specify which it preferred and proposed to approve. MADMF questioned why the SARC did not conclude that natural mortality for GOM cod would be sustained at 0.4 or higher. MADMF also asked NMFS to clarify why the GOM and GB cod assessments did not conclude there has been a change in productivity for these stocks as for SNE/MA yellowtail flounder. NSC challenged that the revised status determination criteria do not represent the best available science because the assessments did not consider alternate methods for deriving F_{MSY} proxies. NSC asked NMFS to ask the Council and SSC to consider alternate methods for establishing F_{MSY} other than $F_{40\%MSP}$ in stock assessments. They challenged that this is a policy decision with management implications and therefore should be made by the SSC and Council, rather than the NEFSC.

Response: NMFS first notes that an error was made in the Framework 48 proposed rule with respect to the overfishing status of SNE/MA yellowtail flounder under the two recruitment scenarios. The Framework 48 proposed rule erroneously stated that SNE/MA yellowtail was experiencing overfishing under the ''two-stanza'' recruitment scenario, when both recruitment scenarios actually led to the conclusion that this stock was not experiencing overfishing.

With respect to the reference points for GOM cod, two sets of status determination criteria were proposed because the SARC accepted two models at the assessment. These models resulted in one maximum fish mortality threshold, but two sets of biomass reference points. Although this approach for determining numerical values for stock status is less straightforward, both models concluded that GOM cod is overfished and undergoing overfishing. NMFS has approved both sets of revised reference points for GOM cod in this final rule.

NMFS understands CLF and MADMF's concerns about the amount of uncertainty in the biomass reference points for SNE/MA yellowtail flounder and GOM cod. SARC 54 modeled possible reasons for reduced recent recruitment of SNE/MA yellowtail flounder, but could not fully explain the low productivity of this stock. SARC 55 reviewed information on natural mortality of GOM cod, but was unable to reach a decision on which natural mortality values best characterized the system. Investigating possible sources of changes in productivity was not a specific TOR in the cod assessments, as it was in the SNE/MA yellowtail flounder assessment. However, the TORs for these assessments were vetted by the Northeast Regional Coordinating Committee (NRCC), which includes representatives of the New England and Mid-Atlantic Councils and their SSCs. There are basic TORs that are the foundation for the TORs of all assessments, but stock-specific TORs may be added based on research recommendations, generated by developments in the science or politics of a particular stock, and vetted by the NRCC. Even without a specific TOR, the SAW working group reviews all available information and the public may submit papers to the working group to consider in their analyses and deliberations. A detailed discussion of the review panels' deliberations are available in the assessment reports and review panel summaries on the NEFSC Web site: *http://www.nefsc.noaa.gov/saw/reports.html.* More exploration is needed, yet the results of the SARC 54 and 55 assessments, even with the acknowledged uncertainty, represent the best scientific information available about the state of SNE/MA yellowtail flounder and GOM cod at this time. These reference points were endorsed by both the SSC and NEFSC for use in managing these stocks. NMFS has approved the revised status determination criteria in this final rule.

Regarding NSC's assertion that the proposed status determination criteria do not represent the best available science because the assessments did not consider alternate methods for deriving F_{MSY}, the Framework 48 proposed rule did not propose or solicit public comment on assessment methods. NMFS can only approve, partially approve, or disapprove the status determination criteria proposed in Framework 48 based upon an evaluation of its compliance with the Magnuson-Stevens Act, the National Standards Guidelines, the FMP, and other applicable law. It would not be appropriate or permissible for NMFS to choose an alternate F_{MSY} reference point through this final rule that was not considered by the SSC or Council. That being said, the TORs generated for each assessment, and vetted by the NRCC with representations by both Councils and their SSCs, specifically direct the SAW/SARC to determine F_{MSY} or, if a direct estimate of F_{MSY} cannot be determined, to select an appropriate proxy. Thus, F_{MSY} or methods for determining its proxy are evaluated and recommended by each SAW and approved by each SARC, and are not pre-determined as NSC seems to suggest, although an F_{MSY} proxy of 40%MSP may be the result in many assessments. The NSC has already forwarded its concerns about the determination of F_{MSY} proxies to the Council for consideration and the Council may choose to pursue this issue for future assessments. However, the numerical estimates of F_{MSY} proposed in Framework 48 for SNE/MA yellowtail

flounder, GOM and GB cod, were reviewed and accepted by the review panels at SARC 54 and 55, the SSC, and the Council, as the best science available for management of these stocks. Subsequently, NMFS has approved these status determination criteria as consistent with the requirements of the Magnuson-Stevens Act and the FMP.

Comment 4: The NEFMC, MEDMR, and Maine Coast Fishermen's Association (MCFA) urged NMFS to implement updated status determination criteria for white hake as soon as possible based upon the results of SARC 56 that recently became available. The results of this latest benchmark assessment suggest an increase in the FY 2013 ACL for white hake would be warranted, which would provide additional economic opportunity to groundfish vessels in FY 2013.

Response: NMFS agrees that the results of the SARC 56 benchmark assessment for white hake represent the best scientific information available for this stock and implements updated status determination criteria for white hake through this final rule (Item 7). The revised status determination criteria were not proposed for public comment in the Framework 48 proposed rule because the assessment results were not yet available (see Item 1 of the proposed rule). However, NMFS believes it is appropriate to implement the updated status determination criteria through this final rule because the Council recommended and analyzed updated status determination in Framework 48 in case the assessment results became available in time for rulemaking. In addition, the SARC 56 assessment shows a change in the stock's status, from overfished and subject to overfishing to neither overfished nor undergoing overfishing, and that is expected to meet its rebuilding end date of 2014. NMFS is implementing the revised white hake status determination criteria with a post promulgation comment period to allow for additional public comment on this measure.

GB Yellowtail Flounder and SNE/MA Windowpane Flounder Sub-ACLs

Comment 5: Four commenters supported establishing sub-ACLs of SNE/MA windowpane flounder for the scallop fishery and other sub-component fisheries, including revising the SNE/MA windowpane flounder commercial groundfish fishery AM to apply to other sub-component fisheries with catch of this stock. AFM generally supported the allocation of this stock to the scallop fishery. NSC, CLF, and Oceana commented in support of both proposed sub-ACLs and the revised AM. CLF commented that these measures are justified given the significant overages of the SNE/MA windowpane flounder ACL in recent years. Oceana also commented that the proposed sub-ACLs increases accountability for fisheries with more than a *de minimis* catch of groundfish.

Response: NMFS agrees that the proposed measures increase accountability among fisheries with a measurable catch of groundfish. Sub-ACLs and AMs encourage these fisheries to minimize catches of SNE/MA windowpane flounder, consistent with the objectives of the FMP and National Standard 9 of the Magnuson-Stevens Act. NMFS has approved these measures through this final rule.

Comment 6: NMFS received seven comments in support of the revised GB yellowtail flounder sub-ACL for the scallop fishery. One individual simply expressed support for the revised sub-ACL as proposed. MEDMR, Associated Fisheries of Maine (AFM), NSC, and one individual supported the revised sub-ACL, because it improves accountability for the scallop fishery and holds each component of the fishery responsible for its own catches. NSC and MEDMR commented that the fixed percentage reflects historical catch. CLF and MEDMR believe the revised allocation creates an incentive for the scallop fishery to reduce bycatch of GB yellowtail flounder. AFM and the Portland Fish Exchange also commented that the fixed percentage provides more stability for groundfish fishermen because it is a more predictable allocation.

Response: NMFS agrees that the fixed percentage provides stability to the scallop and groundfish fisheries by simplifying the allocation scheme. NMFS also agrees that the revised sub-ACL provides an incentive for the scallop fishery to reduce its catch of GB yellowtail flounder and has approved this measure in this final rule.

Comment 7: Fisheries Survival Fund (FSF) supported the allocation of 40 percent of the GB yellowtail flounder U.S. ABC in FY 2013, because it provides for most of the scallop fishery's projected need, while providing an allocation for the groundfish fishery and maintaining an incentive for the scallop fishery to avoid yellowtail flounder. However, FSF opposed the allocation of 16 percent of the GB yellowtail flounder U.S. ABC in FY 2014 and each year after, and 36 percent of the SNE/MA windowpane flounder ACL, because they will result in lost scallop revenues over the long term. FSF also opposed the proposed sub-ACL of SNE/MA windowpane flounder for the other sub-component fisheries, because it will reduce revenues from the fluke fishery. FSF argues that the Council made these allocations in order to maintain a directed groundfish fishery for GB yellowtail flounder. As an alternative, FSF argues, the Council could have closed the directed fishery for GB yellowtail flounder and implemented a zero possession limit for GB yellowtail flounder as it has done for SNE/MA windowpane flounder to promote the greater good, the prosecution of the more valuable scallop and fluke fisheries. FSF argues that by constraining the scallop and fluke fisheries with these sub-ACLs, the Council has not maximized the overall benefit to the nation and reduced the ability of the scallop fishery to achieve optimum yield on a continuing basis, violating National Standard 1.

FSF further contends that these measures do not minimize adverse economic impacts on fishing communities as required by National Standard 8, because they sacrifice valuable scallop and fluke fishery landings for the communities that depend on these revenues, in favor of the less valuable GB yellowtail flounder landings. FSF also urged NMFS to accelerate access for the scallop fishery to the northern edge of GB if it approves these measures to mitigate the economic impacts of the proposed measures.

Response: NMFS disagrees with FSF that the proposed sub-ACLs for SNE/MA windowpane flounder and GB yellowtail flounder are not consistent with the Magnuson-Stevens Act. FSF suggests that the overall benefit to the nation would be to allow the unrestrained prosecution of the scallop and fluke fisheries, based solely on their higher economic value when compared to the groundfish fishery. However, the concept of overall benefit to the nation must be evaluated in the context of optimum yield, which requires consideration and balancing of other factors in addition to economic values, including food production, recreational opportunities, the protection of marine ecosystems, and which can only be *reduced* based on economic, social or ecological factors. And even at OY, management measures must still prevent overfishing. Economic, social and ecological factors concerning the FMPs goals of preserving fishing opportunities for groundfish vessels and minimizing negative impacts on fishing communities, and reducing bycatch of groundfish stocks, contributed to the Council's allocation decisions for these sub-ACLs. OY must also be consistent

with other National Standards of the Magnuson-Stevens Act, particularly in this instance, National Standards 4 and 8. To focus only on OY, would potentially run afoul of National Standard 4 which requires that management measures should be fair and equitable to all fishermen and that no particular entity acquires excessive shares of fishing privileges. Also, to favor the scallop industry by maximizing overall benefits to the nation would be inconsistent with National Standard 8 which requires that management measures must take into account importance of fishery resources to fishing communities in order to provide sustained participation of such communities in fishing and, to the extent practicable, minimize adverse impacts on such communities. The new sub-ACLs are consistent with these principles.

Allocating SNE/MA windowpane flounder sub-ACLs to the scallop and fluke fisheries was necessary to prevent overfishing and ensure accountability for catches of this stock, consistent with the requirements of the National Standard 1. This is a non-allocated stock, for which possession is prohibited and all catch is discarded. As discussed in Item 8 of the preamble, until Framework 47, only the commercial groundfish common pool fishery had an AM for this stock. However, the lack of accountability for catches in the ''other sub-component'' fisheries, including the scallop and fluke fisheries, resulted in total catches that exceeded the ABC and OFL for this stock in FY 2010 and again in FY 2011, despite the implementation of an AM for the common pool fishery in FY 2011 to account for the overage in FY 2010. Catch by non-groundfish fisheries alone exceeded the ABC in FY 2010 and the OFL in FY 2011. Framework 47, and now Framework 48, modified the commercial groundfish fishery AMs to make them more effective. However, as these AMs do nothing to constrain total catches of SNE/MA windowpane flounder in the scallop and other sub-component fisheries where the majority of catch is taken, maintaining a sub-ACL and AMs only for the groundfish fishery does not sufficiently reduce the risk of overfishing and would not be consistent with National Standard 1 or the goals of the FMP. Additional sub-ACLs and corresponding AMs for these fisheries are necessary to constrain catches of this stock by the scallop and other sub-component fisheries and correct any overages, and to prevent overfishing, as is required by the Magnuson-Stevens Act. This measure also ensures equity by holding the component of the fishery responsible for an overage accountable for its catch.

The Council considered not allowing landings of GB yellowtail flounder, meaning it would be considered a non-allocated stock, in this action, but rejected this alternative out of concern that there would be no incentive to minimize discards of this stock, and unrestrained catches would quickly exceed the ABC and ACL being considered for FY 2013. Taking a stock from allocated to non-allocated and prohibiting its possession does not absolve the Council of having to prevent overfishing and ensure accountability for catches of this stock. As demonstrated by the Court's decision on Amendment 16 in *Oceana* v. *Locke et al.,* prohibited possession may not be a sufficient AM, by itself, and if the Council had decided not to allocate this stock in FY 2013, it would still have had to ensure accountability of any overages of the total ACL, including catches by the scallop fishery. Reducing accountability would also be inconsistent with the Council and NMFS' obligations under the joint management agreement with Canada for this stock, and the goals of the FMP, by undermining the integrity of the TACs set under that agreement. The importance of some landings of GB yellowtail flounder to some vessels in the groundfish fishery also weighed on the Council's decision not to make this stock prohibited. Regardless, Framework 48 does not recommend making GB yellowtail flounder a non-allocated stock and NMFS cannot unilaterally do so because it may only approve or disapprove the measures included in the framework.

This action proposed alternative methods for calculating the scallop fishery's sub-ACL, including a method based on an estimate of projected catch and a fixed percentage. The Council selected the fixed percentage method as its preferred alternative out of concern that, with a declining ABC, scallop catches would become a larger part of the total catch if the allocation was calculated based on projected catch of yellowtail flounder. An allocation based on projected catch does not take into account changes in the ABC or the relative health of the stock. A fixed percentage also provides a greater incentive for the scallop fishery to reduce bycatch of these stocks, than an allocation based on projected bycatch, consistent with the goals of the FMP and National Standard 9, to reduce bycatch at the extent practicable. In addition, the Council believed it would be inequitable to allow scallop catches to become a larger portion of the U.S. ABC and thereby reduce the groundfish fishery's historic level of participation in this fishery. This would not be consistent with the goals and objectives of the FMP as described in Amendment 16 to maintain a directed commercial groundfish fishery and the shoreside infrastructure and communities that rely on it, and the requirements of National Standard 4, which requires that allocations be fair and equitable among fishermen. The Council took a similar approach with the SNE/MA windowpane flounder sub-ACL for the scallop fishery.

These factors also influenced the Council's decision to select the fixed percentages of 16 and 36 percent of the ABCs for GB yellowtail flounder and SNE/MA windowpane flounder, respectively. For both stocks, the Council based these percentages on recent catch history. For SNE/MA windowpane flounder, the Council selected the 90th percentile of the highest scallop catches as a proportion of total catches in recent years (2010). This was also the year with the highest scallop fishery discards by weight in the time series. This resulted in an allocation of 36 percent of the ABC. Whether this will be constraining in a particular fishing year depends upon the ABC and resultant sub-ACL allocation, which was analyzed for FY 2013–2015 in Framework 50, and the AM to be developed in a future scallop action. Similarly, the fixed percentage allocation for yellowtail flounder was based on the highest amount of scallop discards as a proportion of total catches of GB yellowtail flounder from 2001–2011. The Council considered a range of 8–16 percent for this stock, with 8 percent being the average percent of total catch in the time series and 16 percent being the highest total catch (2006). For both stocks, the Council selected the percentages that would provide the greatest allocation for the scallop fishery, while still meeting the needs to minimize bycatch to the extent practicable, maintain a fair and equitable allocation for the groundfish fishery, consistent with the FMP and the Magnuson-Stevens Act. In addition, the scallop fishery's AMs for both stocks are only triggered if it exceeds its sub-ACL by more than 50 percent, or causes an overage of the overall ACL. This effectively provides an additional 50 percent of the scallop fishery sub-ACL in any given year, if left uncaught by other components of the ACL. Although an even larger allocation for the scallop and other non-groundfish fisheries would seemingly be justified based on

a strict comparison of the economic values of these fisheries versus the groundfish fishery, the Council is expressly prohibited from making an allocation decision based solely on economic efficiency by National Standard 5 and must take into account other provisions such as fairness and equity and impacts on fishing communities. For these reasons, NMFS approves the proposed sub-ACLs for SNE/MA windowpane flounder and GB yellowtail flounder as consistent with the goals and objectives of the FMP and the requirements of the Magnuson-Stevens Act.

FSF requested that, if NMFS approved these measures in Framework 48, it should accelerate access for scallop vessels to the northern edge of Georges Bank. This area is currently a habitat closed area for the purpose of minimizing the adverse effects of fishing on habitat. As FSF is already aware, there is not a mechanism in the scallop FMP that allows NMFS to grant scallop vessels access to fish in this area without explicit Council action. The Council is already reviewing this area and allowing access to this area as part of the comprehensive review of habitat and other closed areas in the Omnibus EFH Amendment, and is targeting implementation of any measures in 2014.

Comment 8: NMFS received five comments supporting the proposed GB yellowtail flounder sub-ACL for small mesh fisheries. NSC and AFM commented generally in support of the proposed measure. Oceana and one individual supported the allocation because it holds each fishery component accountable for its own catch. Oceana also urged NMFS and the Council to continue evaluating groundfish catch by other fisheries and to establish sub-ACLs whenever catches are above *de minimis* levels. CLF noted that the establishment of a sub-ACL means little without an effective AM, and argued that the public should be able to know when AMs are to be developed.

Response: NMFS agrees that the proposed measure increases accountability for fisheries responsible for catches of groundfish. By providing an incentive for small mesh fisheries to reduce catches of GB yellowtail flounder, this measure is consistent with National Standard 9 and the objectives of the FMP to minimize bycatch of groundfish stocks to the extent practicable. NMFS has approved the GB yellowtail flounder sub-ACL for small mesh fisheries. NMFS will continue to encourage the Council to evaluate groundfish catch in non-groundfish fisheries in the biennial review process, as well as on an ad-hoc basis if any of these fisheries appear to have caused an overage. NMFS agrees with CLF's point that AMs for small mesh fisheries must be developed as soon as possible to provide an incentive for small mesh fisheries to comply with the new sub-ACL. The Council has begun planning the development of the next framework action and AM for this sub-ACL is slated to be included for FY 2014 to cover any overage in FY 2013, if necessary. NMFS believes this provides a sufficient incentive to constrain catches within this sub-ACL in FY 2013, while providing opportunity for thorough development and evaluations of AMs with participation by small mesh fishery participants.

Recreational Fishery AM

Comment 9: CLF commented in support of revising the recreational fishery AM to allow the Regional Administrator to proactively adjust measures to ensure that the recreational fishery sub-ACLs are not exceeded. MADMF urged that NMFS should also consult directly with state agencies about proactive changes to recreational fishery measures, not just as Council members through the Council process.

Response: NMFS agrees that the proposed revision to the recreational fishery AM would improve accountability in the recreational fishery. Currently, the recreational fishery AM only allows the Regional Administrator to change recreational measures if an ACL is exceeded. In addition, due to the delay in availability of recreational catch data at this time, AMs can only be implemented in the third year following an overage. The Council may initiate a management action to revise recreational measures for any given fishing year commensurate with the recreational sub-ACLs being proposed or implemented for that year. However, this process offers little flexibility for the Council or NMFS to revise measures if those in place are expected to result in catches higher than the recreational allocations specified for the coming year and there is no time to complete a framework adjustment. Allowing NMFS to adjust recreational fishery measures proactively before the start of a fishing year reduces the likelihood that a recreational sub-ACL will be exceeded in that fishing year. This allows NMFS and the Council to adapt to changing fishery conditions, by evaluating recreational measures before the start of the fishing year to ensure those measures facilitate a target catch consistent with the sub-ACLs specified for the recreational fishery. NMFS has approved the revised recreational fishery AM in this final rule. The Regional Administrator may only implement proactive measures to ensure that the recreational fishery sub-ACLs are not exceeded after consultation with the Council, which includes representatives from all the New England states. This consultation process built into this measure affords the state directors, or their representatives, to voice any concerns that they may have during this process.

Comment 10: NSC opposed revising the recreational fishery AM to allow the Regional Administrator to liberalize recreational measures inseason to facilitate the recreational fishery catching its sub-ACLs. NSC argued that this reflects an inconsistent application of the National Standard 1 requirements for AMs between the recreational and commercial fisheries. NSC also questioned the data NMFS would use to project recreational fishery effort inseason to make such a determination, given the limitation on recreational data timeliness.

Response: NMFS believes that NSC has misunderstood the proposed revision to the recreational fishery AM. The intent of the proactive AM was not to allow NMFS to project recreational fishery catch and revise recreational measures inseason. The intent of the Council in Framework 48 was for NMFS to follow a procedure similar to the Council's to revise recreational measures, using the Bioeconomic Length-structured Angler Simulation Tool (BLAST) model to identify suites of measures that would achieve but not exceed the recreational sub-ACLs in the coming fishing year, to gather input on these measures from the RAP and Council, and implement them before the start of the fishing year. The text of this measure in Framework 48 and the regulations implementing this measure state that the revised measures would be implemented prior to the start of the fishing year ''to the extent possible,'' because the Council acknowledged the possibility that even this abbreviated, adaptable process may not be completed before the start of the fishing year in some cases. The measures for FY 2013 are a perfect example, where the Council did not take final action on FY 2013 ACLs until January 2013 and NMFS and the Council could not develop recreational measure alternatives for FY 2013 until February 2013.

NMFS contends that this change to the recreational AM is consistent with the implementation of AMs for the commercial fishery. Sector allocations, as hard TACs, are inseason AMs that are

specified as a proportion of the each groundfish fishery sub-ACL for each allocated groundfish stock. This means that, unlike recreational fishery measures, they automatically adjust to increases or decreases in ACLs from one fishing year to the next. Sectors also receive several regulatory exemptions every year to increase operational flexibility and facilitate achieving their ACEs. The common pool sub-ACLs also automatically adjust from one year to the next, and NMFS has the authority to project and revise common pool trip limits before the start of each fishing year and inseason to ensure common pool sub-ACLs are achieved but not exceeded. Contrary to NSC's opinion, the addition of a proactive AM for the recreational fishery would actually result in more consistent application of AMs across fishery components.

Commercial Groundfish Fishery AMs

Comment 11: The Council and a few other commenters pointed out an error in the coordinates for the proposed Atlantic halibut AM areas, and requested NMFS correct this error in the final rule.

Response: The coordinates for the Atlantic Halibut Fixed Gear AM Area 1 on page 67 of the draft Framework 48 EA and, subsequently, in the proposed regulations, located this area overlapping the Atlantic Wolffish Fixed Gear AM Area 1 to the northwest of Closed Area 1. However, Atlantic Halibut Fixed Gear AM Area 1 actually overlaps Atlantic Wolffish Fixed Gear AM Area 2 along the western edge of the Western GOM Closed Area. The figure on page 68 of the draft Framework 48 EA showed the correct halibut AM areas. NMFS has corrected the coordinates in the regulations implementing this final rule.

Comment 12: CLF and Oceana generally supported the proposed changes to AMs for non-allocated stocks in Framework 48. CLF and Oceana supported the revised timing for these AMs, and the creation of area-based AMs for Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder, because they increase accountability for and constrain catches of these stocks. However, Oceana opposed the fact that these AMs would be effectively triggered by an overage of the ABC rather than the ACL, arguing that this approach is illegal and not consistent with National Standard 1 guidelines. Oceana also took issue with the fact that these AMs only account for an overage of up to 20 percent of the ACL and that any overage larger than that would require future action by the Council. Oceana contended that AMs are required to be automatic adjustments to fishery measures and that referring the matter to the Council for further action does not satisfy these criteria, especially in light of recent overages of the SNE/MA windowpane flounder ACL by more than 100 percent. Oceana urged NMFS to partially disapprove these portions of the reactive AMs and to refer them back to the Council for further modification.

Response: NMFS agrees with the commenters that the revisions to non-allocated stock AMs proposed by Framework 48 would increase accountability for catches of these stocks and reduce the likelihood of an ACL being exceeded. NMFS understands Oceana's concerns regarding the trigger point for these AMs being the ABC, rather than the ACL. As discussed in Item 6 of the proposed rule preamble, using the ABC as the trigger point for these AMs was not out of any intention to provide an additional buffer for catches above the ACL. Rather, this was more an artifact of the design of the area-based AMs. The Groundfish PDT was not able to design effective area-based AMs that would account for an overage of only a few percent, while still being effective. Gear restricted areas or closures that small can be easily undermined by a shift of effort to other areas. NMFS does not consider the concept of this trigger for AMs to be illegal or inconsistent with National Standard 1 guidelines. Defining the trigger as an overage greater than the management uncertainty is in concept the same as establishing an annual catch target (ACT) and a higher ACL (e.g., an ACL set equal to the ABC) which serves as the trigger for AMs, which is allowed under National Standard 1 guidelines. So, in approving these AMs, NMFS has considered the ACL for these stocks, in effect, to be ACTs and the trigger based on exceeding the management uncertainty to be, in effect, the ACL. In this sense, these AMs are entirely consistent with National Standard 1 guidelines. By considering these AMs in this fashion, Oceana's comments are really about nomenclature, rather than any fundamental inconsistency with the concepts of Magnuson-Stevens Act or National Standard 1 guidelines. Furthermore, this is the same design as the AMs for windowpane flounder and ocean pout implemented through Framework 47, which Oceana supported.

These AMs are to account for possible overages by non-groundfish fisheries shown to have *de minimis* catches of groundfish. It is not expected that these components themselves are likely to exceed the ACL by more than 20 percent. When catches by these fisheries have risen above *de minimis* levels, such as in the case of overages of the SNE/MA windowpane flounder in FY 2010 and FY 2011, the Council has responded by recommending sub-ACLs and fishery/gear-specific AMs for these fisheries, as is currently proposed through Framework 48. In addition NMFS zero possession for SNE/MA winter flounder and Atlantic wolffish appear to have effectively kept catches within allowable levels in recent years. If zero possession continues to be an effective proactive AM, the reactive AM will likely not be triggered. Subtracting catches by the scallop and fluke fisheries, which will now be constrained by ACLs, coupled with the proactive AMs for these stocks, it is not clear that such large overages by the remainder of the other sub-component fisheries is at all likely and, thus, that these AMs would not be sufficient.

Oceana requested that NMFS partially approve these AMs and refer the trigger point and AM for large overages of more than 20 percent back to the Council. NMFS can only partially approve measures when there are distinct, severable components that would not substantively affect the measure if one component were approved and another disapproved. The trigger point is an integral part of the proposed AMs, thus NMFS cannot simply disapprove it without disapproving the whole measure thereby leaving these stocks with no reactive AM. And it's not clear how disapproving implementing the area-based AMs for large overages and referring this back to the Council would be much different than what would be required by the AM in the event of a large overage. As Oceana points out, these reactive AMs increase accountability for catches of these stocks by ensuring adjustments are made to account for overages and by providing an incentive to restrain catches of these stocks. NMFS believes it would be better to have some reactive AMs in place than none, to constrain catches of these stocks and to address the court remand. For these reasons, NMFS has approved these measures in Framework 48. The Council may continue to modify these measures to make them even more effective through a future action.

Comment 13: NSC, Portland Fish Exchange, CCCHFA, and MCFA opposed the proposed revisions to AMs for non-allocated stocks. Specifically, NSC did not support revising the AM timing or reactive AMs for non-allocated stocks, because they argue that the data used for these determinations is not reliable or available in a timely manner to provide sufficient notification to the

industry of the implementation of an AM in the following fishing year. NSC also questioned whether this modification was necessary, as it was not part of the court remand to address non-allocated stock AMs. Portland Fish Exchange questioned whether such measures are necessary when SNE/MA winter flounder may be allocated by Framework 50, and halibut and wolffish are rarely encountered and are returned to the water when caught. CCCHFA did not support the application of area-based closures in an output based fishery. CCCHFA and the Maine Coast Community Sector (MCCS) also stated that Atlantic halibut is in better condition than the most recent assessment indicated and, as a result, more frequent encounters of this stock could trigger the AMs as soon as FY 2013 or 2014. CCCHFA called on NMFS to conduct an assessment for this stock and to reevaluate the proposed AM in light of the results of that new assessment. MCFA and MCCS expressed concern that the Atlantic Halibut Fixed Gear AM Areas would have significant and disproportionate economic impacts on fishing businesses from Maine that fish this area, with no corresponding benefits to the stock, because the real issue of unrestrained state fishery catches remain unaddressed. MCFA and MCCS argued that vessels and sectors that fish in these areas have not had adequate time to prepare sector exemptions or develop gear modifications that would allow continued access to this area with reduced catches of halibut. MCCS suggested that the fixed gear AMs are too broad, and should instead target sink gillnets using tie-downs to target monkfish in this area, which they believe are responsible for the most bycatch. MCCS also requested clarification as to how the AMs would be in place if triggered.

Response: NMFS recommended that the Council revise the timing of non-allocated stock AMs, not because it was remanded by the Court, but because it would improve the effectiveness of these AMs. To be consistent with the National Standard 1 Guidelines, AMs should correct the problems that caused an overage as soon as possible. Currently, the AMs for non-allocated stocks are implemented in the second year following an overage of the total ACL. This delay may not be needed in all cases, but the current AMs do not allow for the possibility that these AMs could be implemented sooner if reliable information is available. For example, fishery dependent data is available in almost real time in the commercial groundfish fishery. If information was available during Year 1 that the commercial groundfish fishery had exceeded the overall ACL for ocean pout, under the revised AM timing, the respective AM for the stock would be implemented at the start of the next fishing year (Year 2). The revised timing would also allow for improvements in the timeliness of data streams from other fisheries, which NMFS is continually improving. That is why NMFS has approved the revised AM timing through this final rule. In addition, NMFS and the Council understand the need to provide stability for groundfish vessels. Thus, any applicable AMs for the non-allocated stocks would only be implemented at the start of a fishing year.

These reactive AMs for non-allocated stocks are necessary in order to rectify overages and reduce the likelihood of overages in consecutive fishing years. Although landings of these stocks are currently prohibited and, therefore, most catch is made up of discards, the Magnuson-Stevens Act requires that all mortality be accounted for. This means that even if overages of the ACL are caused by discards, an AM must be applied to reduce the likelihood of such an overage happening again and to prevent overfishing. Furthermore, the Council's inability to directly control state fishery catches, does not absolve the Council of doing what it can to prevent overages of the overall ACL. The importance of reactive AMs was further clarified by the Court decision in *Oceana* v. *Locke et al.* The Council designed these AMs around hotspots of bycatch for these stocks, so that if the overall ACL is exceeded, total catch of that stock might be reduced and, therefore, the likelihood that an overage would be repeated would be reduced. Locating the AMs in areas with little impact on fishing effort and bycatch, although that might reduce the impact on vessels trying to target other stocks, would not be effective. During the development of Framework 47, the Groundfish Committee briefly considered allocating these stocks to sectors, which would provide output-based AMs like stocks currently allocated to sectors. However, the Groundfish Committee remained concern that allocations of these stocks would be too restrictive.

The Council may consider further modifications to these AMs if changes in stock size shift hotspot areas of high bycatch. Currently, a benchmark assessment for Atlantic halibut is not scheduled. Revised reference points and ABCs for this stock would not negate the need for a reactive AM for the commercial groundfish fishery, but may increase the ACL and thereby reduce the likelihood that it would be exceeded. Assessments are scheduled through the NRCC, which prioritizes them based on many factors, including how old the most recent assessment is, whether an management action is imminent, whether there is any new information or progress in research that would revise the assumptions or inputs of the assessment, and other priorities. If the commenters are interested in a new assessment for this stock, they may propose it to the Council to bring to the NRCC.

The Council could also refine these AMs to target more specific gears, if a specific gear configuration is identified to be responsible for most bycatch. The AMs approved in Framework 48 apply to those gears identified as having the highest bycatch of these stocks by SBRM observer coverage. Trawl gear was found to be responsible for the majority of discards of halibut, followed by a much smaller amount discarded by gillnet gear. It may be possible that tie-down nets targeting monkfish in these areas are responsible for the majority of bycatch of Atlantic halibut, as suggested by MCCS, but the SBRM gear modes are not defined to this fine a scale. However, these AMs were designed based on the best available information about areas and gears with the highest bycatch of these stocks. Delaying the implementation of these AMs to further refine them would mean that possible overages of the overall ACLs for these stocks would not be accounted for in the interim, which would not be consistent with National Standard 1. Although these AMs may be further refined and improved through future Council actions, they would increase accountability for and constrain catches of these stocks at this time. For these reasons, NMFS has approved these AMs in this final rule.

The Council expressly prohibited sectors from requesting exemptions from the AMs for non-allocated stocks through Framework 47. However, it did provide for the possibility that selective gears could be approved for use in these areas. If MCCS is successful at identifying gear types that could be used in the Atlantic halibut AM areas with little bycatch of this stock, it could submit those gears for review through the same process used to authorize selective trawl gear at § 648.85(b)(6)(iv)(J)(*2*).

Note that Framework 50 allocates SNE/MA winter flounder to the groundfish fishery and allows landings. This means that this stock is subject to sector-specific inseason AMs, coupled

with a pound-for-pound payback of any overage from a sector's allocation in the next fishing year. In this case, the area-based AM would apply only to common pool vessels if the common pool exceeds its sub-ACL for the stock. If triggered, these AMs would be in place for only the fishing year in which they are implemented.

Comment 14: NMFS received one comment, from the Northeast Hook Fishermen's Association (NEHFA), supporting the revised trimester TAC AMs for handgear vessels. NEHFA supported this measure because it would help small handgear vessels, which account for a small percentage of catches of groundfish stocks, but for which groundfish provides an important revenue stream.

Response: NMFS agrees with NEHFA that handgear vessels account for such a small portion of the white hake catch that exempting them from the trimester TAC AMs is justified. This measure would not increase the risk of the common pool exceeding its sub-ACL for this stock, but would relieve an inequity currently present in the common pool inseason AMs. Exempting handgear vessels from these inseason AMs for white hake would reduce the costs of these AMs for handgear vessels by allowing them to continue fishing for other groundfish stocks when an AM for white hake is triggered. That is why NMFS has approved this measure in Framework 48.

Commercial Fishery Minimum Fish Sizes

Comment 15: MEDMR, Portland Fish Exchange, AFM, NSC, and two individuals supported the proposed reductions in commercial minimum fish sizes. Commenters generally supported this measure because it would reduce waste. One commenter supported this measure because it would help would allow the commercial industry to compete with imports from foreign countries, which have lower minimum sizes. One commenter supported this measure because it would generate additional revenue for groundfish vessels and act as a mitigation measure for FY 2013 catch limit reductions. Another commenter suggested the proposed minimum sizes are more consistent with the selectivity of existing allowable mesh sizes. One commenter noted that these sizes are larger than those originally proposed by the Groundfish PDT and take into account the maturity and biology of groundfish stocks.

Response: NMFS agrees with the commenters that reducing the commercial minimum fish sizes as proposed in Framework 48 would reduce waste, provide more opportunity to achieve OY and provide additional revenue to groundfish vessels in FY 2013 that could help mitigate some of the negative economic impacts expected from reductions in catch limits. As indicated by the analysis in Framework 48, this measure would be expected to allow more fish caught and counted against quotas to have economic value rather than be wasted. Under a full retention scenario, estimated additional gross revenues in the short term could be substantial. While reducing the minimum sizes would not be expected to generate quite as much additional revenue, it would increase revenues from quota used for groundfish vessels, especially sector vessels. In addition, these minimum sizes are generally consistent with the length at which 50 percent of fish are expected be mature. In this way, this measure attempts to balances the benefits of reducing waste, with the need to ensure many fish can spawn before being caught. For these reasons, NMFS approved this measure in Framework 48.

Comment 16: CCCHFA, MADMF, MCFA, and CLF opposed the proposed reduction in commercial minimum fish sizes. CCCHFA specifically expressed concern about reducing the minimum fish sizes for cod and haddock, when both GOM and GB cod are overfished and the incoming year class of GB haddock may be what sustains the fishery for the next few years. These commenters generally opposed the measure because it would increase effort on smaller fish, undermine rebuilding programs, and reduce long-term productivity of these stocks. MCFA and CLF expressed concern that reducing the minimum sizes would reduce the current disincentive to target small fish created by counting all discards against quotas, which was an objective of sector management. CLF, MCFA, and MADMF expressed concern that the reduced minimum sizes would encourage fishermen to target smaller fish and potentially increase the use of net liners in order to maximize the retention of legal-sized fish, and could drive stocks into further decline. Thus, they argue that reducing the minimum sizes would increase, rather than reduce, discards overall. They believe that the risk of a shift in selectivity and potential consequences are too high. MADMF argues that maintaining the minimum size above the length at 50 percent maturity is not sufficient or defensible, because research has shown that repeat spawners are important for spawning success.

Response: NMFS understands commenters concerns that this measure may change incentives in targeting fish but it is not possible to accurately predict whether and to the extent that this may actually occur, and the consequences on conservation objectives, due in part to the context in which these reductions in fish size will apply. As NMFS discusses in Item 13 of the preamble, there are two components of uncertainty as to the potential impacts from this measure. First, it is unclear whether a shift in selectivity is likely. According to analysis in Framework 48, this is most likely for yellowtail flounder, for which there is little difference in price between size classes and a simple change in the type of codend used can modify the size of fish caught. The second component to the uncertainty is whether the shift in selectivity could be detected and ABCs could be adjusted to account for this change. Although a shift in selectivity could affect rebuilding time and the probability of overfishing, if this shift is detected and ABCs are adjusted, these potential impacts may be mitigated. That is why NMFS is exploring ways to monitor the length frequency of catch in the commercial groundfish fishery beginning in FY 2013 to see if a change in selectivity could be detected. If such an analysis or data can be put together, NMFS can advise the Council if adjustments to measures may be needed.

Traditional notions as to likelihood of a shift of fishing behavior to target small fish may not be as applicable in the context of the sector program. All catch is counted against sector ACE to create an incentive to minimize discards in order to maximize the value of a sector's quota. However, despite this incentive, sector vessels are still experiencing regulatory discards. Analysis by the Groundfish PDT showed that the majority of discards of groundfish stocks for which size changes are proposed occurred just below the minimum size. The PDT concluded that a size reduction of an inch would reduce discards of cod, haddock, plaice, and yellowtail flounder. The Council then increased the sizes from those proposed to reduce the majority of discards to sizes that would be consistent with or above the length at 50 percent maturity. NMFS believes the proposed reductions to minimum sizes represent a balance between the need to reduce waste and maximize the value of resources expended, and to need to ensure the continued rebuilding of groundfish stocks. All catch would still be counted against sector allocations, including

discards, which should maintain an incentive to reduce discards. It is unclear, in light of such severe reductions in catch limits, whether the expected shifts in fishing behavior will result, given the need to maximize the profitability of every fish caught. Moreover, in light of joint and several liabilities of sector vessels, there is increased incentive for sectors to self-enforce against any illegal activity, such as use of liners or misporting, that facilitate targeting of small fish. For these reasons, NMFS has approved this measure in Framework 48.

Comment 17: MADMF also stated that if these measures are approved and state agencies don't follow suit, sector vessels would be forced to discard fish that do not meet the state minimum fish size in violation of the federal requirement for them to retain all fish of legal size. MADMF also suggested that NMFS should reduce sectors' allocations to account for the additional quota gained from reducing the amount of discards charged through discard rates.

Response: NMFS is also concerned about discrepancies between state and federal minimum fish sizes complicating compliance and enforcement of this measure. To address this concern, NMFS is delaying the effective date of these new minimum sizes to July 1, 2013, to allow state agencies additional time to consider and make corresponding adjustments to their minimum sizes. If a state does not make corresponding adjustment to fish sizes, vessels would not be *forced* to illegally discard fish as they could land in other states' ports. NMFS, however, would not favor this result and the impacts it would have on the non-conforming state, and, for that reason strongly urges all affected states to match these size reductions.

With respect to MADMF's concern that reducing the minimum fish sizes increases the amount of available quota to sectors, NMFS believes this concern arises from a misunderstanding about how sector discard rates are applied. Discard rates generated from observed trips are intended to be representative of the discard rates for each stock on unobserved trips. So, for example, for a single trip in FY 2012, the fish between the current minimum size and new minimum size would have been discarded. If the trip was observed, the sector would have been charged for these discards based on observer data. If the trip was unobserved, the sector would have been charged for these discards based on the discard rate calculated from the observed trips. If total catch remained the same on that same trip in FY 2013, those fish between the current minimum size and new minimum size would be landed instead of discarded. Regardless of whether the trip was observed, the sector would be charged for those fish based on dealer reports of those landings. The sector would then also be charged for the discards below the new minimum size, from either observer data or the new reduced discard rate. Thus, in this example, total catch would remain the same, but fish between the current and new minimum sizes would shift from discards to landings. So sectors would not necessarily be able to catch more fish overall compared to their allocations. Even if an adjustment were somehow appropriate, NMFS does not have the authority to adjust sector allocations without Council action. Although initial rates at the beginning of the year would be based on previous fishing years, once these rates transition to inseason discard rates in FY 2013, they would be based on observed discards on trips carrying an observer in FY 2013. In addition, discards were not used in the computation of vessel PSCs, but are charged to sector allocations.

Comment 18: CCCHFA, MEDMR, and one other individual stated a preference for full catch retention to improve data collection and minimize the cost of at-sea monitoring to the industry.

Response: The Council considered a full retention requirement for sector vessels, but did not recommend it because it was not sufficiently developed for implementation in FY 2013. NMFS, therefore, does not have the authority to replace minimum fish sizes with such a measure as part of its partial approval and implementation of Framework 48 measures. However, the Council passed a motion at their December 20, 2012 meeting to pursue full retention for further development in a future action. NMFS encourages the commenters to participate in the Council process as it considers this option for a future fishing year.

Sector Monitoring Programs

Comment 19: AFM, NSC, and the MADMF supported delaying industry's responsibility to pay for at-sea monitoring costs to FY 2013. However, MADMF expressed concern that approving this measure would lead to continued delays of industry cost responsibility in subsequent actions.

Response: NMFS understands commenters concerns about industry being able to bear the cost of monitoring, especially in light of the substantial reductions in catch limits expected in FY 2013. That is why NMFS intends to cover the full cost of monitoring for sectors in FY 2013 to the extent that it can, by continuing its NMFS At-sea Monitoring Program. Although exact effort levels next year are uncertain, NMFS believes that if sector vessels take fewer trips overall as expected, NMFS will be able to cover 100 percent of the costs of sector monitoring. The availability of these funds makes the Framework 48 measure somewhat moot, but NMFS still cannot approve this measure in Framework 48. This measure is not consistent with the goals of the FMP or the requirements of the Magnuson-Stevens Act, because it would not ensure monitoring levels sufficient to monitor ACLs and sector ACEs. Rather, coverage levels would be determined by the amount of available NMFS funding which, without specific appropriations for this purpose, would not guarantee even minimum coverage levels to meet the performance standard as required by Amendment 16 and Framework 48. NMFS also shares MADMF's concerns that approving this measure in Framework 48 would establish an inappropriate precedent for future fishing years.

Comment 20: CLF opposed the proposed delay of industry responsibility for the costs of at-sea monitoring. CLF contended that the fishing industry should be responsible for the costs of monitoring the harvest of a public trust resource and that it is not clear that the industry could not actually afford these costs. CLF points out that this data is necessary for quality assessments and argues that adequate data for assessments and management should not be sacrificed just because quota levels are low.

Response: NMFS agrees with CLF that delaying industry cost responsibility to FY 2014 and specifying coverage levels according the amount NMFS can fund is not sufficient to ensure the adequate monitoring of ACLs and sector ACEs. As CLF notes, adequate at-sea monitoring is necessary for quality data for assessments and reliable estimates of sector and groundfish fishery catches for the purposes of determining if allocations have been exceeded. Basing coverage levels on NMFS funds alone would not ensure that levels are sufficient to at least meet the performance standard and goals and objectives for monitoring programs defined by Amendment 16 and Framework 48. For these reasons, NMFS has disapproved this measure in Framework 48.

Comment 21: MEDMR, AFM, NSC, the Portland Fish Exchange, MCFA, and one individual commented in support of the proposed sharing of at-sea monitoring costs between NMFS and sectors. Commenters supported this

measure because they believed that industry could not support these costs under reduced catch levels. NSC and MEDMR supported continued efforts by NMFS and the Council to develop a workable for the NE Multispecies FMP, including joining the Squid/Mackerel/Butterfish and Herring FMAT/PDT.

Response: NMFS agrees with commenters that this cost-sharing concept has merit and is worth exploring. However, as explained in Item 2 of the preamble, this measure is not consistent with the requirements of the Anti-Deficiency Act and other appropriations law and policy as developed. As defined, this measure would require NMFS to pay for portions of at-sea monitoring costs that are beyond its statutory obligations and, thus, its appropriations. This measure would also have required NMFS to share payment of some obligations with sectors, which is prohibited. For these reasons, NMFS disapproved this measure through this final rule. However, NMFS believes that a similar measure, if modified, could be workable and is available to assist the Council in further developing this concept for a future action. In addition, as described in the response to Comment 19, NMFS intends to cover the full cost of at-sea monitoring for sectors in FY 2013, to the extent that it can, to address industry's concerns about their ability to bear this burden in FY 2013 in light of the substantial reductions in catch limits that are expected.

Comment 22: One individual commented against the proposed cost-sharing mechanism, out of a belief that it was not sufficiently developed at this time. This commenter stated that the industry should work directly with NMFS, and not involve other parties, in the development of a workable measure when appropriate.

Response: NMFS agrees with the commenter that the proposed monitoring cost-sharing mechanism was not sufficiently developed in this action. That is why NMFS has disapproved this measure through this final rule. NMFS is already assisting the mackerel and herring FMPs to explore cost sharing mechanisms for those fisheries for FY 2014 and can help the Council in further developing this mechanism for the NE Multispecies FMP for a future action if interested.

Comment 23: CLF, NSC, and MCFA supported eliminating dockside monitoring requirements for sectors. Commenters generally supported eliminating this program because it did not provide useful or timely data and, therefore, was not worth its costs. CLF supported eliminating this requirement provided that hails requirements are maintained and that dockside intercepts are effective and sufficient for enforcement. MCFA thought that dockside monitoring should be reconsidered if full retention is adopted in a future action. MADMF did not support or oppose this measure, but asked that NMFS clarify why it believes that dockside intercepts by enforcement personnel will be sufficient to monitor sector landings. MADMF and NSC also supported retaining hail requirements to assist with the deployment of enforcement personnel, but NSC requested that NMFS improve the timeliness of confirmation of receipts for hails. NSC also supported NMFS' intent to clarify the regulations to allow for streamlining of these reporting requirements in the future. MADMF asked whether NMFS and the Office of Law Enforcement have adequate capability to compare hails to observed landings to monitor sector and common pool landings against allocations.

Response: NMFS agrees with commenters that the dockside monitoring program as currently designed is not necessary or sufficiently useful in monitoring sector landings. Dealer reports are the principle data source for commercial landings information. In addition, eliminating the program would reduce costs and potentially increase the profitability of the commercial industry in future years. Eliminating this program would reduce redundancy and reduce costs for the commercial groundfish vessels, thereby increasing net revenues in future fishing years. That is why NMFS approved eliminating the dockside monitoring program, but maintained hail requirements, through this final rule. To the extent that dockside monitoring creates a disincentive to misreport or hide landings that may be used for monitoring purposes, NMFS believes dockside intercepts by enforcement personnel, supported by hail requirements, goes a long way to meet this objective. Should the Council consider full retention of fish in a future action, dockside monitoring should be reconsidered.

NMFS understands NSC's concerns regarding latency issues affecting the timeliness of confirmations of receipts and vessels' ability to comply with this measure. That is why NMFS is continually making improvements to its systems to address these types of issues. NMFS agrees that redundancy should be avoided and costs should be streamlined where possible, thus NMFS has also approved its clarification to the regulations that would allow streamlining of hails with other similar reporting requirements in the future when appropriate.

Law enforcement personnel, including OLE uniformed officers, special agents, and state partners, have access to the data reported in trip start and trip end hails through a secure database. Enforcement personnel do have the capacity to use this information to plan dockside intercepts, and to compare it to other landings data sources. However, NMFS would like to caution commenters that hails were instituted for the purposes of coordinating deployment of dockside monitors. Estimated weights of landings were required to be reported in order to allow the monitoring provide to plan for the type catch that would be offloaded and monitored and the length of the offload. This information was not intended or designed to be used for the verification of dealer reports or VTRs. The estimated weights reported are expected to be the captain's good faith estimate of catch and would not be expected to exactly match a dealer's recorded weights and so are not used for this purpose.

Comment 24: NSC, AFM, and CCCHFA commented in support of the proposed revisions to the goals and objectives and performance standard for groundfish monitoring programs.

Response: NMFS agrees that the measures proposed by Framework 48 clarify the goals and objectives and the performance standard for groundfish monitoring programs. This would help the Council, NMFS, and sectors implement and evaluate these programs more effectively. NMFS has approved these revisions in this final rule.

Comment 25: CLF and Oceana opposed the proposed revisions to the goals and objectives and performance standard for groundfish monitoring programs. They argue that these measures are a fundamental component of sector AMs and, therefore, cannot be revised through a framework adjustment. They argue that adjustments to these requirements through the framework process was not contemplated or specified by Amendment 16 and, thus, urge NMFS to disapprove these proposed changes on procedural grounds. The commenters further contend that the effectiveness of sector AMs depends on the ability of individual sectors to know and manage catch toward their ACEs and thus, for sector AMs to ensure accountability as required by the Magnuson-Stevens Act, the appropriate level for monitoring these catches is at the sector ACE level, rather than the ACL. They urged NMFS to disapprove the proposed action to apply the CV standard at the overall

stock level and instead select the alternative that would apply it at the sector-stock level. The commenters were generally supportive of the proposed goals and objectives for groundfish monitoring programs as consistent with the original purpose of these measures in Amendment 16. However, they expressed concern with the inclusion of the terms ''to the extent possible'' with respect to minimizing potential monitoring bias, and ''cost-effectiveness'' with respect to stratifying discards. They argued that this provides too much discretion for the implementation of these programs as a component of sector AMs. MADMF also expressed concern that the inclusion of a practicability standard would result in coverage rates that are not sufficient for accurate catch accounting.

Response: NMFS disagrees that sector monitoring requirements cannot be revised through a framework action. Section 4.8.2 of Amendment 16 expressly states that frameworkable measures are not limited to the items listed in that section. In addition, sector monitoring requirements, including coverage levels and the performance standard, are listed under sector administration provisions in Amendment 16, which is listed as a frameworkable measure in section 4.8.2. As the commenters note, the regulations at § 648.90(a)(2)(iii) list at-sea and dockside monitoring requirements among the measures that may be modified through the biennial review process, as well as AMs, changes to other administrative measures, and any other measures currently included in the FMP. In addition, the Council deemed these regulations as consistent with their intent in Amendment 16. These changes are at most clarifications and elaborations on how to determine appropriate monitoring levels, not wholesale changes to the monitoring requirements. So, NMFS believes that these changes are lawful under the combination of allowable framework provisions of the FMP and section 305 (d) of the Magnuson-Stevens Act which authorizes NMFS to implement regulations necessary to ensure that Council measures are carried out in a manner consistent with the Act.

Oceana and CLF raised similar concerns that recommended coverage rates based on a CV standard that is applied at the overall stock level would not provide reliable catch estimates for the purpose of implementing AMs at the sector ACE level. As NMFS discussed in its summary of the appropriate level of at-sea monitoring on sectors at *http://www.nero.noaa.gov/ro/fso/reports/Sectors/ASM/FY2013_Multispecies_Sector_ASM_Requirements_Summary.pdf* and in response to these same comments on the proposed rule for FY 2013 sector operations plans, Amendment 16 specified that ASM coverage levels should be less than 100 percent. This means that discards and, thus, total catch by definition shall be based on estimates, rather than absolute numbers. Thus, NMFS believes that it is appropriate to utilize its stated practicability standard in the application of sector monitoring requirements. The level of observer coverage combined with the self-reporting requirements for sectors should provide confidence that the overall catch estimate is accurate enough to ensure that sector fishing activities are consistent with National Standard 1 requirements to prevent overfishing while achieving on a continuing basis optimum yield from each fishery. In the above referenced analysis in response to Oceana's comments, NMFS examined the 256 sector ACE level catch figures (16 fishing sectors * 16 ACE allocations) in comparison to the CV30 standard for FY 2011. This examination reveals that for 207 of the 256 ACE allocations, the percent of discard pounds for which the CV was greater than 30 percent was less than 1 percent. For 43 of the remaining ACE allocations, the percent of discard pounds for which the CV was greater than 30 percent ranged from 1–9.9 percent. There were 6 ACE allocations for which the percent of discard pounds with a CV greater than 30 percent ranged from 10–66 percent. In addition, discard estimates provided by required at-sea monitoring coverage rates are not the sole source of information for monitoring of sector catch and making a determination about whether a sector has exceeded its ACE. Discard estimates, to which the CV standard applies, is only a portion of total catch. Landings, provided by dealer purchase reports, comprise the majority of total catches for groundfish stock. The CV analysis is conducted to evaluate the calculation of discards, which are typically less than 10 percent of the overall catch of the allocated groundfish stocks, and in FY 2011 were less than 5 percent of the catch for most allocated stocks (while discards were a higher percentage of total catch for GOM yellowtail flounder, GB East cod, and American plaice, the total catch of those stocks were less than 90 percent of the sub-ACLs and the CVs for those stocks ranged from 4.4 to 15.4). To monitor sector catch, not just discards, NMFS and sector managers rely on a number of data sources, including observer data, VMS, VTRs, VMS catch reports, and dealer reports. Sectors are also required to submit weekly reports, which are broken down to the sub-trip level catch and gear information, and these reports are stepped up to daily certain catch thresholds (for FY 2013 the daily reporting threshold is 90% of any ACE) are reached. NMFS conducts weekly reconciliation of NMFS and sector reports with sector managers to verify that each sector and NMFS have the best available data to monitor catch and sector ACEs. In addition, due to the joint and several liability of sector members for certain violations, including illegal discarding and misreporting of catch, there is a strong incentive for sector members to self-enforce monitoring and reporting requirements and ensure the sector has the most accurate information available. Based on the totality of this information, NMFS concludes that the performance standard implemented at the overall stock level results in reliable catch estimates for monitoring sector ACEs.

The monitoring program, including the application of the performance standard, must be implemented consistent with the different goals and objectives of sector monitoring programs, as well as the requirements of the other National Standards, which requires a balancing of competing objectives. As NMFS discussed in Item 14 of the preamble, in addition to the revised goals and objectives in Framework 48, NMFS will specifically take into account National Standards 2, 7, and 8 in making its determination of the appropriate level of at-sea monitoring coverage for sectors on an annual basis. These National Standards specifically speak to using the best scientific information available, minimizing costs and avoiding unnecessary duplication where practicable, taking into account impacts on fishing communities, and minimizing adverse economic impacts to the extent practicable. In addition, to account for any lack of absolute precision and accuracy in estimating overall catch by sector vessels, uncertainty buffers are deducted before specifying commercial groundfish fishery sub-ACLs. In light of all these requirements, and in absence of any evidence provided by the commenters to the contrary, NMFS concludes that sector monitoring requirements overall, including the performance standard applied at the overall stock level, are sufficient to monitor sector catch toward ACEs.

Comment 26: CLF, NSC, and CCCHFA supported the provision to reduce at-sea monitoring coverage on trips targeting

monkfish in the Southern New England. Commenters supported this measure because it would reallocate limited resources and coverage to trips that catch groundfish. CLF called for the development of a full retention/electronic monitoring program for such trips, because it would provide valuable catch data and compliance incentives, rather than reducing coverage. CLF also urged NMFS to monitor this exemption to ensure it does not create a loophole for groundfish discards.

Response: NMFS agrees that this measure would prioritize limited resources and monitoring coverage for trips that catch groundfish. Currently these trips that catch little to no groundfish are receiving the same level of coverage as other sector trips, with no resultant benefits to the overall precision and accuracy of groundfish discard estimates. By exempting these trips from some level of at-sea monitoring coverage, those resources can be directed to cover trips with actual catches of groundfish and, thereby, improve the estimates of groundfish discards. For these reasons, has approved this measure through this final rule.

NMFS understands CLF's concerns that this measure could create a loophole for increased discards of groundfish. However, given the size of mesh used on these trips (10 in, 25.4 cm), it is unlikely that catch of groundfish on these trips would increase beyond those analyzed in the development of Framework 48.

GB Yellowtail Flounder Management Measures

Comment 27: NMFS received three comments opposing a separate GB yellowtail flounder discard rate stratum for statistical area 522. NSC, CLF, and one individual opposed this measure because it would complicate monitoring and increase administrative burden to NMFS and sectors without any real benefit. CLF expressed concern that this measure would create another loophole for misreporting of catch of GB yellowtail flounder by vessels on unobserved trips and urged NMFS not to approve this measure until it can implement measures to reduce misreporting.

Response: NMFS shares the commenters concerns that this measure could complicate monitoring and increase the administrative burden for sectors and NMFS without any measurable benefits. Because of the potential added cost of implementing and administering this measure, it may increase costs more than it provides benefits to the fishing industry or the efficient management and monitoring of catches, which would not be consistent with National Standards 5 and 7 of the Magnuson-Stevens Act. Both sectors and NMFS would have to modify quota monitoring programs and reports to accommodate the new strata, increasing the administrative burden for sector managers and NMFS. NMFS also remains concerned about how this revised strata, combined with other changes to the discard rate method in FY 2013, will affect the variance of discard rates and thereby affect our ability to achieve the performance standard for sector monitoring at recommended coverage rates. As CLF notes, it is also possible that this measure could further complicate monitoring and increase uncertainty of catch estimates by creating an incentive to misreport catches of GB yellowtail flounder on unobserved trips as having been caught in statistical area 522 in order to get a reduced discard rate.

On the other hand, this measure would have no real benefits for a sector that could not be achieved under the existing discard rate scheme. A separate discard rate in statistical area 522 could benefit an individual vessel fishing in deeper water in this area with a lower GB yellowtail flounder discard rate that would not be influenced by higher GB yellowtail flounder discards by other vessels in its sector fishing elsewhere on Georges Bank. However, the sector's fishing season on GB would still be limited by the total catch of GB yellowtail flounder by all its member vessels. If some vessels in the sector continued to have high discard rates of GB yellowtail flounder on other parts of Georges Bank, the entire stock area could still close early in the season, including statistical area 522. This finer stratum would not free a sector from having to manage its vessels' effort to extend its fishing season next year.

Thus, NMFS agrees with commenters approving this measure would increase the cost and administrative burden of sector monitoring for sectors and NMFS without any corresponding benefits to sectors. NMFS has concluded that this would not be consistent with the requirements of National Standard 5 and 7 and NMFS has disapproved this measure in Framework 48.

Comment 28: AFM, the Portland Fish Exchange, and one individual commented in support of the revised GB yellowtail flounder discard rate strata for sector vessels. Commenters believed this measure would more accurately reflect actual discard rates of GB yellowtail flounder in statistical area 522, and enable sector vessels to have a longer fishing season on Georges Bank.

Response: NMFS agrees that finer scale strata would allow discard rates to more closely reflect actual discard rates over smaller areas. However, as discussed fully in NMFS's response to Comment 27, NMFS disagrees that this measure would have any real benefits for a sector that could not be achieved with existing discard rate strata. A separate discard rate in statistical area 522 could benefit an individual vessel fishing in this area with a lower GB yellowtail flounder discard rate. However, this measure alone would not prevent a sector's fishing season on GB from ending prematurely. As a result of this new strata, GB yellowtail discard rates in the rest of GB would be higher and, thus, if the sector did not also manage yellowtail flounder discards on other parts of GB, it would still be limited by the total catch of GB yellowtail flounder by all its member vessels. As analysis showed in the Framework 48 EA, the new strata are unlikely to affect the overall discard estimates of GB yellowtail flounder, meaning that sector vessels would still have to avoid GB yellowtail flounder in order to prolong their fishing season. The most effective way to prolong a sector's fishing season on GB would be through active management of effort and catch by its member vessels. If a sector wanted to incentivize its vessels to fish in deeper water and avoid yellowtail flounder, or ensure that one member's high yellowtail flounder discard rate does not penalize another vessel that avoids yellowtail flounder, they could differentially charge individual member shares based on discard behavior. Sectors can do this under the existing discard strata scheme, without unnecessarily complicating monitoring for other sectors. In contrast, the proposed measure could have real effects on monitoring practices for both NMFS and sectors. Implementing this measure would increase administrative costs and burden associated with monitoring and without any real benefits for sectors, which would reduce efficiency and would not be consistent with National Standards 5 and 7. NMFS believes the reduced efficiency is not justified in light of the lack of real benefits from this measure as discussed in the response to the previous comment on this measure. For these reasons, NMFS has disapproved this measure in Framework 48.

List of Allowable Sector Exemption Requests

Comment 29: Over 75,000 comments were received from various groups and individuals opposing the proposed change to allowable sector exemption

requests as it pertained to year-round groundfish closure areas. Many of these comments were form letters submitted through online nongovernment organization campaigns. By comparison, a limited amount of comments were received supporting the proposed change to allowable sector exemption requests.

The comments opposing the exemption proposal that would allow sectors to request access to year-round closure areas raise several objections. While some of the specific comments raise slightly different points, the major issues raised are enumerated below. Some of the topics have a great deal of interrelatedness. By categorizing the issues in this manner, NMFS can provide a focused series of responses. The primary issues raised are:

1. Commenters stated the areas should not be opened because they provide important protection for critical life stages and spawning activities of critically depressed fish stocks. Many comments also stated the stocks in question warrant additional closed area protections, not less.

2. Commenters stated that access to closed areas would provide only short-term nominal economic gain but could cause long-term biological impacts. Commenters assert that because of this the areas should remain closed.

3. Many commenters presented arguments alleging the Framework 48 action illegally segments the required NEPA analysis from the Council's ongoing Omnibus Habitat Amendment. Commenters assert that NMFS and the Council are seeking to avoid development of an Environmental Impact Statement (EIS) to evaluate the potential impact of providing potential access to closed areas.

4. Some commenters allege the decision to provide sector exemptions for closed area access was made before the results of analysis were available.

5. Many comments were received stating the closed area consideration requires an EIS analysis under NEPA as it is significant as defined by NEPA criteria, the Framework 48 analysis is insufficient, and the Framework 48 EA's Finding of No Significant Impact (FONSI) conclusions are not supported by the available analysis.

6. Commenters stated the impacts to Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA) protected species are inadequate and, in some regards, completely absent from the Framework 48 analyses.

7. Commenters state the rulemaking and analytical procedure used for Framework 48 was inappropriately conducted, insufficient, and circumvented necessary public participation and comment.

8. Commenters stated the closed areas in question are mischaracterized as redundant mortality control closures in Framework 48. Commenters state that the areas under consideration were created for and provide much broader benefits than just controlling fishing mortality.

9. Commenters allege Framework 48 analysis did not analyze a sufficient range of alternatives when considering closed area access through sector exemption.

10. Commenters assert the scope and scale of the action requires an FMP amendment, stating the action cannot be taken through a framework adjustment to the FMP.

Response: The comments opposing modification of the allowable sector exemption request provisions are misapplied with respect to the Framework 48 rulemaking process. NMFS is not permitting access to year-round closed areas through the measures implemented in this final rule. Nor is NMFS modifying or changing any closed areas or essential fish habitat areas or boundaries. This rule only modifies the list of allowable sector exemptions under current regulations. This modification itself does not provide any access to groundfish closed areas at this time. This action merely allows sectors the opportunity to request access to portions of year-round closed areas through their annual sector operations plans by removing the prohibition on granting such requests. A more extensive analysis than was conducted for Framework 48 is necessary for NMFS to make any determination on potential sector access to closed areas for FY 2013, or in subsequent fishing years.

The Regional Administrator, in conjunction with requesting sectors, is obligated under the sector exemption process established in Amendment 16 to consider whether to approve sector exemption requests that are not prohibited under the FMP. To do so, analysis of the requested exemptions is necessary to determine if the exemption in question can be approved. From the Amendment 16 final rule preamble (75 FR 18276; April 9, 2010):

> Sectors may [still] request and analyze additional exemptions as part of their yearly operations plans, but such exemptions need to be approved by the Regional Administrator.

The accompanying regulations for the sector exemption approval process are found at § 648.87(c)(1) and(2). Summarized, these regulations specify that NMFS, through the Regional Administrator, will allow exemptions that are consistent with the goals and objectives of the FMP and conduct the approval process consistent with the Administrative Procedure Act (APA) and other applicable law. The other applicable law includes, among others, NEPA, the Magnuson-Stevens Act, MMPA, ESA, and the Regulatory Flexibility Act.

By lifting the prohibition on sectors requesting access to year-round closed areas, NMFS will evaluate requests in the same process as any exemption request consistent with the process outlined in Amendment 16 and past practices. Sector requests were made in the sector's respective 2013 operations plans submitted in September 2012 in anticipation of this prohibition being lifted in this action to meet a May 1, 2013 effective date. However, NMFS reiterates that no decisions on sector exemption requests have been made to access closed areas in conjunction with Framework 48 since this framework simply addresses a procedural issue pertaining to closed area openings. Further, since the necessary analyses have not yet been completed, an additional sector rule to consider and potentially approve any year-round closure openings would be delayed beyond May 1. Indeed, NMFS must still decide which, if any, exemptions will be granted, and, if granted, whether seasonal, area, gear or other types of limitations are necessary to ensure any exemption will be consistent with the conservation and management requirements of the groundfish FMP and the Magnuson-Stevens Act. The analysis in Framework 48 is based, in part, on a preliminary analysis by the Closed Area Technical Team (CATT) that provides an initial overview of potential impacts. However, the analysis did not specifically analyze the actual impacts of granting any exemptions because Framework 48 is not intended to make decisions concerning the closed area exemption requests. The level of detail in these analyses for Framework 48 was sufficient for the type of change implemented in Framework 48 but is not sufficient to determine if, when, or how sectors may be permitted closed area access through exemptions. Accordingly, the change implemented by Framework 48 to allow NMFS to consider granting sectors access to closed areas has no actual impacts.

NMFS and the Council initiated the process of evaluating potential sector access to closed areas late in 2012 when the issue was first raised at the Council level. The CATT was formed in part for this purpose and provided a cursory

analysis of closed areas and the potential impacts of allowing fishing in these areas for Framework 48. CATT analysis is ongoing and continues to evaluate in greater detail the appropriate areas needed to provide protection to rebuilding groundfish stocks. Many of the issues and concerns raised in the extensive public comments submitted for Framework 48 are important considerations in NMFS' ongoing analysis. In response to the concerns raised, the Council limited the potential access to the closed areas only to the portions that did not infringe on currently defined habitat areas or any currently proposed areas included in the draft Omnibus Habitat Amendment. NMFS is concerned that any access provided to closed areas must be done in a responsible manner such that stock recovery is not impeded, protected species are not negatively impacted, and sensitive habitat and life stages are protected. This ongoing analysis, when complete, will be provided to the public with opportunity for review and additional comment, consistent with the sector exemption review process conducted for all sector exemption requests and APA.

NMFS has initiated an EA in connection with the separate rulemaking process concerning these requests to conduct the specific environmental impact evaluations for the closed area sector exemption requests. In connection with the separate rulemaking concerning these requests, if the ongoing analysis determines that a FONSI cannot be supported for access to the closed areas, the agency may elect to develop an EIS prior to proceeding or cease closed area access consideration until such time that the Council's Omnibus Habitat Amendment is completed.

Once informed by analysis, NMFS will also publish a proposed rule outlining what type of access, if any, may be granted to sectors as exemptions in the 2013 fishing year. The proposed rulemaking would also outline any conditions required for exemption use, if granted.

For example, as was stated publically by the Northeast Regional Administrator in the December 2012 and January 2013 Council meetings, NMFS is analyzing the potential to provide seasonal access with selective gears to Closed Areas I and II, and the Nantucket Lightship Closed Area, to target healthy fish stocks. Generally, NMFS is analyzing in what months closed areas may be accessed to avoid peak spawning activity of depressed fish stocks, gear conflicts, and encounters with MMPA and ESA protected species. NMFS is also evaluating habitat-related impacts. The analysis is examining what selective gears may better minimize catch of depressed fish stocks while providing strong catches of healthy stocks. The initial analysis along with substantial public opposition to opening closed areas in the Gulf of Maine, i.e., the Western Gulf of Maine and Cashes Ledge Closed Areas, suggest that it may not be possible or desired to provide access to these areas in FY 2013.

NMFS has also stated in the proposed sector operations plan approval rule (78 FR 16220; March 14, 2013) that it is considering a 100-percent monitoring requirement for participation in any closed area exemption granted for FY 2013. NMFS acknowledges the potential costs associated with monitoring are substantial and may limit the utility of closed area access, if provided for FY 2013. NMFS views this requirement as a necessary component to responsibly monitor activity in closed areas, if access is permitted in FY 2013. NMFS has already committed to providing funding for required at-sea monitoring for general fisheries and is looking into other possible means to fund all, or part, of the monitoring requirements being considered for potential approval of requests for access to year-round closure areas.

NMFS has been clear that the specific evaluation of closed area access would occur as a separate step through an independently severable analysis and, if warranted, rulemaking. NMFS currently anticipates that the ongoing analysis will continue through mid-June. Should the analysis support responsible alternatives for sector access to closed areas, proposed rulemaking would occur this summer.

The issues raised in public comment for this rule, as NMFS has pointed out, will be analyzed if and when NMFS decides to propose granting any sectors access to closed areas. Most of the issues raised in these comments already have been identified by NMFS as part of the closed area sector exemption analysis initiated in early 2013 and helped inform the Council in limiting closed areas access to avoid conflicts with existing and future habitat concerns.

The removal of the prohibition on requesting access to specific portions of closed areas as a sector exemption implemented by this rule is not self-actuating and in that sense is more procedural in nature. It removes a regulatory impediment to granting such requests but does not, itself, provide closed area access or predetermine that such access would be granted when requested. NMFS has determined, however, that the concept of allowing access to closed areas on a limited and controlled basis that NMFS can prescribe through the sector exemption process is supportable and necessary, consistent with Magnuson-Stevens Act, National Standards and other requirements, to provide possible mitigation of negative impacts resulting from severe cutbacks in catch limits by facilitating achieving optimum yield (OY) for some groundfish stocks. For that reason, NMFS does not believe it is necessary to fully analyze potential, speculative impacts that do not result from this action nor to disapprove the procedural measure allowing sectors to request and be granted access based on the specific objections raised by public comment. As long as the types of concerns raised by the public regarding access to closed areas can be adequately addressed or accounted for in the sector exemption process, there is no basis for disapproving the procedural measure in Framework 48 allowing access to be granted. To illustrate that potential, the following provides NMFS' preliminary responses to each enumerated objection based on NMFS' ongoing analysis on whether to grant limited access to closed areas to sectors:

1. The areas should not be opened because they provide important protection for critical life stages and spawning activities of critically depressed stocks. NMFS acknowledges that the status of many key NE groundfish stocks is poor. NMFS is concerned about potential impact on stock recovery that may result from access to closed areas and this is a key investigation being developed in the ongoing closed area sector exemption analysis. However, no decision has been made at this time on whether sectors will be granted access to closed areas in FY 2013, nor has a decision been made on how access may be structured if granted.

The CATT is deeply involved in ascertaining how potential changes in closed areas as part of the Omnibus Habitat Amendment may impact fish stocks. NMFS is an active member of the CATT and has already been making use of CATT-generated analyses in its sector exemption evaluation. NMFS is conducting independent evaluation of the specific impact of seasonal access with selective gear in Closed Areas I and II, and the Nantucket Lightship Closed Area, as part of the closed area sector exemption evaluation process. NMFS's analysis is geared toward identifying key times in which access to closed areas may potentially disrupt or otherwise impact spawning activities with the intent of not providing closed area access during such times. The

analysis is ongoing and will be provided to the public with an anticipated availability of mid-summer, 2013.

2. Access to closed areas would provide only short-term nominal economic gain but could cause long-term biological impacts. NMFS agrees that the limited analysis conducted for Framework 48 indicates that economic benefit is difficult to predict one way or the other. If economic benefit is small, that may mean that the closed areas are not that important to groundfish stocks and access to the closed areas is not detrimental. On the other hand, if there are significant amounts of groundfish stocks in the closed areas, it may be important to allow fishing on a controlled and conservative basis in order to maximize OY for those stocks. To be sure, as indicated in these analyses, the long-term impact on recovering stocks in these closed areas is of paramount importance. But to deny any opportunity to fish in the closed areas unnecessarily limits the possibility of providing the fishing industry the opportunity to catch as much fish as possible as long as the long-term health of groundfish stocks is protected.

3. The action illegally segments the required NEPA analysis from the Council's ongoing Omnibus Habitat Amendment. NMFS disagrees that either Framework 48 or the as-of-yet completed closed area sector exemption request evaluation segments the NEPA analysis. Classic segmentation concerns raised by commenters pertain only to situations wherein the responsible agency seeks to *avoid* development of an EIS. This is not the case here. In its broadest sense, segmentation occurs when an agency impermissibly narrows the scope of its NEPA analysis by either failing to evaluate the environmental impacts of an entire multi-stage decision where irreversible commitments are made at the initial decision point without consideration of the environmental impacts of later stages; or, where the agency excludes connected actions (i.e. those that are interrelated or interdependent) from the scope of its NEPA analysis. Neither of those circumstances is present in this case. In addition, the initial decision to allow sectors to request exemptions from closed sectors does not make any irretrievable commitment. That is, it would not commit the agency to any future course of action that will cause adverse consequences to the environment. Again, prior to approving or disapproving any specific request for access, the agency will consider the environmental impacts and prepare the appropriate level of NEPA analysis; i.e. an EA or EIS. Moreover, the actions at issue are not interdependent or interrelated; each is supported by its own rationale and has independent utility as explained below. The EA for Framework 48 rightly supports a FONSI, in large part, because rescinding the prohibition on sectors requesting specific closed area exemptions does not itself result in actual impacts on the environment, nor does it cause indirect effects that are later in time but reasonably foreseeable. Any potential indirect effects are merely speculative. NMFS has acknowledged that an EIS will be completed if a FONSI cannot be supported based on the EA evaluating the closed area sector exemption requests. The EA is serving its intended purpose to facilitate our determination as to whether any significant impacts will result from a decision on closed area exemption requests, and thus whether an EIS may be required for that action. If NMFS determines that the impacts from a later action to grant some level of access to closed areas would necessitate consideration in an EIS, and NMFS decides to move forward with said action rather than wait for completion of the ongoing Omnibus Habitat Amendment, a Notice of Intent would be published in the FR to make the public aware of the agencies intent to prepare an EIS. As indicated here, NMFS is interested in developing potential alternatives for closed area sector exemption analysis that seek to minimize potential impacts. To the extent that commenters contend that this Framework 48 measure is an attempt to unlawfully ''segment'' the larger Omnibus Habitat Amendment to avoid an EIS, those concerns are misplaced. In support of their comments, they cite to federal court decisions that define segmentation as splitting federal actions into smaller units to avoid developing an EIS. The Council and NMFS have every intention to and are preparing an EIS for the Omnibus Amendment. Moreover, the inclusion of the procedural measure to allow access to closed areas is not being ''split off'' from the Omnibus Habitat Amendment. The measure is a discrete action, independently justified and analyzed that does not foreclose any consideration of alternatives in the Omnibus Habitat EIS nor does it result in obviating the need to prepare an EIS for the Omnibus Habitat Amendment. While the Framework 48 measure may involve similar issues as the Omnibus Habitat Amendment, they are not directly connected actions. NEPA is a procedural statute intended to require full analysis of environmental impacts and is not intended to dictate outcomes. All actions that related to closed areas do not have to be evaluated within the scope of a single NEPA document. The fact that the Omnibus Habitat Amendment is examining closed areas in a separate action through an EIS does not preclude the Council and NMFS' consideration and adoption of independent measures in the meantime that are tangentially related to the amendment, as long as those actions independently satisfy NEPA requirements. Moreover, even if there were a credible basis for concluding that the Framework 48 measures was a splitting off of an action from the Omnibus Habitat Amendment, for which there is not, the Framework 48 measure meets the test cited by commenters concerning segmentation. The measure is a discrete action, independently justified and analyzed that does not foreclose any consideration of alternatives in the EIS being prepared for the Omnibus Habitat Amendment nor does it irretrievably commit resources. Thus, NMFS considers the scope of the EA supporting the implementation of the Framework 48 measure allowing the granting of access to closed areas to be consistent with NEPA.

4. The decision on closed areas was made before the results of analysis were available. NMFS disagrees that any decision to grant access to closed areas has been made. As has been stated previously, the action in Framework 48 only removes the prohibition on sectors requesting year-round closed area exemptions. It does not grant or guarantee any such exemptions will be provided much less how any exemptions would be structured, if granted. NMFS has stated multiple times its intent to conduct thorough analyses to inform decision-making on the requests for closed area sector exemptions. This analysis is ongoing and, as such, no decisions on closed area access have been made at the time of this rule's publication. Any access proposed will be fully informed by rigorous analysis that began early in 2013 and is anticipated to be completed during the summer of 2013. Rulemaking, consistent with APA, will also occur as needed.

5. The action requires an EIS analysis under NEPA as it is significant as defined by NEPA criteria, the Framework 48 analysis is insufficient, and the FONSI conclusions are not supported by the available analysis. NMFS disagrees with the assertions made by the commenters. Given the action implemented in Framework 48 to allow sectors to request exemption from

closed areas not designated for habitat conservation, the analysis was wholly appropriate. In fact, it went beyond what was necessary given that the procedural change involved with the Framework 48 action does not itself result in any impacts on the environment. Because the action in Framework 48 merely removes a regulatory prohibition and does not actually provide any closed area access, the FONSI determinations are appropriate. NMFS acknowledges that the analysis conducted by the Council in the Framework 48 EA does discuss potential impacts if closed area access is granted. However, NMFS asserts that the potential impacts discussed are applicable to the cumulative impacts of the action, but are not determinative in the FONSI, nor are they specifically relevant to the Framework 48 measure because no actual impacts will occur.

As previously stated, NMFS has initiated an EA for evaluation of potential closed area sector exemptions in FY 2013. However, the substantive analyses needed to determine if a FONSI can be supported have not yet been completed. NEPA process is clear that if a FONSI cannot be supported, then an EIS must be developed if the agency wishes to continue the development of the action. NMFS is aware of the timing considerations involved with the Council's initial request to consider sector closed area access exemptions in FY 2013. If analyses conclude that a FONSI determination cannot be made for potential closed area exemptions, even if the access is constrained in a manner to reduce or eliminate potential impacts, NMFS and the Council will need to evaluate what is the most logical next step: To develop a separate EIS to consider only potential sector closed area exemptions or to defer any access considerations until such time that the Council's Omnibus Habitat Amendment is completed. It is neither possible nor appropriate at this time to try and determine if a FONSI can be supported for sector year-round closed area exemptions.

6. The impacts to species afforded protections under MMPA and ESA are inadequate and, in some regards, completely absent from the Framework 48 analyses. NMFS acknowledges that substantial additional analyses are necessary to fully evaluate potential marine mammal and ESA listed, threatened, and candidate species impacts associated with potential closed area access prior to considering if, when, and how access may be provided. Much of the Framework 48 analysis was a cursory evaluation of potential future impacts if sectors were provided access to closed areas. The impacts on MMPA and ESA species cannot be specifically considered or determined until it is known what limitations may be prescribed on closed area access if access is granted (see preceding response pertaining to analysis). However, the conclusions reached for cumulative effects analysis and FONSI statement determinations consider the procedural nature of the actual change implemented by Framework 48. Specifically, the action to rescind the prohibition on sectors requesting exemptions from closed areas without providing any actual access to such areas. NMFS has initiated an ESA-mandated Section 7 consultation and is reviewing potential impacts to marine mammals in the closed area sector exemption consideration. As previously stated, these analyses will be made available for review and comment in conjunction with proposed rulemaking this summer. NMFS was aware of many of the issues and concerns raised in public comment on Framework 48 and will make use of all the comments received to better ensure that the ongoing sector exemption review thoroughly examines the potential impacts for use in decision-making.

7. The rulemaking and analytical procedure used was inappropriately conducted, insufficient, and circumvented necessary public participation and comment. NMFS disagrees with assertions made by the commenters. NMFS reiterates that it has been forthright about the potential closed area sector exemption process since outlining the sector exemption approach as a possibility for considering closed area access in FY 2013. For clarity, here is the process as it has been described and occurred: First, the Council considered and ultimately recommended to remove the prohibition on sector exemption requests on a limited basis for year-round closed area access not designated as habitat areas in Framework 48. This component was developed though the Council process and provided substantial opportunity for public participation and input. Many of the same objections and comments raised in connection with this rule were considered in the Council's decision to include the Framework 48 measure and influenced its decision to limit access to non-habitat areas. NMFS has conducted Framework 48 rulemaking consistent with the APA by providing opportunity for public comment.

Concurrent to NMFS review and rulemaking for the Framework 48 component, sectors were informed that they could submit closed area exemption requests in their FY 2013 sector operations plans in the fall of 2012 in anticipation that access could be potentially approved as early as the start of FY 2013, if the Framework 48 procedural measure was approved. This was done even though the prohibition on such requests was still in effect. The purpose of this was twofold: To better understand the scope and scale of potential requests moving forward in the exemption review and analysis and to help streamline the review process so that if closed area access was provided at some point in FY 2013, some of the administrative process could be frontloaded.

Finally, NMFS explained that the agency would undertake the necessary review and analysis of closed area sector exemption requests if the provisions in Framework 48 were approved. Now, with this rule, NMFS has approved the Framework 48 provisions that allow sectors to request closed area exemptions, interested sectors have submitted requests for FY 2013, and NMFS is continuing the process of reviewing and analyzing those requests. This is not dissimilar to the normal process undertaken for sector exemption review except that a regulatory change was needed to make the requests in question legal.

Another difference in the closed area consideration that differs from the standard sector exemption review process is that there is no time certain needed for completion of the review process. Closed area exemption analysis was anticipated to be extensive and it was doubtful from the onset that analysis would be complete for the May 1, 2013, start of the fishing year. Because the closed area sector exemption evaluation is not tied to the start of the fishing year, this affords additional time for review, analysis, and action development and, because the concerns raised in the Framework 48 public comment, additional time for public review and comment through normal APA rulemaking. NMFS is proceeding as quickly as possible; however, there are substantial analyses that need to be completed as part of the closed area access consideration process.

We are hopeful that analyses will be completed in time to allow the public and Council an opportunity to review the analytical work prior to the June Council meeting.

8. The areas in question are mischaracterized as redundant mortality control closures. NMFS acknowledges that the mortality control characterization of those portions of closed areas not specifically designated

as habitat conservation areas has become a misapplied term of art. The record clearly shows that the areas in question were created with several considerations in mind, including protection for spawning stocks and improvement of benthic habitats. The argument that any additional constraints on mortality under a ''hard TAC'' or ACL system are redundant is unsubstantiated. By the logic implied by this statement, no additional management constraints other than a catch limit would be necessary to successfully manage fisheries. Clearly, there are benefits to establishing additional controls on fisheries such as gear restrictions to minimize take of juvenile fish or to reduce take of other more depleted stocks. NMFS and the Council's CATT are conducting analyses that seek to provide information on the potential stock benefits of providing protections to critical life stages and/or spawning periods through restricted time and area access to existing closed areas.

9. An insufficient range of alternatives were analyzed. NMFS disagrees. In considering whether a sufficient range of alternatives have been examined in the context of fishery management, it must be acknowledged that each framework or amendment is incremental in nature and builds on extensive examination of myriads of alternatives of how best to manage a fishery. So, any consideration of specific new measure has benefitted from the examination of many alternatives in previous actions. For example, one commenter claims that exempted fishing permits (EFPs) should have been considered as an alternative for accessing closed areas. This option was discussed and considered by the Agency in the initial discussions on how to potentially provide closed area access in FY 2013. EFPs can be issued by NMFS under existing regulations and, as such, are an option that requires no specific Council analysis. If used, the EFP process would conduct the necessary analyses.

During the development of Framework 48, the Council considered and rejected potential access to habitat closed areas as well as several modifications to closed area boundaries. The status quo, wherein no modification to the sector exemption prohibition list was made, was analyzed in Framework 48. The remaining alternative analyzed was, as previously described, the procedural change in the sector exemption prohibition list to allow sectors to request exemptions for access to year-round closure areas not defined as habitat closure areas. Having rejected alternatives that modified closed area boundaries, the remaining option of adopting the procedural change considering the non-habitat areas that remained for consideration was sufficient. As previously stated, this was the only action undertaken by Framework 48.

Potential alternatives for actual closed area exemptions will be developed by NMFS as part of the sector exemption review. NMFS has previously stated it is considering a sub-set of the available so-called ''mortality'' closed areas for potential sector exemptions. To date, NMFS has indicated it is interested in examining alternatives that permit seasonal access to select areas with selective gear types designed to increase access to healthy stocks while minimizing impacts on depressed fish stocks and ESA-listed, threatened, and candidate species, and marine mammals.

10. The action cannot be undertaken by a framework adjustment to the FMP. NMFS disagrees that consideration of closed area sector exemption access cannot be undertaken through framework adjustment to the FMP. Furthermore, NMFS asserts that the *Oceana* v. *Evans* (389 F.Supp.2d 4 (2005)) decision is not applicable in the context raised by commenters.

Section 648.90 of the NE Multispecies regulations contains among other things, a description of the Council's FMP framework adjustment process. Section 648.90(a)(2)(iii) lists items that may be addressed through a framework adjustment. This list includes changes to closed areas, management boundaries, essential fish habitat, and, most on point for this action, sector administration provisions and sector allocation requirements and specifications.

Several commenters assert that the adjustment contemplated access to year round closed areas through sector exemption requests, is beyond the scope of what is permissible in a framework adjustment. They cite in support of their position that the action cannot be undertaken through framework adjustment, citing *Oceana* v. *Evans* that states that allowing access to closed areas is a fundamental change to the FMP and is also inconsistent with the goals and objectives established for the FMP.

Oceana v. *Evans* specified that an FMP amendment would be necessary when a new concept or radical changes to an existing concept were made in a way not considered in the previous FMP, prior amendments, or in hearings held in preparation of such actions. The findings in that case are distinguishable from the facts in Framework 48. The FMP involved in that case, as contrasted to the framework, did not have specific listing of a frameworkable measure to alter the boundaries of EFH. Moreover, closed area access is not a new concept in the FMP, nor is it a radical change to procedurally change the prohibition on sectors requesting closed area access exemptions. Various levels of access and modification of closed areas has occurred on numerous occasions since the inception of the FMP and though several subsequent amendments. As previously stated, all the Framework 48 action does is remove the prohibition on sectors requesting access to closed areas through exemptions. It does not change the boundaries of the closed areas or EFH, nor does it fully open the closed areas. It only permits the potential for limited access to year-round closed areas by sectors. Additional analysis is necessary to determine if, when, and how sectors may be exempted to access these closed areas.

Beyond the Framework 48 action, the areas where NMFS is examining potential sector access through exemptions are all areas that are open seasonally and to specific gears through either Special Access Programs or scallop rotational access areas. Inherent in the process previously outlined for review and analysis of potential sector exemptions, i.e., the next phase under consideration by NMFS, is the need to ensure consistency with the goals and objectives of the FMP. If the action eventually contemplated by NMFS were inconsistent with the goals and objectives, then it would be a fair assertion that the action in question should be developed through an FMP amendment. Because NMFS intends to analyze alternatives that seek to minimize potential negative impacts and, as a result, remain wholly consistent with the FMP objectives, it asserts that the sector exemption evaluation for closed area access can be developed through a framework adjustment.

In summary, NMFS asserts that the action implemented by Framework 48 is primarily procedural in nature with no actual environmental impacts, and, as such, the majority of comments and issues raised do not apply. Rather, they are issues to be addressed moving forward in the sector exemption review process. NMFS has determined that the concept of allowing access to closed areas on a limited and controlled basis through the sector exemption process is supportable and necessary, consistent with Magnuson-Stevens Act, National Standards and other requirements. The access, if ultimately granted is designed

to provide possible mitigation of negative impacts resulting from low FY 2013 catch limits by facilitating achieving OY for some groundfish stocks. NMFS intends to only consider potential access to the closed areas in areas that do not infringe on currently defined habitat areas or any currently proposed areas included in the draft Omnibus Habitat Amendment. Furthermore, NMFS is developing the analyses around alternatives that provide potential seasonal access to Georges Bank and Southern New England with selective gear. NMFS has been and continues to work on analyses that seek to address many of the issues raised. NMFS anticipates providing information on the status of the analysis and rulemaking at the June 2013 Council meeting.

Requirement To Stow Trawl Gear While Transiting

Comment 30: Eight commenters, including the Council, the Portland Fish Exchange, AFM, NSC, MEDMR, and three individuals, supported removing trawl gear stowage requirements for groundfish vessels. Commenters stated that the gear stowage requirements are no longer useful and that VMS is sufficient to enforce transiting of closed areas. Some commenters urged NMFS to approve this measure because the existing requirements are unsafe. One commenter suggested that the existing requirements actually make it easier for a vessel to illegally fish in a closed area, because it gives the illusion that trawl gear is properly stowed from the air. The Council also noted that neither the USCG nor NMFS representatives opposed the proposed measure when it came up for vote at Council meetings.

Response: NMFS disagrees that the existing trawl gear stowage requirements are no longer useful and that VMS is a sufficient alternative tool for enforcement of closed areas. As discussed in Item 4 of the preamble to this final rule, a few VMS positions or a reduced calculated speed in a closed area is not sufficient to enforce the prohibition on fishing when vessels are allowed to transit a closed area. The purpose of gear stowage requirements were not just to make stowed gear visible from the air, but to increase the time it would take for vessels to hide illegal fishing activity before a boarding by enforcement personnel at sea. They could also be a deterrent by increasing the likelihood of being caught. Eliminating these requirements for only some vessels would complicate enforcement and could make it difficult to detect and prosecute unlawful fishing in closed areas, which would undermine the effectiveness of these areas to achieve the objectives for which they were established as conservation and management measures in the FMP, including the protection of spawning and juvenile fish, habitat, and protected species. To the extent that closed areas were established to comply with sections 303(a)(1) and (7), and National Standard 9 of the Magnuson-Stevens Act to rebuild or ensure the long-term sustainability of fish stocks and fisheries, to minimize the adverse effects of fishing on habitat, or minimize bycatch of certain stocks or protected species, undermining these measures would be inconsistent with these provisions. Although the Council commented that the requirements are a relic of an earlier management regime, it did not provide any additional rationale to address NMFS concerns that eliminating these requirements would undermine the conservation objectives of closed areas and be inequitable to vessels in other FMPs. It is also not clear why the Council believes these measures do not apply in a sector management or ACL and AM system, when sector vessels are still prohibited from fishing in closed areas.

Although this measure would have some safety benefits for groundfish vessels, it would have been inconsistent with National Standard 4 of the Magnuson-Stevens Act requiring measures to be fair and equitable because it does not extend the safety benefits to other fisheries. Framework 48 also did not provide sufficient rationale as to why eliminating these requirements, rather than modifying them, satisfied the criteria of National Standard 10 to reduce risk while meeting the needs of conservation and management. For these reasons, NMFS has disapproved this measure in Framework 48.

NMFS does share commenters concerns, however, that the existing trawl gear stowage requirement can be unsafe for crew in bad weather. That is why NMFS will be initiating a separate management action to consider modifications to the gear stowage definition recommended by the Council's VMS/Enforcement Committee to address safety concerns while still meeting the needs of conservation and management. With respect to one commenter's concern that this measure actually makes it easier for vessels to hide illegal fishing activity, the VMS/Enforcement Committee considered this issue during its deliberations and examined different materials that could be used to cover the net while still making it visible from the air. NMFS intends to consider these materials and other ideas the Council or industry may have to improve the enforcement of these requirements from the air in its separate rulemaking.

Comment 31: The USCG and CLF opposed eliminating gear stowage requirements for groundfish trawlers and urged NMFS to disapprove this measure. The USCG commented that the proposed measure would make current and future closed areas virtually unenforceable. While VMS is an effective tool to enforce closed areas when transits are not allowed, it is not sufficient to document vessel activities when transiting is allowed. The USCG contends that eliminating these measures would reduce the time required to set and recover fishing gear, and thereby undermine enforcement of transiting restrictions at sea. The USCG also maintains that inconsistent gear stowage requirements would unnecessarily complicate enforcement, undermining the conservation objectives of closed areas. Furthermore, the USCG is concerned that this measure does not extend safety benefits to vessels in other FMPs, raising serious equity issues. CLF noted this measure was adopted against the advice of the Council's VMS/Enforcement Committee, and is concerned that removing these requirements would further exacerbate what it believes to be already an extensive problem of illegal fishing activity and misreporting of catch.

Response: NMFS agrees with the commenters that the proposed measure does not adequately balance the needs of safety with those of conservation and management, which is one reason why NMFS has disapproved this measure in Framework 48. NMFS agrees that these requirements are still needed to enforce the prohibition on fishing in closed areas and do not wish eliminating these requirements in the name of safety to open up a loophole for illegal fishing that would undermine the conservation benefits of closed areas for protecting spawning fish and habitat. Given that NMFS is initiating a separate rulemaking to address safety issues while ensuring and even improving the effectiveness of the requirements for enforcement, NMFS has disapproved this measure in Framework 48.

Correction to Eastern U.S./Canada Quota Monitoring

Comment 32: The Council, CLF, Earthjustice, and CCCHFA commented against NMFS proposed correction to the regulations. The Council and other commenters questioned NMFS' authority to make this change without explicit Council action, and asked NMFS to disapprove this change,

particularly in light of continued concerns of misreporting of catches of Eastern GB stocks. The Council also noted that NMFS proposed change would not be consistent with the regulations that the Council deemed as consistent with Amendment 16. The commenters urged NMFS to return to the former method of monitoring, counting all catch of cod, haddock, and yellowtail against Eastern GB TACs, to eliminate possible incentives to misreport these stocks that may have arisen by NMFS change to its monitoring practices since 2010. Earthjustice also requested that NMFS apply its correction retroactively and adjust catches for FY 2010–2012 and payback any overages that result to be consistent with the regulations.

Response: NMFS acknowledges the clarification provided by the Council and has disapproved its proposed correction in this final rule. In light of this clarified interpretation of Amendment 16, NMFS will revise its quota monitoring methods beginning with FY 2013 to be consistent with the regulations and will count all catch of cod, haddock, and yellowtail caught on trips inside and outside the Eastern U.S./Canada Area against the U.S./Canada TACs, sub-ACLs, and ACEs. The details of how NMFS intends to implement this monitoring method are described in Item 4 of the preamble. NMFS does not intend to apply this measure retroactively to FY 2010–2012, because that would unfairly penalize sector vessels and the common pool by changing the rules long past the time they could do anything to comply with them. NMFS disagrees that adjusting catches in FY 2010–2012 would result in more accurate catch estimates, but rather estimates that are consistent with the letter of the regulations. Estimates under the precautionary method may be more accurate, if one believes estimates of Eastern GB catches are biased low because vessels report some catch as from GOM or Western GB. Neither the Council nor NMFS, however, believe that all catches of cod, haddock, or yellowtail on all multi-area trips into the Eastern U.S./Canada Area are actually caught in Eastern GB. The purpose of this measure is not to apportion catch more accurately, but to provide a disincentive to fish in both the Eastern Area and Western GB/GOM and thereby be able to misreport catch. One would expect that if this measure had been in place during FY 2010–2012, fewer trips would have been fished in both the Eastern Area and other areas. Thus, applying this measure retroactively would not necessarily result in catch estimates that are more accurate, but rather estimates that are perhaps biased high instead of low. Retroactively adjusting catch estimates would also have implications for other stocks, biasing low catches of Western GB stocks and GOM cod and haddock, which would potentially underestimate mortality on those stocks. NMFS maintains that catch estimates in FY 2010–2012 were consistent with NMFS interpretation of Amendment 16 at the time, as NMFS described in the preamble to the Amendment 16 final rule, and the guidance NMFS provided to common pool and sector vessels for complying with the regulations. NMFS will revise its monitoring protocol for FY 2013 going forward, which would allow sector and common pool vessels to plan their fishing seasons based on the new rate of utilization of their Eastern allocations.

Comment 33: MEDMR, NSC, AFM, and one individual commented in support of NMFS proposed change to the regulations. The commenters believed that NMFS existing monitoring method was consistent with the Council's intent in Amendment 16 to increase operational flexibility for vessels to fish in multiple areas and to apportion catch according the area reported fished. Some commenters argued that there is no evidence of widespread misreporting, and emphasized that even if there was it would have management and not biological implications. Some commenters expressed concerns that returning to the Framework 42 method of catch attribution would not fix misreporting issues, but would only reduce flexibility for vessels, thereby making trips to Eastern GB too costly and reducing vessels' ability to target GB haddock. One commenter was concerned that the Framework 42 method would actually result in less accurate catch estimates by incorrectly apportioning catch.

Response: NMFS understands commenters concerns, but in light of the clarification received from the Council, NMFS is disapproving its proposed correction in this final rule and will instead revise its monitoring protocol to be consistent with the regulations. NMFS does not believe it has authority in the context of this action to reconsider and override the Council's clarified intent in Amendment 16 regarding this measure. A detailed description of how NMFS intends to implement the requirements is available in Item 5 of the preamble. NMFS agrees that the intent of Amendment 16 was to attribute catch to stock based on all available information (see 4.2.3.5.3 of Amendment 16). This would seem to conflict with the language of Framework 42. As discussed in the preamble, NMFS intends to implement both of these requirements by counting all catch of cod, haddock, and yellowtail on trips that declare into the Eastern U.S./Canada area inseason for the purpose of determining when a TAC has been reached and a closure is necessary. At the end of the fishing year, for the purposes of determining if a TAC has been exceeded and an AM is triggered, NMFS will subtract any catches on trips that declared into the Eastern U.S./Canada but showed no fishing activity in those areas on VMS. NMFS believes this would satisfy the intent of Framework 42 and Amendment 16, and meet our obligations to ensure the integrity of US/Canada TACs. Although there may be no conclusive evidence of misreporting of Eastern GB catches, the Council chose through Framework 42 to address a management problem with a policy decision to count catch in precautionary inseason to maintain the integrity of TACs agreed to with Canada. As noted in the response to Comment 32, this measure is not intended to necessarily attribute catch more accurately but to address a specific management problem, which is to ensure the U.S./Canada TACs are not exceeded. Because NMFS did not provide details of this monitoring method in the proposed rule for Framework 48, NMFS will collect additional public comment on it at this time.

Changes From the Proposed Rule

NMFS has made three changes from the proposed rule. Based upon public comment, the coordinates for the Atlantic Halibut Fixed Gear AM Area 1 was revised to correct errors contained in the proposed rule. In addition, NMFS withdrew its proposed correction to the regulations pertaining to monitoring the Eastern U.S./Canada TACs, and will instead be returning to the Framework 42 method of monitoring (see Item 5 of the preamble). Finally, NMFS implements revised status determination criteria for white hake through this interim final rule (see Item 7 of the preamble).

Classification

The Administrator, Northeast Region, NMFS, determined that the approved measures of Framework 48 are necessary for the conservation and management of the NE multispecies fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866.

This final rule does not contain policies with Federalism or ''takings'' implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

The Assistant Administrator for Fisheries finds good cause to waive the notice and comment provisions in 5 U.S.C. 553(b)(B) for the status determination criteria for white hake because it is impracticable and contrary to the public interest. As discussed more fully in Item 7 of the preamble, the purpose of implementing the revised status determination criteria for white hake make solicitation of public comment contrary to the public interest. The results of the February 2013 benchmark assessment for white hake are a change from the previous assessment and indicate that the stock is no longer overfished or undergoing overfishing. These criteria represent the best scientific information available and support an increase to the FY 2013 ABC and ACL for this stock. Implementing revised status determination criteria through this final rule is necessary in order to incorporate the best scientific information available into the FMP and to allow NMFS potentially to take separate action to implement an appropriate ABC and ACL for white hake in FY 2013. This could result in the benefit of revenues associated with a higher white hake catch limit in FY 2013, including increased landings of white hake and other groundfish species caught with it. Because a sector vessel must stop fishing in a stock area once its sector has reached its allocation for that particular stock, additional allocation of white hake extends the fishing season for sector vessels in the white hake stock area, including for other species. This is particularly true for unit stocks like white hake, for which the stock area encompasses the entire region. Additional white hake quota could also extend the fishing season for common pool vessels, which have a sub-ACL for this stock.

This action could not allow for prior public comment because the scientific review process and determination could not have been completed any earlier due to the inherent time constraints associated with such process. The benchmark assessment for white hake was completed in February 2013, but a summary report documenting the assessment results was not released until April 2, 2013, after publication of the Framework 48 proposed rule. However, because the Council included and recommended an alternative in Framework 48 to implement the revised status determination criteria in FY 2013, should it become available in time for rulemaking, NMFS is approving the revised status determination criteria through this final rule. The time necessary to provide for prior notice and opportunity for public comment would delay the incorporation of the best scientific information available into the FMP for management. It would also extend the time necessary to develop an action to implement a revised quota for this stock for FY 2013, should NMFS decide to do so. In the interest of receiving public input on this action, NMFS is publishing the revised status determination criteria as an interim final measure and is requesting public comments on it in this rule.

The Assistant Administrator for Fisheries finds that the need to implement these measures in a timely manner to incorporate the best scientific information available to establish appropriate quotas to prevent overfishing in FY 2013, constitutes good cause under authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date. This action incorporates the best scientific information available from recent stocks assessments into the FMP to allow Framework 50, a parallel action, to specify appropriate catch limits to prevent overfishing and achieve optimum yield. There is a need to implement this action in timely manner, because the 2013 fishing year begins on May 1, 2013. Without this action, appropriate quotas based on the best available science would not be set, and virtually the entire groundfish fishery would not receive allocations of groundfish stocks to begin fishing, which would have significant negative economic impacts on fishery participants and the communities that depend on them. In addition, there were unavoidable time constraints outside the agency's control, because the Council took final action and submitted Framework 48 much later than originally scheduled. As a result, review of the framework, and the entire rulemaking process was delayed.

A Final Regulatory Flexibility Analysis (FRFA) was prepared pursuant to 5 U.S.C. 604(a), and incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS's responses to those comments, and a summary of the analyses completed to support the action. A copy of the EA/RIR/IRFA is available from the both the Council and NMFS (see **ADDRESSES**).

The preamble to the proposed rule included a detailed summary of the analyses contained in the IRFA, and that discussion is not repeated here.

Final Regulatory Flexibility Analysis

Statement of Objective and Need

A description of the reasons why this action is being taken, and the objectives of and legal basis for this final rule, is contained in the preambles to the proposed rule and this final rule and is not repeated here.

Summary of Significant Issues Raised in Public Comments

NMFS's response to all comments received on the proposed rule, including those that raised significant issues or commented on the economic analyses summarized in the IRFA can be found in the ''Comments and Responses'' section of this rule. As outlined in that section, significant issues were raised by the public with respect to:

- The procedural-type change allowing sectors to request access to year-round closed areas;
- Reactive AMs for non-allocated stocks;
- Modifications to sector at-sea monitoring requirements;
- Reduction in minimum fish sizes, and;
- Sub-ACLs for GB yellowtail flounder and SNE/MA windowpane flounder for the scallop fishery.

Detailed responses are provided to the specific significant issues raised by the public comment and are not repeated here. The proposed change to GB discard strata was disapproved as a result of the public comments received. No other changes to the proposed rule measures were necessary as a result of public comments.

Description and Estimate of Number of Small Entities To Which the Rule Will Apply

The information analyzed in the RFA analysis indicated for 2011, the most recent complete year of data available, there were 1,370 distinct ownership entities identified. Of these, 1,312 are categorized as small and 58 are large entities as per SBA guidelines. As stated in the IRFA, a definition of dependence was also used to examine potential impact of this rule on small entities. Dependence was defined as entities deriving greater than 50 percent of gross sales from sales of either regulated groundfish or from scallops. This definition was used to identify those ownership groups most likely to be impacted by the proposed regulations. Using this threshold, 135 entities are groundfish-dependent, with 131 small

and 4 large. Forty-seven entities are scallop-dependent, with 39 small and 8 large.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This final rule contains a revision to collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by the Office of Management and Budget (OMB) under control number 0648–0605 (Amendment 16 reporting requirements). Framework 48 adjusts the sector at-sea monitoring pre-trip notification and NEFOP notification implemented through Amendment 16, by adding a question to allow fishermen to indicate what fishery they intend to participate in. This change is necessary to identify monkfish trips in Southern New England that may qualify for the exemption from sector at-sea monitoring coverage, in order to deploy at-sea monitors appropriately to achieve the coverage levels required by the FMP. Currently, all groundfish vessels make these notifications to the NEFOP through the PTNS via an online form, a telephone call, or email to NEFOP. When sector at-sea monitoring programs become established, the pre-trip notification may be made to NEFOP or other at-sea monitoring provider, via a telephone call or email or through a secure database. Public reporting burden for the Amendment 16 reporting requirements is estimated to average two minutes per individual response for sector at-sea monitoring pre-trip notification and NEFOP notification, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Framework 48 only adds a question to these notifications and would not affect the number of entities required to comply with these notifications (approximately 900 permits enrolled in sectors and 1482 limited access NE multispecies permits). The revision to these requirements is not expected to change this burden estimate.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Description of the Steps Taken To Minimize Economic Impact on Small Entities

Introduction. The Regulatory Flexibility Act (RFA) analysis is required to evaluate the impact of Federal proposed and final rules on small business entities. Federal agencies are required in this analysis to identify reasonable alternatives that may mitigate impacts on small business entities. The RFA does not compel specific regulatory outcomes. Moreover, the RFA does not require agencies to consider or adopt alternatives that are inconsistent with law or outside the scope and purpose of the regulations.

NMFS's ability to minimize economic impacts is constrained, in part, by recommendations of the Council. NMFS has only the ability to approve, partially approve, or disapprove Council-recommended measures. The Agency cannot revise or substitute Council-recommended measures in the framework review and implementation process. This limits the range of alternatives that can be considered in Framework 48 to the suite of preferred and non-preferred alternatives forwarded by the Council. NMFS does have the ability through independent rulemaking under specifically defined Magnuson-Stevens Act criteria to implement alternative measures that respond to emergencies or end overfishing. In situations where Council recommendations are determined consistent with the Magnuson-Stevens Act and other applicable law, NMFS is obligated to implement the measures in question.

Framework 48 measures. NMFS is disapproving the provision to eliminate trawl gear stowage requirements as recommended by the Council along with measures pertaining to at-sea monitoring industry cost sharing, at-sea monitoring cost responsibility of sectors, and discard rate strata for GB yellowtail flounder. The rationale for disapproving these Council-recommended Framework 48 measures is outlined in detail in the preamble and not repeated here. For all other Framework 48 measures described in the preamble, NMFS has determined the Council recommendations are consistent with applicable requirements of the Magnuson-Stevens Act and other law. As a result, NMFS is implementing the measures, as proposed by the Council, and the available mitigation is limited as a result.

The approved measures change status determination criteria, modify management measures for at-sea monitoring, allow exemption requests from sectors to year-round closures, change minimum size restrictions for allocated fish, and modify some AMs. The IRFA concluded the Framework 48 alternatives have the potential to impact a large number of small entities, and while some of the options may significantly alter profitability, none of them would have a disproportionate impact on small entities.

The new status determination criteria impacts the catch limits set for each species. In situations where the revised status determination criteria result in much lower catch limits than under the no action alternative considered in the IRFA, then the measures implemented by this rule would reduce fishing revenues. NMFS is required by the Magnuson-Stevens Act National Standard 2 to use the best available scientific information in setting catch limits. The new stock status determination criteria implemented by NMFS have been certified as the best available scientific information by the NEFSC. The no action alternative is inconsistent with the Magnuson-Stevens Act because it would continue to use outdated stock assessment data that is not the best available scientific information and; therefore, it cannot be implemented.

Establishing sub-ACLs for SNE/MA windowpane flounder and for GB yellowtail flounder impacts both the groundfish and scallop fisheries by shifting accountability for overages or changing the method of sub-ACL calculation. SNE/MA windowpane sub-ACLs for the scallop and other sub-components fisheries can reduce the likelihood of an overage and overfishing. Avoiding overages and overfishing may, in turn, lower operating costs and result in higher future revenues. If sub-ACLs are set below average yearly landings for a given fishery, and if AMs are severely restrictive, the impacted vessels could experience a substantial reduction in their profitability.

The modifications to the scallop fishery GB yellowtail flounder sub-ACL would use a fixed percentage to determine the scallop fishery allocation of the GB yellowtail flounder—40 percent in FY 2013 and 16 percent in each subsequent year. The economic impacts to fishing businesses will depend on the overall GB yellowtail flounder ABC and the probability of an overage, both of which are currently unquantifiable. The 16-percent fixed rate may be prohibitive to maximizing the value from scallop landings. In the worst-case scenario, if an overage occurred that closed a valuable access area to the scallop fishery, the scallop

industry could suffer a $16.9 million dollar loss in economic benefits. A non-preferred alternative was considered by the Council to use a set 90-percent of estimated scallop catch as the determinant of the scallop sub-ACL. Since the allocation method of the 90 percent alternative does not adjust for changes in the ABC, it could lead to a very low groundfish fishery sub-ACL for GB yellowtail flounder but mitigate potential impact to the scallop fishery. The measure to establish a small-mesh fishery sub-ACL for GB yellowtail flounder would use a fixed percentage, based on previous catch history, to set the allocation. This measure is expected to have similar impacts and unknowns as the other sub-ACLs, but with respect to the small-mesh groundfish vessels. The sub-ACL modifications implemented by this rule provide overall benefit to the nation in terms of the broader concept of optimum yield and further ensure the likelihood of overfishing is prevented. The non-preferred GB yellowtail flounder scallop sub-ACL determinant or not establishing additional sub-ACLs would not be consistent with National Standards 1, 4, 5, or 8 and the goals and objectives of the FMP. As such, these non-preferred approaches that may mitigate impacts to the scallop, small-mesh, and Mid-Atlantic fisheries were not favored by the Council and not approved by NMFS.

Modifying the groundfish sector monitoring requirements would impact all sector vessels. The removal of dockside monitoring implemented in this rule for FY 2013 has a positive economic impact by lowering operating costs and increasing probability. As such, it provides the maximum economic impact mitigation in comparison to the alternative that would require industry funded dockside monitoring to be in place for FY 2013 and beyond. The disapproved cost-sharing provision was intended to reduce the overall cost of at-sea monitoring paid for by the industry and would have provided similar positive impacts by lowering costs and increasing profits; however, the measure as recommended by the Council was not consistent with anti-deficiency and other Federal laws and policies and could not be implemented by NMFS. Similarly, eliminating the industry's responsibility to pay for at-sea monitoring would have positive economic impacts. This alternative would not ensure that coverage levels are sufficient to monitor sector allocations and satisfy the Amendment 16 monitoring requirements and, as a result, could not be approved. NMFS has committed to fully funding the required at-sea monitoring cost for FY 2013. This will provide a 1-year short-term relief to sector vessels until FY 2014. Had this funding not been made available, industry would have been required to fully fund at-sea monitoring in FY 2013 at a substantial economic impact. As modified by Amendment 16, the FMP requires industry to fully fund at-sea monitoring; however, NMFS has provided this funding each fishing year since 2010.

Modifying the minimum size limits for commercially allocated groundfish species would be expected to positively impact sector vessels. The lower minimum size restrictions will allow a portion of previously wasted regulated discards to become landings. This is expected to provide a positive economic impact on net trip revenues, as more fish will be landed for the same amount of expended quota as under the no action alternative. Under the full-retention alternative, there could have been unforeseen consequences from targeting smaller fish that could have long-term negative impacts on future landings and revenue. This could also occur under the changed minimum fish sizes. Maintaining minimum mesh sizes may help to mitigate some of this effect.

Based on public comment received, the modification of sector discard strata for GB yellowtail flounder in Federal statistical area 522 was not approved in this rule. This had the potential for positive impacts on revenue for large trawl vessels that predominantly fish this area.

The measure to modify AM timing for stocks not allocated to sectors is expected to help prevent overfishing. Controlling overfishing ensures long-term positive impacts. Under this provision, AMs would not be implemented mid-season, which will be beneficial to business planning. There is, however, the potential for short-term decreases in revenue based on implementation of AMs as catches may be reduced in the year AMs are enacted. The ability to implement AMs as soon as possible to correct the operational issue that caused the ACL overage, consistent with the National Standard 1 Guideline recommendations, is constrained in this case by the timing of data availability. The approach implemented by this rule provides a balance of ensuring AMs are enacted on the best available information in as timely a manner as possible. In that regard, little else could be done with respect to AM timing that remains consistent with National Standard 1.

Framework 48 would also create area–based AMs for Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder. In the event these AMs are triggered, trawl vessels would be forced to use selective gears within designated closure areas and fixed-gear vessels would be forced to cease fishing entirely inside designated closure areas. If triggered, these areas could have economic impacts in the $4 million to $5 million dollars for trawl vessels, and around $1 million for fixed-gear vessels, based on FY 2010 information. These AMs were nondiscretionary as they were required by a remand from Federal appellate court.

The measures to revise the recreational AM and to allow sectors to request year-round closed area exemptions has no immediate direct economic impact, because these measures only confer authority on the Regional Administrator to take action at a later date. Subsequent actions to implement specific adjustments to recreational measures or to consider sector exemption requests will fully analyze potential economic impacts to small entities, consistent with RFA requirements.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal permits issued for the NE multispecies fishery. In addition, copies of this final rule and guide (i.e., information bulletin) are available from NMFS (see **ADDRESSES**) and at the following Web site: *http://www.nero.noaa.gov/*.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: April 29, 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 stated in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 1. In § 648.4, revise paragraph (a)(1)(ii) to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(1) * * *

(ii) *Open access permits.* A vessel of the United States that has not been issued and is not eligible to be issued a limited access multispecies permit is eligible for and may be issued an ''open access multispecies'', ''handgear'', or ''charter/party'' permit, and may fish for, possess on board, and land multispecies finfish subject to the restrictions in § 648.88. A vessel that has been issued a valid limited access scallop permit, but that has not been issued a limited access multispecies permit, is eligible for and may be issued an open access scallop multispecies possession limit permit and may fish for, possess on board, and land multispecies finfish subject to the restrictions in § 648.88. The owner of a vessel issued an open access permit may request a different open access permit category by submitting an application to the Regional Administrator at any time.

* * * * *

■ 2. In § 648.7, remove and reserve paragraph (a)(4), revise paragraph (e)(3), and remove paragraph (h) and redesignate paragraph (i) as paragraph (h).

The revision reads as follows:

§ 648.7 Recordkeeping and reporting requirements.

* * * * *

(e) * * *

(3) *At-sea monitor reports.* Any record, as defined in § 648.2, related to fish observed by an at-sea monitor, including any reports provided to NMFS, sector managers, or another third-party service provider specified in paragraph (h) of this section, must be retained and made available for immediate review for a total of 3 years after the date the fish were first observed. At-sea monitor providers must retain the required records and reports at their principal place of business.

* * * * *

■ 3. In § 648.10, revise paragraph (k)(1)(iii) and add paragraph (k)(1)(iv) to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(k) * * *

(1) * * *

(iii) *Trip-start hail report.* If instructed by the Regional Administrator or required by a sector operations plan approved pursuant to § 648.87(b)(2) and (c), the operator of a vessel must submit a trip-start hail report prior to departing port at the beginning of each trip notifying the sector manager and/or NMFS of the vessel permit number; trip ID number in the form of the VTR serial number of the first VTR page for that trip, or another trip identifier specified by NMFS; an estimate of the date and time of arrival to port; and any other information as instructed by the Regional Administrator. Trip-start hail reports by vessels operating less than 6 hr or within 6 hr of port must also include estimated date and time of offload. The trip-start hail report may be submitted via VMS or some other method, as instructed by the Regional Administrator or required by a sector operations plan approved pursuant to § 648.87(b)(2) and (c). If the vessel operator does not receive confirmation of the receipt of the trip-start hail report from the sector manager or NMFS, the operator must contact the intended receiver to confirm the trip-start hail report via an independent back-up system, as instructed by the Regional Administrator. To the extent possible, NMFS shall reduce unnecessary duplication of the trip-start hail report with any other applicable reporting requirements..

(iv) *Trip-end hail report.* Upon its return to port and prior to crossing the VMS demarcation line as defined in § 648.10, the owner or operator of any vessel issued a limited access NE multispecies permit that is subject to the VMS requirements specified in paragraph (b)(4) of this section must submit a trip-end hail report to NMFS via VMS, as instructed by the Regional Administrator. The trip-end hail report must include at least the following information, as instructed by the Regional Administrator: The vessel permit number; VTR serial number, or other applicable trip ID specified by NMFS; intended offloading location(s), including the dealer name/offload location, port/harbor, and state for the first dealer/facility where the vessel intends to offload catch and the port/harbor, and state for the second dealer/facility where the vessel intends to offload catch; estimated date/time of arrival; estimated date/time of offload; and the estimated total amount of all species retained, including species managed by other FMPs (in pounds, landed weight), on board at the time the vessel first offloads its catch from a particular trip. The trip-end hail report must be submitted at least 6 hr in advance of landing for all trips of at least 6 hr in duration or occurring more than 6 hr from port. For shorter trips, the trip-end hail reports must be submitted upon the completion of the last tow or hauling of gear, as instructed by the Regional Administrator. To the extent possible, NMFS shall reduce unnecessary duplication of the trip-end hail reports with any other applicable reporting requirements.

* * * * *

■ 4. In § 648.11, revise paragraphs (k)(1) and (2) and add paragraph (l) to read as follows:

§ 648.11 At-sea sampler/observer coverage.

* * * * *

(k) * * *

(1) *Pre-trip notification.* Unless otherwise specified in this paragraph (k), or notified by the Regional Administrator, the owner, operator, or manager of a vessel (i.e., vessel manager or sector manager) issued a limited access NE multispecies permit that is fishing under a NE multispecies DAS or on a sector trip, as defined in this part, must provide advanced notice to NMFS of the vessel name, permit number, and sector to which the vessel belongs, if applicable; contact name and telephone number for coordination of observer deployment; date, time, and port of departure; and the vessel's trip plan, including area to be fished, whether a monkfish DAS will be used, and gear type to be used at least 48 hr prior to departing port on any trip declared into the NE multispecies fishery pursuant to § 648.10 or § 648.85, as instructed by the Regional Administrator, for the purposes of selecting vessels for observer deployment. For trips lasting 48 hr or less in duration from the time the vessel leaves port to begin a fishing trip until the time the vessel returns to port upon the completion of the fishing trip, the vessel owner, operator, or manager may make a weekly notification rather than trip-by-trip calls. For weekly notifications, a vessel must notify NMFS by 0001 hr of the Friday preceding the week (Sunday through Saturday) that it intends to complete at least one NE multispecies DAS or sector trip during the following week and provide the date, time, port of departure, area to be fished, whether a monkfish DAS will be used, and gear type to be used for each trip during that week. Trip notification calls must be made no more than 10 days in advance

of each fishing trip. The vessel owner, operator, or manager must notify NMFS of any trip plan changes at least 24 hr prior to vessel departure from port. A vessel may not begin the trip without being issued an observer notification or a waiver by NMFS.

(2) *Vessel selection for observer coverage.* NMFS shall notify the vessel owner, operator, or manager whether the vessel must carry an observer, or if a waiver has been granted, for the specified trip within 24 hr of the vessel owner's, operator's or manager's notification of the prospective trip, as specified in paragraph (k)(1) of this section. All trip notifications shall be issued a unique confirmation number. A vessel may not fish on a NE multispecies DAS or sector trip with an observer waiver confirmation number that does not match the trip plan that was called in to NMFS. Confirmation numbers for trip notification calls are valid for 48 hr from the intended sail date. If a trip is interrupted and returns to port due to bad weather or other circumstance beyond the operator's control, and goes back out within 48 hr, the same confirmation number and observer status remains. If the layover time is greater than 48 hr, a new trip notification must be made by the operator, owner, or manager of the vessel.

(l) *NE multispecies monitoring program goals and objectives.* Monitoring programs established for the NE multispecies are to be designed and evaluated consistent with the following goals and objectives:

(1) Improve documentation of catch:

(i) Determine total catch and effort, for each sector and common pool, of target or regulated species; and

(ii) Achieve coverage level sufficient to minimize effects of potential monitoring bias to the extent possible while maintaining as much flexibility as possible to enhance fleet viability.

(2) Reduce the cost of monitoring:

(i) Streamline data management and eliminate redundancy;

(ii) Explore options for cost-sharing and deferment of cost to industry; and

(iii) Recognize opportunity costs of insufficient monitoring.

(3) Incentivize reducing discards:

(i) Determine discard rate by smallest possible strata while maintaining cost-effectiveness; and

(ii) Collect information by gear type to accurately calculate discard rates.

(4) Provide additional data streams for stock assessments:

(i) Reduce management and/or biological uncertainty; and

(ii) Perform biological sampling if it may be used to enhance accuracy of mortality or recruitment calculations.

(5) Enhance safety of monitoring program.

(6) Perform periodic review of monitoring program for effectiveness.

■ 5. In § 648.14:
■ a. Revise paragraph (e)(1);
■ b. Remove paragraph (k)(14)(x);
■ c. Redesignate paragraphs (k)(14)(xi) and (xii) as paragraphs (k)(14)(x) and (xi), respectively, and revise them;
■ d. Remove and reserve paragraphs (k)(18)(i)(B) through (D); and
■ e. Revise paragraphs (k)(19) introductory text, (k)(19)(i), and (k)(20).

The revisions read as follows:

§ 648.14 Prohibitions.

* * * * *

(e) * * *

(1) Assault, resist, oppose, impede, harass, intimidate, or interfere with or bar by command, impediment, threat, or coercion any NMFS-approved observer or sea sampler conducting his or her duties; any authorized officer conducting any search, inspection, investigation, or seizure in connection with enforcement of this part; any official designee of the Regional Administrator conducting his or her duties, including those duties authorized in § 648.7(g).

* * * * *

(k) * * *

(14) * * *

(x) Leave port to begin a trip before an at-sea monitor has arrived and boarded the vessel or before electronic monitoring equipment has been properly installed if assigned to carry either an at-sea monitor or electronic monitoring equipment for that trip, as prohibited by § 648.87(b)(5)(iii)(A).

(xi) Leave port to begin a trip if a vessel has failed a review of safety issues by an at-sea monitor and has not successfully resolved any identified safety deficiencies, as prohibited by § 648.87(b)(5)(iv)(A).

* * * * *

(19) *At-sea/electronic monitoring service providers.* It is unlawful for any at-sea/electronic monitoring service provider, including individual at-sea monitors, to do any of the following:

(i) Fail to comply with the operational requirements, including the recordkeeping and reporting requirements, specified in § 648.87(b)(5).

* * * * *

(20) *AMs for both stocks of windowpane flounder, ocean pout, Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder.* It is unlawful for any person, including any owner or operator of a vessel issued a valid Federal NE multispecies permit or letter under § 648.4(a)(1)(i), unless otherwise specified in § 648.17, to fail to comply with the restrictions on fishing and gear specified in § 648.90(a)(5)(i)(D).

* * * * *

■ 6. In § 648.80, revise paragraph (a)(3)(vii) to read as follows:

§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(a) * * *

(3) * * *

(vii) *Rockhopper and roller gear restrictions.* For all trawl vessels fishing on a NE multispecies DAS or sector trip in the GOM/GB Inshore Restricted Roller Gear Area, the diameter of any part of the trawl footrope, including discs, rollers, or rockhoppers, must not exceed 12 inches (30.5 cm). The GOM/GB Inshore Restricted Roller Gear Area is defined by straight lines connecting the following points in the order stated:

INSHORE RESTRICTED ROLLER GEAR AREA

Point	N. Latitude	W. Longitude
1	42°00′	(1)
2	42°00′	(2)
3	42°00′	(3)
4	42°00′	69°50′
5	43°00′	69°50′
6	43°00′	70°00′
7	43°30′	70°00′
8	43°30′	(4)

[1] Massachusetts shoreline.
[2] Cape Cod shoreline on Cape Cod Bay.
[3] Cape Cod shoreline on the Atlantic Ocean.
[4] Maine shoreline.

* * * * *

■ 7. In § 648.82:
■ a. Revise paragraphs (k)(2)(i), (n)(1) introductory text, (n)(2)(ii) introductory text, (n)(2)(ii)(A) and (B), (n)(2)(ii)(H) through (J), and (n)(2)(ii)(M);
■ b. Remove and reserve paragraph (n)(2)(iv); and
■ c. Revise paragraph (n)(2)(vi).

The revisions read as follows:

§ 648.82 Effort-control program for NE multispecies limited access vessels.

* * * * *

(k) * * *

(2) * * *

(i) A vessel issued a valid limited access NE multispecies permit is eligible to lease Category A DAS to or from another such vessel, subject to the conditions and requirements of this part, unless the vessel was issued a valid Small Vessel or Handgear A

permit specified under paragraphs (b)(5) and (6) of this section, respectively.

* * * * *

(n) * * *

(1) *Differential DAS counting AM for fishing years 2010 and 2011.* Unless otherwise specified pursuant to § 648.90(a)(5), based upon catch and other information available to NMFS by February of each year, the Regional Administrator shall project the catch of regulated species or ocean pout by common pool vessels for the fishing year ending on April 30 to determine whether such catch will exceed any of the sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4)(iii). This initial projection of common pool catch shall be updated shortly after the end of each fishing year, once information becomes available regarding the catch of regulated species and ocean pout by vessels fishing for groundfish in state waters outside of the FMP, vessels fishing in exempted fisheries, and vessels fishing in the Atlantic sea scallop fishery; and the catch of Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, and Atlantic wolffish by sector vessels to determine if excessive catch by such vessels resulted in the overall ACL for a particular stock to be exceeded. If such catch resulted in the overall ACL for a particular stock being exceeded, the common pool's catch of that stock shall be increased by an amount equal to the amount of the overage of the overall ACL for that stock multiplied by the common pool's share of the overall ACL for that stock calculated pursuant to § 648.90(a)(4)(iii)(H)(*2*). For example, if the 2010 overall ACL for GOM cod was exceeded by 10,000 lb (4,536 kg) due to excessive catch of that stock by vessels fishing in state waters outside the FMP, and the common pool's share of the 2010 overall GOM cod ACL was 5 percent, then the common pool's 2010 catch of GOM cod shall be increased by 500 lb (226.8 kg) (10,000 lb (4,536 kg) × 0.05 of the overall GOM cod ACL). If, based on the initial projection completed in February, the Regional Administrator projects that any of the sub-ACLs specified for common pool vessels will be exceeded or underharvested, the Regional Administrator shall implement a differential DAS counting factor to all Category A DAS used within the stock area in which the sub-ACL was exceeded or underharvested, as specified in paragraph (n)(1)(i) of this section, during the following fishing year, in a manner consistent with the Administrative Procedure Act. Any differential DAS counting implemented at the start of the fishing year will be reevaluated and recalculated, if necessary, once updated information is obtained. The differential DAS counting factor shall be based upon the projected proportion of the sub-ACL of each NE multispecies stock caught by common pool vessels, rounded to the nearest even tenth, as specified in paragraph (n)(1)(ii) of this section, unless otherwise specified pursuant to § 648.90(a)(5). For example, if the Regional Administrator projects that common pool vessels will catch 1.18 times the sub-ACL for GOM cod during fishing year 2010, the Regional Administrator shall implement a differential DAS counting factor of 1.2 to all Category A DAS used by common pool vessels only within the Inshore GOM Differential DAS Area during fishing year 2011 (i.e., Category A DAS will be charged at a rate of 28.8 hr for every 24 hr fished—1.2 times 24-hr DAS counting). If it is projected that catch in a particular fishing year will exceed or underharvest the sub-ACLs for several regulated species stocks within a particular stock area, including both exceeding and underharvesting several sub-ACLs within a particular stock area, the Regional Administrator shall implement the most restrictive differential DAS counting factor derived from paragraph (n)(1)(ii) of this section for the sub-ACLs exceeded or underharvested to any Category A DAS used by common pool vessels within that particular stock area. For example, if it is projected that common pool vessels will be responsible for 1.2 times the GOM cod sub-ACL and 1.1 times the CC/GOM yellowtail flounder sub-ACL, the Regional Administrator shall implement a differential DAS counting factor of 1.2 to any Category A DAS fished by common pool vessels only within the Inshore GOM Differential DAS Area during the following fishing year. For any differential DAS counting factor implemented in fishing year 2011, the differential DAS counting factor shall be applied against the DAS accrual provisions specified in paragraph (e)(1)(i) of this section for the time spent fishing in the applicable differential DAS counting area based upon the first VMS position into the applicable differential DAS counting area and the first VMS position outside of the applicable differential DAS counting area, pursuant to § 648.10. For example, if a vessel fished 12 hr inside a differential DAS counting area where a differential DAS counting factor of 1.2 would be applied, and 12 hr outside of the differential DAS counting area, the vessel would be charged 48 hr of DAS use because DAS would be charged in 24-hr increments ((12 hr inside the area × 1.2 = 14.4 hr) + 12 hr outside the area, rounded up to the next 24-hr increment to determine DAS charged). For any differential DAS counting factor implemented in fishing year 2012, the differential DAS counting factor shall be applied against the DAS accrual provisions in paragraph (e)(1)(i) of this section, or if a differential DAS counting factor was implemented for that stock area during fishing year 2011, against the DAS accrual rate applied in fishing year 2011. For example, if a differential DAS counting factor of 1.2 was applied to the Inshore GOM Differential DAS Area during fishing year 2011 due to a 20-percent overage of the GOM cod sub-ACL, yet the GOM cod sub-ACL was exceeded again, but by 50 percent during fishing year 2011, an additional differential DAS factor of 1.5 would be applied to the DAS accrual rate applied during fishing year 2012 (i.e., the DAS accrual rate in the Inshore GOM Differential DAS Counting Area during fishing year 2012 would be 43.2 hr charged for every 24-hr fished—1.2 × 1.5 × 24-hr DAS charge). If the Regional Administrator determines that similar DAS adjustments are necessary in all stock areas, the Regional Administrator will adjust the ratio of Category A:Category B DAS specified in paragraph (d)(1) of this section to reduce the number of available Category A DAS available based upon the amount of the overage, rather than apply a differential DAS counting factor to all Category A DAS used in all stock areas.

* * * * *

(2) * * *

(ii) *Stock area closures.* Unless otherwise specified in this paragraph (n)(2)(ii), if the Regional Administrator projects that 90 percent of the trimester TACs specified in paragraph (n)(2)(i) of this section will be caught based upon available information, the Regional Administrator shall close the area where 90 percent of the catch for each such stock occurred to all common pool vessels on a NE multispecies DAS using gear capable of catching such stocks for the remainder of that trimester, as specified in paragraphs (n)(2)(ii)(A) through (N) of this section, in a manner consistent with the Administrative Procedure Act. For example, if the Regional Administrator projects that 90 percent of the CC/GOM yellowtail flounder Trimester 1 TAC will be caught, common pool vessels using trawl and gillnet gear shall be prohibited from fishing in the CC/GOM Yellowtail Flounder Closure Area

specified in paragraph (n)(2)(ii)(G) of this section until the beginning of Trimester 2 on September 1 of that fishing year. Based upon all available information, the Regional Administrator is authorized to expand or narrow the areas closed under this paragraph (n)(2)(ii) in a manner consistent with the Administrative Procedure Act. If it is not possible to identify an area where only 90 percent of the catch occurred, the Regional Administrator shall close the smallest area possible where greater than 90 percent of the catch occurred. Common pool vessels holding either a Handgear A or B permit and fishing with handgear or tub trawls are exempt from stock area closures for white hake. The Regional Administrator may exempt Handgear A and B permitted vessels from stock area closures for other stocks pursuant to this paragraph (n)(2)(ii) if it is determined that catches of the respective species or stock by these vessels are less than 1 percent of the common pool catch of that species or stock. The Regional Administrator shall make such determination prior to the start of the fishing year through a notice published in the **Federal Register**, consistent with the Administrative Procedure Act, and any such determination shall remain in effect until modified.

(A) *GB Cod Trimester TAC Area.* For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Cod Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded by straight lines connecting the following points in the order stated:

GB COD TRIMESTER TAC AREA

Point	N. Latitude	W. Longitude
1	42° 20′	70° 00′
2	42° 20′	(1)
3	41° 50′	(1)
4	41° 50′	67° 40′
5	41° 10′	67° 40′
6	41° 10′	67° 10′
7	41° 00′	67° 10′
8	41° 00′	67° 00′
9	40° 50′	67° 00′
10	40° 50′	66° 50′
11	40° 40′	66° 50′
12	40° 40′	66° 40′
13	39° 50′	66° 40′
14	39° 50′	68° 50′
15	41° 00′	68° 50′
16	41° 00′	69° 30′
17	41° 10′	69° 30′
18	41° 10′	69° 50′
19	41° 20′	69° 50′
20	41° 20′	(2)
21	(3)	70° 00′
22	(4)	70° 00′

GB COD TRIMESTER TAC AREA—Continued

Point	N. Latitude	W. Longitude
23	(5)	70° 00′

1 U.S./Canada maritime boundary.
2 East-facing shoreline of Nantucket, MA.
3 North-facing shoreline of Nantucket, MA.
4 South-facing shoreline of Cape Cod, MA.
5 North-facing shoreline of Cape Cod, MA.

(B) *GOM Cod Trimester TAC Area.* For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GOM Cod Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear within the area bounded on the south, west, and north by the shoreline of the United States and bounded on the east by straight lines connecting the following points in the order stated:

GOM COD TRIMESTER TAC AREA

Point	N. Latitude	W. Longitude
1	(1)	69° 20′
2	43° 40′	69° 20′
3	43° 40′	69° 00′
4	43° 10′	69° 00′
5	43° 10′	69° 10′
6	43° 00′	69° 10′
7	43° 00′	69° 20′
8	42° 50′	69° 20′
9	42° 50′	69° 40′
10	42° 20′	69° 40′
11	42° 20′	70° 00′
12	(2)	70° 00′

1 Intersection with ME shoreline.
2 North-facing shoreline of Cape Cod, MA.

* * * * *

(H) *American Plaice Trimester TAC Area.* For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the American Plaice Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

AMERICAN PLAICE TRIMESTER TAC AREA

Point	N. Latitude	W. Longitude
1	(1)	68°00′
2	44°10′	67°50′
3	44°00′	67°50′
4	44°00′	67°40′
5	(2)	67°40′
6	42°53.1′	67°44.4′
7	(2)	67°40′
8	41°10′	67°40′
9	41°10′	67°10′
10	41°00′	67°10′
11	41°00′	67°00′
12	40°50′	67°00′
13	40°50′	66°50′

AMERICAN PLAICE TRIMESTER TAC AREA—Continued

Point	N. Latitude	W. Longitude
14	40°40′	66°50′
15	40°40′	66°40′
16	39°50′	66°40′
17	39°50′	68°50′
18	41°00′	68°50′
19	41°00′	69°30′
20	41°10′	69°30′
21	41°10′	69°50′
22	41°20′	69°50′
23	41°20′	(3)
24	(4)	70°00′
25	(5)	70°00′

1 Intersection with ME shoreline.
2 U.S./Canada maritime boundary.
3 East-facing shoreline of Nantucket, MA.
4 North-facing shoreline of Nantucket, MA.
5 South-facing shoreline of Cape Cod, MA.

(I) *Witch Flounder Trimester TAC Area.* For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the Witch Flounder Trimester TAC Area shall apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

WITCH FLOUNDER TRIMESTER TAC AREA

Point	N. Latitude	W. Longitude
1	(1)	68°00′
2	44°10′	67°50′
3	44°00′	67°50′
4	44°00′	67°40′
5	(2)	67°40′
6	42°53.1′	67°44.4′
7	(2)	67°40′
8	41°10′	67°40′
9	41°10′	67°10′
10	41°00′	67°10′
11	41°00′	67°00′
12	40°50′	67°00′
13	40°50′	66°50′
14	40°40′	66°50′
15	40°40′	66°40′
16	39°50′	66°40′
17	39°50′	68°50′
18	41°00′	68°50′
19	41°00′	69°30′
20	41°10′	69°30′
21	41°10′	69°50′
22	41°20′	69°50′
23	41°20′	(3)
24	(4)	70°00′
25	(5)	70°00′

1 Intersection with ME shoreline.
2 U.S./Canada maritime boundary.
3 East-facing shoreline of Nantucket, MA.
4 North-facing shoreline of Nantucket, MA.
5 South-facing shoreline of Cape Cod, MA.

(J) *GB Winter Flounder Trimester TAC Area.* For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the GB Winter Flounder Trimester TAC Area shall

apply to common pool vessels using trawl gear within the area bounded by straight lines connecting the following points in the order stated:

GB WINTER FLOUNDER TRIMESTER TAC AREA

Point	N. Latitude	W. Longitude
1	42°20′	68°50′
2	42°20′	(1)
3	40°30′	(1)
4	40°30′	66°40′
5	39°50′	66°40′
6	39°50′	68°50′

[1] U.S./Canada maritime boundary

* * * * *

(M) *White Hake Trimester TAC Area.* For the purposes of the trimester TAC AM closure specified in paragraph (n)(2)(ii) of this section, the White Hake Trimester TAC Area shall apply to common pool vessels using trawl gear, sink gillnet gear, and longline/hook gear, except for Handgear A and B permitted vessels using handgear or tub trawls, within the area bounded by straight lines connecting the following points in the order stated:

WHITE HAKE TRIMESTER TAC AREA

Point	N. Latitude	W. Longitude
1	(1)	69°20′
2	43°40′	69°20′
3	43°40′	69°00′
4	43°20′	69°00′
5	43°20′	67°40′
6	(2)	67°40′
7	42°53.1′	67°44.4′
8	(2)	67°40′
9	41°20′	67°40′
10	41°20′	68°10′
11	41°10′	68°10′
12	41°10′	68°20′
13	41°00′	68°20′
14	41°00′	69°30′
15	41°10′	69°30′
16	41°10′	69°50′
17	41°20′	69°50′
18	41°20′	(3)
19	(4)	70°00′
20	(5)	70°00′

[1] Intersection with ME shoreline.
[2] U.S./Canada maritime boundary.
[3] East-facing shoreline of Nantucket, MA.
[4] North-facing shoreline of Nantucket, MA.
[5] South-facing shoreline of Cape Cod, MA.

* * * * *

(vi) *Trip limit adjustment.* When 60 percent of the northern or southern windowpane flounder, ocean pout, or Atlantic halibut sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4)(iii)(H)(*2*) is projected to be caught, the Regional Administrator may specify, consistent with the APA, a possession limit for these stocks that is calculated to prevent the yearly sub-ACL from being exceeded prior to the end of the fishing year.

* * * * *

■ 8. In § 648.83, revise paragraph (a)(1) to read as follows:

§ 648.83 Multispecies minimum fish sizes.

(a) * * *

(1) Minimum fish sizes for recreational vessels and charter/party vessels that are not fishing under a NE multispecies DAS are specified in § 648.89. Except as provided in § 648.17, all other vessels are subject to the following minimum fish sizes, determined by total length (TL):

MINIMUM FISH SIZES (TL) FOR COMMERCIAL VESSELS

Species	Size (inches)
Cod	19 (48.3 cm)
Haddock	16 (40.6 cm)
Pollock	19 (48.3 cm)
Witch flounder (gray sole)	13 (33 cm)
Yellowtail flounder	12 (30.5 cm)
American plaice (dab)	12 (30.5 cm)
Atlantic halibut	41 (104.1 cm)
Winter flounder (blackback)	12 (30.5 cm)
Redfish	7 (17.8 cm)

* * * * *

■ 9. In § 648.84, add paragraph (e) to read as follows:

§ 648.84 Gear-marking requirements and gear restrictions.

* * * * *

(e) *Rope separator trawl.* A rope separator trawl is defined as a four-seam bottom trawl net (i.e., a net with a top and bottom panel and two side panels) modified to include both a horizontal separator panel and an escape opening in the bottom belly of the net below the separator panel, as further specified in paragraphs (e)(1) through (3) of this section.

(1) *Mesh size.* The minimum mesh size applied throughout the body and extension of a rope separator trawl must be 6-inch (15.2-cm) diamond mesh or 6.5-inch (16.5-cm) square mesh, or any combination thereof. Mesh in the bottom belly of the net must be 13-inch (33-cm) diamond mesh. Unless otherwise specified in this part, the codend mesh size must be consistent with mesh size requirements specified in § 648.80. The mesh size of a particular section of the rope separator trawl is measured in accordance with § 648.80(f)(2), unless insufficient numbers of mesh exist, in which case the maximum total number of meshes in the section will be measured (between 2 and 20 meshes).

(2) *Separator panel.* The separator panel must consist of parallel lines made of fiber rope, the ends of which are attached to each side of the net starting at the forward edge of the square of the net and running aft toward the extension of the net. The leading rope must be attached to the side panel at a point at least ⅓ of the number of meshes of the side panel above the lower gore, and the panel of ropes shall slope downward toward the extension of the net. For example, if the side panel of the net is 42 meshes tall, the leading rope must be attached at least 14 meshes above the lower gore. The forward ⅔ of the separator ropes that comprise the separator panel must be no farther than 26 inches (66 cm) apart, with the after ⅓ of the separator ropes that comprise the separator panel being no farther than 13 inches (33 cm) apart. The ends of the aftermost rope shall be attached to the bottom belly at a point ⅙ of the number of meshes of the after end of the bottom belly below the lower gore. The separator ropes should be of sufficient length not to impinge upon the overall shape of the net without being too long to compromise the selectivity of the net. The separator ropes may not be manipulated in any way that would inhibit the selectivity of the net by causing the separator ropes to dip toward the bottom belly of the net and obscure the escape opening, as defined in paragraph (e)(3) of this section.

(3) *Escape opening.* The escape opening must be positioned in the bottom belly of the net behind the sweep and terminate under the separator panel, as described in paragraph (e)(2) of this section. Longitudinal lines may be used to maintain the shape of the escape opening, as necessary. The escape opening shall be at least 18 meshes in both length and width.

■ 10. In § 648.85, revise paragraphs (a)(2)(ii) and (iii), (a)(3)(iv)(E), (b)(7)(iv)(H), (b)(8)(v)(C), and (d) to read as follows:

§ 648.85 Special management programs.

(a) * * *

(2) * * *

(ii) *Adjustments to TACs.* Any overages of the overall Eastern GB cod, Eastern GB haddock, and GB yellowtail flounder U.S. TACs caused by an overage of the component of the U.S. TAC specified for either the common pool, individual sectors, the scallop fishery, or any other fishery, pursuant to this paragraph (a)(2) and § 648.90(a)(4), that occur in a given fishing year shall be subtracted from the respective TAC component responsible for the overage in the following fishing year and may be

subject to the overall groundfish AM provisions as specified in § 648.90(a)(5)(ii) if the overall ACL for a particular stock in a given fishing year, specified pursuant to § 648.90(a)(4), is exceeded.

(iii) *Distribution of TACs.* For stocks managed by the U.S./Canada Resource Sharing Understanding, as specified in paragraph (a)(1) of this section, the TAC allocation determined pursuant to this paragraph (a)(2) shall be distributed between sectors approved pursuant to § 648.87(c), common pool vessels, scallop vessels, and other applicable fisheries, as specified in § 648.90(a)(4). Approved sectors will be allocated ACE for Eastern GB cod and Eastern GB haddock proportional to the sector's allocation of the overall ACL for these stocks, based upon the fishing histories of sector vessels, as specified in § 648.87(b)(1)(i). Any ACE for Eastern GB cod and Eastern GB haddock allocated to an individual sector is considered a subset of the overall GB cod and GB haddock ACE allocated to that sector and may only be harvested from the Eastern U.S./Canada Area, while the remaining ACE for GB cod and GB haddock available to that sector may only be harvested outside of the Eastern U.S./Canada Area. For example, if a sector is allocated 10 percent of the GB haddock ACL, it will also be allocated 10 percent of the Eastern GB haddock TAC for that particular fishing year.

(3) * * *

(iv) * * *

(E) *Closure of Eastern U.S./Canada Area.* Based upon available information, when the Regional Administrator projects that any individual TAC allocation for NE multispecies common pool or sectors specified in paragraph (a)(2)(iii) of this section will be caught, NMFS shall close, in a manner consistent with the Administrative Procedure Act, the Eastern U.S./Canada Area to all vessels subject to that particular TAC allocation, unless otherwise allowed under this paragraph (a)(3)(iv)(E). For example, if the Eastern GB cod TAC specified for common pool vessels is projected to be caught, NMFS shall close the Eastern U.S./Canada Area to all common pool vessels operating under a NE multispecies DAS. Should the Eastern U.S./Canada Area close as described in this paragraph (a)(3)(iv)(E), common pool vessels fishing under a DAS may continue to fish in a SAP within the Eastern U.S./Canada Area, provided that the TAC for the target stock identified for that particular SAP (i.e., haddock for the Eastern U.S./Canada Haddock SAP or haddock or yellowtail flounder for the CA II Yellowtail Flounder/Haddock SAP) has not been fully harvested. A vessel fishing on a sector trip may only fish in a SAP if that vessel's sector has ACE available for all stocks caught in that SAP. For example, should the GB cod TAC allocation specified for common pool vessels in paragraph (a)(2)(iii) of this section be attained, and the Eastern U.S./Canada Area closure implemented for common pool vessels, common pool vessels could continue to fish for yellowtail flounder within the SAP identified as the Closed Area II Yellowtail Flounder/Haddock SAP, described in paragraph (b)(3) of this section, in accordance with the requirements of that program. Upon closure of the Eastern U.S./Canada Area, vessels may transit through this area as described in paragraph (a)(1)(ii) of this section, provided that its gear is stowed in accordance with the provisions of § 648.23(b), unless otherwise restricted under this part.

* * * * *

(b) * * *

(7) * * *

(iv) * * *

(H) *Landing limits.* For all vessels legally declared into the CA I Hook Gear Haddock SAP described in paragraph (b)(7)(i) of this section, landing limits for NE multispecies are specified in paragraphs (b)(7)(v)(B) and (b)(7)(vi)(C) of this section, respectively. Unless otherwise restricted by § 648.86, such vessels are prohibited from discarding legal-sized regulated species and ocean pout, and must exit the SAP and cease fishing if any trip limit is achieved or exceeded.

* * * * *

(8) * * *

(v) * * *

(C) *Observer notifications.* For the purpose of selecting vessels for observer deployment, a vessel must provide notice to NMFS of the vessel name; contact name for coordination of observer deployment; telephone number for contact; areas to be fished; and date, time, and port of departure at least 48 hours prior to the beginning of any trip that it declares into the Eastern U.S./Canada Haddock SAP Program specified in paragraph (b)(8)(i) of this section, as required under paragraph (b)(8)(v)(D) of this section, and in accordance with instructions provided by the Regional Administrator.

* * * * *

(d) *Haddock incidental catch allowance for some Atlantic herring vessels.* The haddock incidental catch allowance for a vessel issued a Federal Atlantic herring permit and fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined in § 648.200(f)(1) and (3), is 1 percent of each of the ABCs for GOM haddock and GB haddock (U.S. catch only) specified according to § 648.90(a)(4) for a particular NE multispecies fishing year. Such haddock catch will be determined as specified in § 648.86(a)(3)(ii).

* * * * *

■ 11. In § 648.86, revise paragraphs (a)(3)(ii)(A)(*1*), (*3*), and (*4*), to read as follows:

§ 648.86 NE Multispecies possession restrictions.

* * * * *

(a) * * *

(3) * * *

(ii) * * *

(A) * * *

(*1*) When the Regional Administrator has determined that the incidental catch allowance for a given haddock stock, as specified in § 648.85(d), has been caught, no vessel issued an Atlantic herring permit and fishing with midwater trawl gear in the applicable stock area, i.e., the Herring GOM Haddock Accountability Measure (AM) Area or Herring GB Haddock AM Area, as defined in paragraphs (a)(3)(ii)(A)(*2*) and (*3*) of this section, may fish for, possess, or land herring in excess of 2,000 lb (907.2 kg) per trip in or from that area, unless all herring possessed and landed by the vessel were caught outside the applicable AM Area and the vessel complies with the gear stowage provisions specified in § 648.23(b) while transiting the AM Area. Upon this determination, the haddock possession limit is reduced to 0 lb (0 kg) for a vessel issued a Federal Atlantic herring permit and fishing with midwater trawl gear or for a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip, regardless of area fished or gear used, in the applicable AM area, unless the vessel also possesses a NE multispecies permit and is operating on a declared (consistent with § 648.10(g)) NE multispecies trip. In making this determination, the Regional Administrator shall use haddock catches observed by NMFS-approved observers by herring vessel trips using midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined in § 648.200(f)(1) and (3), expanded to an estimate of total haddock catch for all such trips in a given haddock stock area.

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(*3*) *The Herring GB Haddock Accountability Measure Area.* The Herring GB Haddock AM Area is defined by the straight lines connecting

the following points in the order stated (copies of a map depicting the area are available from the Regional Administrator upon request):

HERRING GB HADDOCK ACCOUNTABILITY MEASURE AREA

Point	N. Latitude	W. Longitude
1	42° 20′	70° 00′
2	42° 20′	(1)
3	40° 30′	(1)
4	40° 30′	66° 40′
5	39° 50′	66° 40′
6	39° 50′	68° 50′
7	(2)	68° 50′
8	41° 00′	(3)
9	41° 00′	69° 30′
10	41° 10′	69° 30′
11	41° 10′	69° 50′
12	41° 20′	69° 50′
13	41° 20′	(4)
14	(5)	70° 00′
15	(6)	70° 00′
16	(7)	70° 00′

[1] The intersection of the U.S./Canada maritime boundary.
[2] The intersection of the boundary of Closed Area I and 68° 50′ W. long.
[3] The intersection of the boundary of Closed Area I and 41° 00′ N. lat.
[4] The intersection of the east-facing shoreline of Nantucket, MA, and 41° 20′ N. lat.
[5] The intersection of the north-facing shoreline of Nantucket, MA, and 70° 00′ W. long.
[6] The intersection of the south-facing shoreline of Cape Cod, MA, and 70° 00′ W. long.
[7] The intersection of the north-facing shoreline of Cape Cod, MA, and 70° 00′ W. long.

(*4*) The haddock incidental catch caps specified are for the NE multispecies fishing year (May 1-April 30), which differs from the herring fishing year (January 1-December 31). If the haddock incidental catch allowance is attained by the herring midwater trawl fishery for the GOM or GB, as specified in § 648.85(d), the 2,000-lb (907.2-kg) limit on herring possession in the applicable AM Area, as described in paragraph (a)(3)(ii)(A)(*2*) or (*3*) of this section, shall be in effect until the end of the NE multispecies fishing year. For example, the 2011 haddock incidental catch cap is specified for the period May 1, 2011-April 30, 2012, and the 2012 haddock catch cap would be specified for the period May 1, 2012-April 30, 2013. If the catch of haddock by herring midwater trawl vessels reached the 2011 incidental catch cap at any time prior to the end of the NE. multispecies fishing year (April 30, 2012), the 2,000-lb (907.2-kg) limit on possession of herring in the applicable AM Area would extend through April 30, 2012. Beginning May 1, 2012, the 2012 catch cap would go into effect.

* * * * *

■ 12. In § 648.87:

■ a. Add paragraphs (b)(1)(ii)(A) through (F);
■ b. Revise paragraphs (b)(1)(v)(B), (b)(1)(vi)(B), (b)(2)(xi), (b)(4) introductory text, (b)(4)(i)(F) and (G), (b)(4)(i)(I), and (J), and (b)(4)(ii);
■ c. Remove paragraphs (b)(4)(iii);
■ d. Redesignate paragraph (b)(4)(iv) as paragraph (b)(4)(iii);
■ e. Remove paragraph (b)(5);
■ f. Redesignate paragraph (b)(6) as paragraph (b)(5) and revise it; and
■ g. Revise paragraph (c)(2)(i); and

The revisions and additions read as follows:

§ 648.87 Sector allocation.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) *CC/GOM Yellowtail Flounder Stock Area.* The CC/GOM Yellowtail Flounder Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86, and for determining areas applicable to sector allocations of CC/GOM yellowtail flounder ACE pursuant to paragraph (b) of this section, is defined as the area bounded on the north and west by the coastline of the United States, on the east by the U.S./Canadian maritime boundary, and on the south by rhumb lines connecting the following points in the order stated:

CC/GOM YELLOWTAIL FLOUNDER STOCK AREA

Point	N. Latitude	W. Longitude
1	(1)	70° 00′
2	(2)	70° 00′
3	41° 20′	(3)
4	41° 20′	69° 50′
5	41° 10′	69° 50′
6	41° 10′	69° 30′
7	41° 00′	69° 30′
8	41° 00′	68° 50′
9	42° 20′	68° 50′
10	42° 20′	(4)

[1] Intersection of south-facing coastline of Cape Cod, MA, and 70° 00′ W. long.
[2] Intersection of north-facing coastline of Nantucket, MA, and 70° 00′ W. long.
[3] Intersection of east-facing coastline of Nantucket, MA, and 41° 20′ N. lat.
[4] U.S./Canada maritime boundary.

(B) *SNE/MA Yellowtail Flounder Stock Area.* The SNE/MA Yellowtail Flounder Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86, and for determining areas applicable to sector allocations of SNE/MA yellowtail flounder ACE pursuant to paragraph (b) of this section, is the area bounded by rhumb lines connecting the following points in the order stated:

SNE/MA YELLOWTAIL FLOUNDER STOCK AREA

Point	N. Latitude	W. Longitude
1	35° 00′	(1)
2	35° 00′	(2)
3	39° 00′	(2)
4	39° 00′	69° 00′
5	39° 50′	69° 00′
7	39° 50′	68° 50′
8	41° 00′	68° 50′
9	41° 00′	69° 30′
10	41° 10′	69° 30′
11	41° 10′	69° 50′
12	41° 20′	69° 50′
13	41° 20′	(3)
14	(4)	70° 00′
15	(5)	70° 00′

[1] Intersection of east-facing coastline of Outer Banks, NC, and 35° 00′ N. lat.
[2] U.S./Canada maritime boundary.
[3] Intersection of east-facing coastline of Nantucket, MA, and 41° 20′ N. lat.
[4] Intersection of north-facing coastline of Nantucket, MA, and 70° 00′ W. long.
[5] Intersection of south-facing coastline of Cape Cod, MA, and 70° 00′ W. long.

(C) *GOM Haddock Stock Area.* The GOM Haddock Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of GOM haddock ACE pursuant to paragraph (b) of this section, is defined as the area bounded on the north and west by the coastline of the United States, on the east by the U.S./Canadian maritime boundary, and on the south by straight lines connecting the following points in the order stated:

GOM HADDOCK STOCK AREA

Point	N. Latitude	W. Longitude
1	(1)	70° 00′
2	42° 20′	70° 00′
3	42° 20′	67° 40′
4	(2)	67° 40′
5	(3)	67° 40′
6	43° 50′	67° 40′
7	43° 50′	(4)
8	(4)	67° 00′
9	(5)	67° 00′

[1] Intersection of the north-facing coastline of Cape Cod, MA, and 70° 00′ W. long.
[2] U.S./Canada maritime boundary southern intersection with 67° 40′ W. long.).
[3] U.S./Canada maritime boundary northern intersection with 67° 40′ W. long.).
[4] U.S./Canada maritime boundary.
[5] Intersection of the south-facing ME coastline and 67° 00′ W. long.

(D) *GB Haddock Stock Area.* The GB Haddock Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of GB haddock ACE pursuant to paragraph (b) of this section, is defined as the area bounded on the west by the coastline of the United

States, on the south by a line running from the east-facing coastline of North Carolina at 35° N. lat. until its intersection with the EEZ, on the east by the U.S./Canadian maritime boundary, and bounded on the north by straight lines connecting the following points in the order stated:

GB HADDOCK STOCK AREA

Point	N. Latitude	W. Longitude
1	(1)	70° 00′
2	42° 20′	70° 00′
3	42° 20′	(2)

[1] Intersection of the north-facing coastline of Cape Cod, MA, and 70° 00′ W. long.
[2] U.S./Canada maritime boundary.

(E) *Redfish Stock Area.* The Redfish Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of redfish ACE pursuant to paragraph (b) of this section, is defined as the area bounded on the north and west by the coastline of the United States, on the east by the U.S./Canadian maritime boundary, and bounded on the south by a rhumb line running from the east-facing coastline of North Carolina at 35° N. lat. until its intersection with the EEZ.

(F) *GOM Winter Flounder Stock Area.* The GOM Winter Flounder Stock Area, for the purposes of identifying stock areas for trip limits specified in § 648.86 and for determining areas applicable to sector allocations of GOM winter flounder ACE pursuant to paragraph (b) of this section, is the area bounded by straight lines connecting the following points in the order stated:

GOM WINTER FLOUNDER STOCK AREA

Point	N. Latitude	W. Longitude
1	(1)	70° 00′
2	42° 20′	70° 00′
3	42° 20′	67° 40′
4	(2)	67° 40′
5	(3)	67° 40′
6	43° 50′	67° 40′
7	43° 50′	(4)
8	(4)	67° 00′
9	(5)	67° 00′

[1] Intersection of the north-facing coastline of Cape Cod, MA, and 70° 00′ W. long.
[2] U.S./Canada maritime boundary southern intersection with 67° 40′ N. lat.).
[3] U.S./Canada maritime boundary northern intersection with 67° 40′ N. lat.).
[4] U.S./Canada maritime boundary.
[5] Intersection of the south-facing ME coastline and 67° 00′ W. long.

* * * * *

(v) * * *

(B) *Independent third-party monitoring program.* Beginning in fishing year 2013 (May 1, 2013), a sector must develop and implement an at-sea or electronic monitoring program to verify area fished, as well as catch and discards by species and gear type, and that is consistent with the goals and objectives of groundfish monitoring programs at § 648.11(l). The details of any at-sea or electronic monitoring program must be specified in the sector's operations plan, pursuant to paragraph (b)(2)(xi) of this section, and must meet the operational standards specified in paragraph (b)(5) of this section. Electronic monitoring may be used in place of actual observers if the technology is deemed sufficient by NMFS for a specific trip type based on gear type and area fished, in a manner consistent with the Administrative Procedure Act. The level of coverage for trips by sector vessels is specified in paragraph (b)(1)(v)(B)(*1*) of this section. The at-sea/electronic monitoring program shall be reviewed and approved by the Regional Administrator as part of a sector's operations plans in a manner consistent with the Administrative Procedure Act. A service provider providing at-sea or electronic monitoring services pursuant to this paragraph (b)(1)(v)(B) must meet the service provider standards specified in paragraph (b)(4) of this section, and be approved by NMFS in a manner consistent with the Administrative Procedure Act.

(*1*) *Coverage levels.* Except as specified in paragraph (b)(1)(v)(B)(*1*)(*i*) of this section, any service provider providing at-sea or electronic monitoring services required under this paragraph (b)(1)(v)(B)(*1*) must provide coverage that is fair and equitable, and distributed in a statistically random manner among all trips such that coverage is representative of fishing activities by all vessels within each sector and by all operations of vessels operating in each sector throughout the fishing year. Coverage levels for an at-sea monitoring program shall be specified by NMFS, pursuant to paragraph (b)(1)(v)(B)(*1*)(*i*) of this section, but shall be less than 100 percent of all sector trips. In the event that a NMFS-sponsored observer and a third-party at-sea monitor are assigned to the same trip, only the NMFS observer must observe that trip. If either an at-sea monitor or electronic monitoring is assigned to a particular trip, a vessel may not leave port without the appropriate at-sea monitor or electronic monitoring equipment on board.

(*i*) *At-sea/electronic monitoring.* Unless otherwise specified in this paragraph (b)(1)(v)(B)(*1*)(*i*), beginning in fishing year 2013, coverage levels must be sufficient to at least meet the coefficient of variation specified in the Standardized Bycatch Reporting Methodology at the overall stock level for each stock of regulated species and ocean pout, and to monitor sector operations, to the extent practicable, in order to reliably estimate overall catch by sector vessels. In making its determination, NMFS shall take into account the goals and objective of groundfish monitoring programs at § 648.11(l), the National Standards and requirements of the Magnuson-Stevens Act, including but not limited to the costs to sector vessels and NMFS, and any other relevant factors. For FYs 2013 and beyond, NMFS shall specify a separate coverage rate, lower than the coverage rate for all other sector trips, for sector trips fishing with 10-inch (25.4-cm) mesh or larger gillnets on a monkfish DAS, pursuant to § 648.91(c)(1)(iii), and only in the SNE Broad Stock Area, as defined at § 648.10(k)(3)(iv).

(*2*) *Hail reports.* For the purposes of the at-sea monitoring requirements specified in paragraph (b)(1)(v)(B) of this section, sector vessels must submit all hail reports for a sector trip in which the NE multispecies catch applies against the ACE allocated to a sector, as specified in this part, to service providers offering at-sea monitoring services. The mechanism and timing of the transmission of such hail reports must be consistent with instructions provided by the Regional Administrator for any at-sea or electronic monitoring program required by paragraph (b)(1)(v)(B) of this section, or specified in the annual sector operations plan, consistent with paragraph (b)(5) of this section.

(*3*) *Notification of service provider change.* If, for any reason, a sector decides to change approved service providers used to provide at-sea or electronic monitoring services required in this paragraph (b)(1)(v), the sector manager must first inform NMFS in writing in advance of the effective date of the change in approved service providers in conjunction with the submission of the next weekly sector catch report specified in paragraph (b)(1)(vi)(B) of this section. A sector may employ more than one service provider at any time, provided any service provider employed by a sector meets the standards specified in paragraph (b)(4) of this section.

(vi) * * *

(B) *Weekly catch report.* Each sector must submit weekly reports to NMFS stating the remaining balance of ACE allocated to each sector based upon

regulated species and ocean pout landings and discards of vessels participating in that sector and any compliance/enforcement concerns. These reports must include at least the following information, as instructed by the Regional Administrator: Week ending date; species, stock area, gear, number of trips, reported landings (landed pounds and live pounds), discards (live pounds), total catch (live pounds), status of the sector's ACE (pounds remaining and percent remaining), and whether this is a new or updated record of sector catch for each NE multispecies stock allocated to that particular sector; sector enforcement issues; and a list of vessels landing for that reporting week. These weekly catch reports must be submitted no later than 0700 hr on the second Monday after the reporting week, as defined in this part. The frequency of these reports must be increased to more than a weekly submission when the balance of remaining ACE is low, as specified in the sector operations plan and approved by NMFS. If requested, sectors must provide detailed trip-by-trip catch data to NMFS for the purposes of auditing sector catch monitoring data based upon guidance provided by the Regional Administrator.

* * * * *

(2) * * *

(xi) Detailed plans for the monitoring and reporting of landings and discards by sector participants, including, but not limited to, detailed information describing the sector's at-sea/electronic monitoring program for monitoring utilization of ACE allocated to that sector; identification of the independent third-party service providers employed by the sector to provide at-sea/electronic monitoring services; the mechanism and timing of any hail reports; a list of specific ports where participating vessels will land fish, with specific exemptions noted for safety, weather, etc., allowed, provided the sector provides reasonable notification to NMFS concerning a deviation from the listed ports; and any other information about such a program required by NMFS;

* * * * *

(4) *Independent third-party monitoring provider standards.* Any service provider intending to provide at-sea/electronic monitoring services described in paragraph (b)(1)(v) of this section must apply to and be approved/certified by NMFS in a manner consistent with the Administrative Procedure Act. NMFS shall approve/certify service providers and/or at-sea monitors as eligible to provide sector monitoring services specified in this part and can disapprove/decertify service providers and/or individual monitors through notice in writing to individual service providers/monitors if the following criteria are no longer being met:

(i) * * *

(F) A description of the applicant's ability to carry out the responsibilities and duties of a sector monitoring/reporting service provider and the arrangements to be used, including whether the service provider is able to offer at-sea monitoring services;

(G) Evidence of adequate insurance (copies of which shall be provided to the vessel owner, operator, or vessel manager, when requested) to cover injury, liability, and accidental death to cover at-sea monitors (including during training); vessel owner; and service provider;

* * * * *

(I) Proof that the service provider's at-sea monitors have passed an adequate training course sponsored by the service providers to the extent not funded by NMFS that is consistent with the curriculum used in the current yearly NEFOP training course, unless otherwise specified by NMFS;

(J) An Emergency Action Plan describing the provider's response to an emergency with an at-sea monitor, including, but not limited to, personal injury, death, harassment, or intimidation; and

* * * * *

(ii) *Service provider performance requirements.* At-sea monitoring service providers must be able to document compliance with the following criteria and requirements:

(A) A service provider must establish and carry out a comprehensive plan to deploy NMFS-certified at-sea monitors, or other at-sea monitoring mechanism, such as electronic monitoring equipment that is approved by NMFS, according to a prescribed coverage level (or level of precision for catch estimation), as specified by NMFS, including all of the necessary vessel reporting/notice requirements to facilitate such deployment, as follows:

(*1*) A service provider must be available to industry 24 hr per day, 7 days per week, with the telephone system monitored a minimum of four times daily to ensure rapid response to industry requests;

(*2*) A service provider must be able to deploy at-sea monitors, or other approved at-sea monitoring mechanism to all ports in which service is required by sectors, or a subset of ports as part of a contract with a particular sector;

(*3*) A service provider must report at-sea monitors and other approved at-sea monitoring mechanism deployments to NMFS and the sector manager in a timely manner to determine whether the predetermined coverage levels are being achieved for the appropriate sector;

(*4*) A service provider must assign at-sea monitors and other approved at-sea monitoring mechanisms without regard to any preference by the sector manager or representatives of vessels other than when the service is needed and the availability of approved/certified monitors and other at-sea monitoring mechanisms;

(*5*) A service provider's at-sea monitor assignment must be fair, equitable, representative of fishing activities within each sector, and able to monitor fishing activity throughout the fishing year;

(*6*) For service providers offering catch estimation or at-sea monitoring services, a service provider must be able to determine an estimate of discards for each trip and provide such information to the sector manager and NMFS, as appropriate and as required by this section;

(B) The service provider must ensure that at-sea monitors remain available to NMFS, including NMFS Office for Law Enforcement, for debriefing for at least 2 weeks following any monitored trip/offload;

(C) The service provider must report possible at-sea monitor harassment; discrimination; concerns about vessel safety or marine casualty; injury; and any information, allegations, or reports regarding at-sea monitor conflict of interest or breach of the standards of behavior to NMFS and/or the sector manager, as specified by NMFS;

(D) The service provider must submit to NMFS, if requested, a copy of each signed and valid contract (including all attachments, appendices, addendums, and exhibits incorporated into the contract) between the service provider and those entities requiring services (i.e., sectors and participating vessels) and between the service provider and specific dockside, roving, or at-sea monitors;

(E) The service provider must submit to NMFS, if requested, copies of any information developed and used by the service providers distributed to vessels, such as informational pamphlets, payment notification, description of duties, etc.;

(F) A service provider may refuse to deploy an at-sea monitor or other approved at-sea monitoring mechanism on a requesting fishing vessel for any reason including, but not limited to, the following:

(*1*) If the service provider does not have an available at-sea monitor or other at-sea monitoring mechanism approved by NMFS within the advanced notice requirements established by the service provider;

(*2*) If the service provider is not given adequate notice of vessel departure or landing from the sector manager or participating vessels, as specified by the service provider;

(*3*) For the purposes of at-sea monitoring, if the service provider has determined that the requesting vessel is inadequate or unsafe pursuant to the reasons described in § 600.746; and

(*4*) Failure to pay for previous deployments of at-sea monitors, or other approved at-sea monitoring mechanism.

(G) With the exception of a service provider offering reporting, dockside, and/or at-sea monitoring services to participants of another fishery managed under Federal regulations, a service provider must not have a direct or indirect interest in a fishery managed under Federal regulations, including, but not limited to, fishing vessels, dealers, shipping companies, sectors, sector managers, advocacy groups, or research institutions and may not solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who conducts fishing or fishing-related activities that are regulated by NMFS, or who has interests that may be substantially affected by the performance or nonperformance of the official duties of service providers;

(H) A system to record, retain, and distribute the following information to NMFS, as requested, for a period specified by NMFS, including:

(*1*) At-sea monitor and other approved monitoring equipment deployment levels, including the number of refusals and reasons for such refusals;

(*2*) Incident/non-compliance reports (e.g., failure to offload catch); and

(*3*) Hail reports, landings records, and other associated interactions with vessels and dealers.

(I) A means to protect the confidentiality and privacy of data submitted by vessels, as required by the Magnuson-Stevens Act; and

(J) A service provider must be able to supply at-sea monitors with sufficient safety and data-gathering equipment, as specified by NMFS.

* * * * *

(5) *At-sea/electronic monitoring operational standards.* In addition to the independent third-party monitoring provider standards specified in paragraph (b)(4) of this section, any at-sea/electronic monitoring program developed as part of a sector's yearly operations plan pursuant to paragraph (b)(1)(v)(B) of this section must meet the following operational standards to be approved by NMFS:

(i) *Gear.* Each at-sea monitor must be provided with all of the equipment specified by the Northeast Fisheries At-sea Monitoring Program. A list of such equipment is available from the Northeast Fisheries Science Center upon request. At-sea/electronic monitoring service providers are responsible for the cost of providing such gear to at-sea monitors to the extent not funded by NMFS. This gear shall be inspected by NMFS upon the completion of training required pursuant to paragraph (b)(4)(i)(I) of this section.

(ii) *Vessel selection protocol.* An at-sea/electronic monitoring program service provider must develop a formal vessel-selection protocol to deploy at-sea monitors and electronic monitoring equipment in a statistically random manner consistent with the coverage levels required pursuant to paragraph (b)(1)(v)(B)(*1*) of this section. This protocol must include a method to allow for waivers in specific circumstances, including how waivers would be requested, assessed, and recorded.

(iii) *Reporting/recordkeeping requirements*—(A) *Vessel requirements.* In addition to all other reporting/recordkeeping requirements specified in this part, to facilitate the deployment of at-sea monitors and electronic monitoring equipment pursuant to paragraph (b)(1)(v)(B)(*1*) of this section, the operator of a vessel fishing on a sector trip must provide at-sea/electronic monitoring service providers with at least the following information: The vessel name, permit number, trip ID number in the form of the VTR serial number of the first VTR page for that trip or another trip identifier specified by NMFS, whether a monkfish DAS will be used, and an estimate of the date/time of departure in advance of each trip. The timing of such notice shall be sufficient to allow ample time for the service provider to determine whether an at-sea monitor or electronic monitoring equipment will be deployed on each trip and allow the at-sea monitor or electronic monitoring equipment to prepare for the trip and get to port, or to be installed on the vessel, respectively. The details of the timing, method (e.g., phone, email, etc.), and information needed for such pre-trip notifications shall be included as part of a sector's yearly operations plan. If a vessel has been informed by a service provider that an at-sea monitor or electronic monitoring equipment has been assigned to a particular trip pursuant to paragraph (b)(6)(iii)(B)(*1*) of this section, the vessel may not leave port to begin that trip until the at-sea monitor has arrived and boarded the vessel, or the electronic monitoring equipment has been properly installed.

(B) *At-sea/electronic monitoring service provider requirements—(1) Confirmation of pre-trip notification.* Upon receipt of a pre-trip notification pursuant to paragraph (b)(5)(iii)(A) of this section, the service provider shall inform the vessel operator whether the vessel will be monitored by an at-sea observer or electronic monitoring equipment for that trip, or will be issued an at-sea/electronic monitoring waiver for that trip based upon the vessel selection protocol specified in paragraph (b)(5)(ii) of this section.

(2) At-sea/electronic monitoring report. A report detailing area fished and the amount of each species kept and discarded shall be submitted electronically in a standard acceptable form to the appropriate sector and NMFS within 48 hr of the completion of the trip, as instructed by the Regional Administrator. The data elements to be collected and the format for submission shall be specified by NMFS and distributed to all approved at-sea/electronic monitoring service providers and sectors. At-sea/electronic monitoring data shall not be accepted until such data pass automated NMFS data quality checks.

(iv) *Safety hazards*—(A)*Vessel requirements.* The operator of a sector vessel must detail and identify any safety hazards to any at-sea monitor assigned pursuant to paragraph (b)(5)(iii)(B)(*1*) of this section prior to leaving port. A vessel cannot begin a trip if it has failed a review of safety issues pursuant to paragraph (b)(5)(iv)(B) of this section, until the identified safety deficiency has been resolved, pursuant to § 600.746(i).

(B) *At-sea/electronic monitoring service provider requirements.* An at-sea monitor must complete a pre-trip vessel safety checklist provided by NMFS before an at-sea monitor can leave port onboard a vessel on a sector trip. If the vessel fails a review of safety issues pursuant to this paragraph (b)(5)(iv)(B), an at-sea monitor cannot be deployed on that vessel for that trip.

(v) *Adjustment to operational standards.* The at-sea/electronic monitoring operational standards specified in paragraph (b)(5) of this section may be revised by the Regional Administrator in a manner consistent with the Administrative Procedure Act.

(c) * * *

(2) * * *

(i) *Regulations that may not be exempted for sector participants.* The Regional Administrator may not exempt participants in a sector from the following Federal fishing regulations: Specific time and areas within the NE multispecies year-round closure areas; permitting restrictions (e.g., vessel upgrades, etc.); gear restrictions designed to minimize habitat impacts (e.g., roller gear restrictions, etc.); reporting requirements; and AMs specified at § 648.90(a)(5)(i)(D). For the purposes of this paragraph (c)(2)(i), the DAS reporting requirements specified at § 648.82; the SAP-specific reporting requirements specified at § 648.85; and the reporting requirements associated with a dockside monitoring program specified in paragraph (b)(5)(i) of this section are not considered reporting requirements, and the Regional Administrator may exempt sector participants from these requirements as part of the approval of yearly operations plans. For the purpose of this paragraph (c)(2)(i), the Regional Administrator may not grant sector participants exemptions from the NE multispecies year-round closures areas defined as Essential Fish Habitat Closure Areas as defined at § 648.81(h); the Fippennies Ledge Area as defined in paragraph (c)(2)(i)(A) of this section; Closed Area I and Closed Area II, as defined at § 648.81(a) and (b), respectively, during the period February 16 through April 30; and the Western GOM Closure Area, as defined at § 648.81(e), where it overlaps with any Sector Rolling Closure Areas, as defined at § 648.81(f)(2)(vi). This list may be modified through a framework adjustment, as specified in § 648.90.

(A) *Fippennies Ledge Area.* The Fippennies Ledge Area is bounded by the following coordinates, connected by straight lines in the order listed:

FIPPENNIES LEDGE AREA

Point	N. Latitude	W. Longitude
1	42°50.0′	69°17.0′
2	42°44.0′	69°14.0′
3	42°44.0′	69°18.0′
4	42°50.0′	69°21.0′

(B) [Reserved]

* * * * *

■ 13. In § 648.89, revise paragraph (f)(2) and add paragraph (f)(3) to read as follows:

§ 648.89 Recreational and charter/party vessel restrictions.

* * * * *

(f) * * *

(2) *Reactive AM adjustment.* If it is determined that any recreational sub-ACL was exceeded, as specified in paragraph (f)(1) of this section, the Regional Administrator, after consultation with the New England Fishery Management Council, shall develop measures necessary to prevent the recreational fishery from exceeding the appropriate sub-ACL in future years. Appropriate AMs for the recreational fishery, including adjustments to fishing season, minimum fish size, or possession limits, may be implemented in a manner consistent with the Administrative Procedure Act, with final measures published in the **Federal Register** no later than January when possible. Separate AMs shall be developed for the private and charter/party components of the recreational fishery.

(3) *Proactive AM adjustment.* When necessary, the Regional Administrator, after consultation with the New England Fishery Management Council, may adjust recreational measures to ensure the recreational fishery achieves, but does not exceed any recreational fishery sub-ACL in a future fishing year. Appropriate AMs for the recreational fishery, including adjustments to fishing season, minimum fish size, or possession limits, may be implemented in a manner consistent with the Administrative Procedure Act, with final measures published in the **Federal Register** prior to the start of the fishing year where possible. In specifying these AMs, the Regional Administrator shall take into account the non-binding prioritization of possible measures recommended by the Council: for cod, first increases to minimum fish sizes, then adjustments to seasons, followed by changes to bag limits; and for haddock, first increases to minimum size limits, then changes to bag limits, and then adjustments to seasons.

■ 14. In § 648.90:

■ a. Revise paragraphs (a)(4)(iii) introductory text and (a)(4)(iii)(B), (C), and (E);

■ b. Add paragraphs (a)(4)(iii)(F) through (H); and

■ c. Revise paragraphs (a)(4)(iv)(B) and (a)(5).

The revisions and additions read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(a) * * *

(4) * * *

(iii) *ABC/ACL distribution.* The ABCs/ACLs adopted by the Council for each regulated species or ocean pout stock pursuant to this paragraph (a)(4) shall be subdivided among the various sub-components of the fishery, as specified in paragraphs (a)(4)(iii)(A) through (H) of this section. For transboundary stocks managed by the Understanding, pursuant to § 648.85(a), the distribution of ABC/ACLs described in paragraphs (a)(4)(iii)(A) through (H) of this section shall be based upon the catch available to U.S. fishermen. The Council may revise its recommendations for the distribution of ABCs and ACLs among these and other sub-components through the process to specify ABCs and ACLs, as described in this paragraph (a)(4).

* * * * *

(B) *Regulated species or ocean pout catch by exempted fisheries.* Unless otherwise specified in paragraphs (a)(4)(iii)(F) or (G) of this section, regulated species or ocean pout catch by other, non-specified sub-components of the fishery, including, but not limited to, exempted fisheries that occur in Federal waters and fisheries harvesting exempted species specified in § 648.80(b)(3) shall be deducted from the ABC/ACL of each regulated species or ocean pout stock, pursuant to the process to specify ABCs and ACLs described in this paragraph (a)(4). The catch of these non-specified sub-components of the ACL shall be monitored using data collected pursuant to this part. If catch from such fisheries exceeds the amount specified in this paragraph (a)(4)(iii)(B), AMs shall be developed to prevent the overall ACL for each stock from being exceeded, pursuant to the framework adjustment process specified in this section.

(C) *Yellowtail flounder catch by the Atlantic sea scallop fishery.* Yellowtail flounder catch in the Atlantic sea scallop fishery, as defined in subpart D of this part, shall be deducted from the ABC/ACL for each yellowtail flounder stock pursuant to the restrictions specified in subpart D of this part and the process to specify ABCs and ACLs, as described in paragraph (a)(4) of this section. Unless otherwise specified in this paragraph (a)(4)(iii)(C), or subpart D of this part, the specific value of the sub-components of the ABC/ACL for each stock of yellowtail flounder distributed to the Atlantic sea scallop fishery shall be specified pursuant to the biennial adjustment process specified in paragraph (a)(2) of this section. The Atlantic sea scallop fishery shall be allocated 40 percent of the GB yellowtail ABC (U.S. share only) in fishing year 2013, and 16 percent in fishing year 2014 and each fishing year thereafter, pursuant to the process for specifying ABCs and ACLs described in this paragraph (a)(4). An ACL based on

this ABC shall be determined using the process described in paragraph (a)(4)(i) of this section. Based on information available, NMFS shall project the expected scallop fishery catch of GB yellowtail flounder for the current fishing year by January 15. If NMFS determines that the scallop fishery will catch less than 90 percent of its GB yellowtail flounder sub-ACL, the Regional Administrator may reduce the scallop fishery sub-ACL to the amount projected to be caught, and increase the groundfish fishery sub-ACL by any amount up to the amount reduced from the scallop fishery sub-ACL. The revised groundfish fishery sub-ACL shall be distributed to the common pool and sectors based on the process specified in paragraph (a)(4)(iii)(H)(*1*) of this section.

* * * * *

(E) *SNE/MA windowpane flounder catch by the Atlantic sea scallop fishery.* SNE/MA windowpane flounder catch in the Atlantic sea scallop fishery, as defined in subpart D of this part, shall be deducted from the ABC/ACL for SNE/MA windowpane flounder pursuant to the restrictions specified in subpart D of this part and the process to specify ABCs and ACLs, as described in paragraph (a)(4) of this section. The Atlantic sea scallop fishery shall be allocated 36 percent of the GB yellowtail ABC (U.S. share only) in fishing year 2013 and each fishing year after, pursuant to the process for specifying ABCs and ACLs described in this paragraph (a)(4). An ACL based on this ABC shall be determined using the process described in paragraph (a)(4)(i) of this section.

(F) *SNE/MA windowpane flounder catch by exempted fisheries.* SNE/MA windowpane flounder catch by other, non-specified sub-components of the fishery, including, but not limited to, exempted fisheries that occur in Federal waters and fisheries harvesting exempted species specified in § 648.80(b)(3), shall be deducted from the ABC/ACL for SNE/MA windowpane flounder pursuant to the process to specify ABCs and ACLs, as described in this paragraph (a)(4). The specific value of the sub-components of the ABC/ACL for SNE/MA windowpane flounder distributed to these other fisheries shall be specified pursuant to the biennial adjustment process specified in paragraph (a)(2) of this section.

(G) *GB yellowtail flounder catch by small mesh fisheries.* GB yellowtail flounder catch by bottom trawl vessels fishing with a codend mesh size of less than 5-inch (12.7-cm) in other, non-specified sub-components of the fishery, including, but not limited to, exempted fisheries that occur in Federal waters and fisheries harvesting exempted species specified in § 648.80(b)(3), shall be deducted from the ABC/ACL for GB yellowtail flounder pursuant to the process to specify ABCs and ACLs, as described in this paragraph (a)(4). This small mesh fishery shall be allocated 2 percent of the GB yellowtail ABC (U.S. share only) in fishing year 2013 and each fishing year after, pursuant to the process for specifying ABCs and ACLs described in this paragraph (a)(4). An ACL based on this ABC shall be determined using the process described in paragraph (a)(4)(i) of this section.

(H) *Regulated species or ocean pout catch by the NE multispecies commercial and recreational fisheries.* Unless otherwise specified in the ACL recommendations developed pursuant to paragraph (a)(4)(i) of this section, after all of the deductions and considerations specified in paragraphs (a)(4)(iii)(A) through (G) of this section, the remaining ABC/ACL for each regulated species or ocean pout stock shall be allocated to the NE multispecies commercial and recreational fisheries, pursuant to this paragraph (a)(4)(iii)(H).

(*1*) *Recreational allocation.* Unless otherwise specified in paragraph (a)(5) of this section, recreational catches shall be compared to the ACLs allocated pursuant to this paragraph (a)(4)(iii)(H)(*1*) for the purposes of determining whether adjustments to recreational measures are necessary, pursuant to the recreational fishery AMs specified in § 648.89(f).

(*i*) *Stocks allocated.* Unless otherwise specified in this paragraph (a)(4)(iii)(H)(*1*), the ABCs/ACLs for GOM cod and GOM haddock available to the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(H) of this section shall be divided between commercial and recreational components of the fishery, based upon the average proportional catch of each component for each stock during fishing years 2001 through 2006.

(*ii*) *Process for determining if a recreational allocation is necessary.* A recreational allocation may not be made if it is determined that, based upon available information, the ACLs for these stocks are not being fully harvested by the NE multispecies fishery, or if the recreational harvest, after accounting for state waters catch pursuant to paragraph (a)(4)(iii)(A) of this section, is less than 5 percent of the overall catch for a particular stock of regulated species or ocean pout.

(*2*) *Commercial allocation.* Unless otherwise specified in this paragraph (a)(4)(iii)(H)(*2*), the ABC/ACL for regulated species or ocean pout stocks available to the commercial NE multispecies fishery, after consideration of the recreational allocation pursuant to paragraph (a)(4)(iii)(H)(*1*) of this section, shall be divided between vessels operating under approved sector operations plans, as described at § 648.87(c), and vessels operating under the provisions of the common pool, as defined in this part, based upon the cumulative PSCs of vessels participating in sectors calculated pursuant to § 648.87(b)(1)(i)(E). For fishing years 2010 and 2011, the ABC/ACL of each regulated species or ocean pout stocks not allocated to sectors pursuant to § 648.87(b)(1)(i)(E) (i.e., Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, and Atlantic wolffish) that is available to the commercial NE multispecies fishery shall be allocated entirely to the common pool. Unless otherwise specified in paragraph (a)(5) of this section, regulated species or ocean pout catch by common pool and sector vessels shall be deducted from the sub-ACL/ACE allocated pursuant to this paragraph (a)(4)(iii)(H)(*2*) for the purposes of determining whether adjustments to common pool measures are necessary, pursuant to the common pool AMs specified in § 648.82(n), or whether sector ACE overages must be deducted, pursuant to § 648.87(b)(1)(iii).

(*3*) *Revisions to commercial and recreational allocations.* Distribution of the ACL for each stock available to the NE multispecies fishery between and among commercial and recreational components of the fishery may be implemented through a framework adjustment pursuant to this section. Any changes to the distribution of ACLs to the NE multispecies fishery shall not affect the implementation of AMs based upon the distribution in effect at the time of the overage that triggered the AM.

(iv) * * *

(B) *Discards.* Unless otherwise specified in this paragraph (a)(4)(iv)(B), regulated species or ocean pout discards shall be monitored through the use of VTRs, observer data, VMS catch reports, and other available information, as specified in this part. Regulated species or ocean pout discards by vessels on a sector trip shall be monitored pursuant to § 648.87(b)(1)(v)(A).

(v) * * *

(5) *AMs.* Except as specified in paragraphs (a)(4)(iii)(A) through (G) of this section, if any of the ACLs specified in paragraph (a)(4) of this section are exceeded based upon available catch information, the AMs specified in paragraphs (a)(5)(i) and (ii) of this section shall take effect in the following

fishing year, or as soon as practicable, thereafter, once catch data for all affected fisheries are available, as applicable.

(i) *AMs for the NE multispecies commercial and recreational fisheries.* If the catch of regulated species or ocean pout by a sub-component of the NE multispecies fishery (i.e., common pool vessels, sector vessels, or private recreational and charter/party vessels) exceeds the amount allocated to each sub-component, as specified in paragraph (a)(4)(iii)(H) of this section, then the applicable a.m. for that sub-component of the fishery shall take effect, pursuant to paragraphs (a)(5)(i)(A) through (C) of this section. In determining the applicability of AMs specified for a sub-component of the NE multispecies fishery in paragraphs (a)(5)(i)(A) through (C) of this section, the Regional Administrator shall consider available information regarding the catch of regulated species and ocean pout by each sub-component of the NE multispecies fishery, plus each sub-component's share of any overage of the overall ACL for a particular stock caused by excessive catch by vessels outside of the FMP, exempted fisheries, or the Atlantic sea scallop fishery, as specified in this paragraph (a)(5), as appropriate.

(A) *Excessive catch by common pool vessels.* If the catch of regulated species and ocean pout by common pool vessels exceeds the amount of the ACL specified for common pool vessels pursuant to paragraph (a)(4)(iii)(H)(*2*) of this section, then the AMs described in § 648.82(n) shall take effect. Pursuant to the distribution of ABCs/ACLs specified in paragraph (a)(4)(iii)(H)(*2*) of this section, for the purposes of this paragraph (a)(5)(i)(A), the catch of each regulated species or ocean pout stock not allocated to sectors pursuant to § 648.87(b)(1)(i)(E) (i.e., Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, and Atlantic wolffish) during fishing years 2010 and 2011 shall be added to the catch of such stocks by common pool vessels to determine whether the differential DAS counting AM described in § 648.82(n)(1) shall take effect. If such catch does not exceed the portion of the ACL specified for common pool vessels pursuant to paragraph (a)(4)(iii)(H)(*2*) of this section, then no AMs shall take effect for common pool vessels.

(B) *Excessive catch by sector vessels.* If the catch of regulated species and ocean pout by sector vessels exceeds the amount of the ACL specified for sector vessels pursuant to paragraph (a)(4)(iii)(H)(*2*) of this section, then the AMs described in § 648.87(b)(1)(iii) shall take effect. For the purposes of this paragraph (a)(5)(i)(B), the catch of regulated species and ocean pout for each sector approved pursuant to § 648.87 shall be based upon the catch of vessels participating in each approved sector. If such catch does not exceed the portion of the ACL specified for an individual sector pursuant to paragraph (a)(4)(iii)(H)(*2*) of this section, then no AMs shall take effect for that sector.

(C) *Excessive catch by the NE multispecies recreational fishery.* If the catch of regulated species and ocean pout by private recreational and charter/party vessels exceeds the amount of the ACL specified for the recreational fishery pursuant to paragraph (a)(4)(iii)(H)(*1*) of this section, then the AMs described in § 648.89(f) shall take effect. If such catch does not exceed the portion of the ACL specified for the recreational fishery pursuant to paragraph (a)(4)(iii)(H)(*1*) of this section, then no AMs shall take effect for the recreational fishery.

(D) *AMs for both stocks of windowpane flounder, ocean pout, Atlantic halibut, Atlantic wolffish, and SNE/MA winter flounder.* At the end of each fishing year, NMFS shall determine if the overall ACL for northern windowpane flounder, southern windowpane flounder, ocean pout, Atlantic halibut, Atlantic wolffish, or SNE/MA winter flounder was exceeded. If the overall ACL for any of these stocks is exceeded, NMFS shall implement the appropriate AM, as specified in this paragraph (a)(5)(i)(D), in a subsequent fishing year, consistent with the APA. If reliable information is available, the AM shall be implemented in the fishing year immediately following the fishing year in which the overage occurred. Otherwise, the AM shall be implemented in the second fishing year after the fishing year in which the overage occurred. For example, if NMFS determined before the start of fishing year 2013 that the overall ACL for northern windowpane flounder was exceeded by the groundfish fishery in fishing year 2012, the applicable AM would be implemented for fishing year 2013. If NMFS determined after the start of fishing year 2013 that the overall ACL for northern windowpane flounder was exceeded in fishing year 2012, the applicable AM would be implemented for fishing year 2014. If updated catch information becomes available subsequent to the implementation of an AM that indicates that an ACL was not exceeded, the AM will be rescinded, consistent with the Administrative Procedure Act.

(*1*) *Windowpane flounder and ocean pout.* If NMFS determines the overall ACL for either stock of windowpane flounder or ocean pout is exceeded, as described in this paragraph (a)(5)(i)(D)(*1*), by any amount greater than the management uncertainty buffer, the applicable small AM area for the stock shall be implemented, as specified in paragraph (a)(5)(i)(D) of this section. If the overall ACL is exceeded by 21 percent or more, the applicable large AM area(s) for the stock shall be implemented, as specified in paragraph (a)(5)(i)(D) of this section, and the Council shall revisit the AM in a future action. The AM areas defined below are bounded by the following coordinates, connected in the order listed by rhumb lines, unless otherwise noted. Vessels fishing with trawl gear in these areas may only use a haddock separator trawl, as specified in § 648.85(a)(3)(iii)(A); a Ruhle trawl, as specified in § 648.85(b)(6)(iv)(J)(*3*); a rope separator trawl, as specified in § 648.84(e); or any other gear approved consistent with the process defined in § 648.85(b)(6). If an overage of the overall ACL for SNE/MA windowpane flounder is as a result of an overage of the sub-ACL allocated to exempted fisheries pursuant to paragraph (a)(4)(iii)(F) of this section, the applicable AM area(s) shall be in effect for any trawl vessel fishing with a codend mesh size of greater than or equal to 5-inch (12.7-cm) in other, non-specified sub-components of the fishery, including, but not limited to, exempted fisheries that occur in Federal waters and fisheries harvesting exempted species specified in § 648.80(b)(3). If an overage of the overall ACL for SNE/MA windowpane flounder is as a result of an overage of the sub-ACL allocated to the groundfish fishery pursuant to paragraph (a)(4)(iii)(H)(*2*) of this section, the applicable AM Area(s) shall be in effect for any limited access NE multispecies permitted vessel fishing on a NE multispecies DAS or sector trip. If an overage of the overall ACL for SNE/MA windowpane flounder is as a result of overages of both the groundfish fishery and exempted fishery sub-ACLs, the applicable AM area(s) shall be in effect for both the groundfish fishery and exempted fisheries. If a sub-ACL for either stock of windowpane flounder or ocean pout is allocated to another fishery, consistent with the process specified at § 648.90(a)(4), and AMs are otherwise developed for that fishery, the groundfish fishery AM shall only be implemented if the sub-ACL allocated to the groundfish fishery is exceeded (i.e., the sector and common pool catch for a particular stock, including the common

pool's share of any overage of the overall ACL caused by excessive catch by other sub-components of the fishery pursuant to § 648.90(a)(5) exceeds the common pool sub-ACL) and the overall ACL is also exceeded.

NORTHERN WINDOWPANE FLOUNDER AND OCEAN POUT SMALL AM AREA

Point	N. Latitude	W. Longitude
1	41°10′	67°40′
2	41°10′	67°20′
3	41°00′	67°20′
4	41°00′	67°00′
5	40°50′	67°00′
6	40°50′	67°40′
1	41°10′	67°40′

NORTHERN WINDOWPANE FLOUNDER AND OCEAN POUT LARGE AM AREA

Point	N. Latitude	W. Longitude
1	42°10′	67°40′
2	42°10′	67°20′
3	41°00′	67°20′
4	41°00′	67°00′
5	40°50′	67°00′
6	40°50′	67°40′
1	42°10′	67°40′

SOUTHERN WINDOWPANE FLOUNDER AND OCEAN POUT SMALL AM AREA

Point	N. Latitude	W. Longitude
1	41°10′	71°30′
2	41°10′	71°20′
3	40°50′	71°20′
4	40°50′	71°30′
1	41°10′	71°30′

SOUTHERN WINDOWPANE FLOUNDER AND OCEAN POUT SMALL AM AREA 1

Point	N. Latitude	W. Longitude
1	41°10′	71°50′
2	41°10′	71°10′
3	41°00′	71°10′
4	41°00′	71°20′
5	40°50′	71°20′
6	40°50′	71°50′
1	41°10′	71°50′

SOUTHERN WINDOWPANE FLOUNDER AND OCEAN POUT LARGE AM AREA 2

Point	N. Latitude	W. Longitude
1	(1)	73°30′
2	40°30′	73°30′
3	40°30′	73°50′
4	40°20′	73°50′
5	40°20′	(2)
6	(3)	73°58.5′
7	(4)	73°58.5′
8	40°32.6′ (5)	73°56.4′ (5)

SOUTHERN WINDOWPANE FLOUNDER AND OCEAN POUT LARGE AM AREA 2—Continued

Point	N. Latitude	W. Longitude
1	(1)	73°30′

[1] The southern-most coastline of Long Island, NY at 73°30′ W. longitude.
[2] The eastern-most coastline of NJ at 40°20′ N. latitude, then northward along the NJ coastline to Point 6.
[3] The northern-most coastline of NJ at 73°58.5′ W. longitude.
[4] The southern-most coastline of Long Island, NY at 73°58.5′ W. longitude.
[5] The approximate location of the southwest corner of the Rockaway Peninsula, Queens, NY, then eastward along the southern-most coastline of Long Island, NY (excluding South Oyster Bay), back to Point 1.

(*2*) *Atlantic halibut.* If NMFS determines the overall ACL for Atlantic halibut is exceeded, as described in this paragraph (a)(5)(i)(D)(*2*), by any amount greater than the management uncertainty buffer, the applicable AM areas shall be implemented, as specified in paragraph (a)(5)(i)(D) of this section. If the overall ACL is exceeded by 21 percent or more, the applicable large AM area(s) for the stock shall be implemented, as specified in paragraph (a)(5)(i)(D) of this section, and the Council shall revisit the AM in a future action. The AM areas defined below are bounded by the following coordinates, connected in the order listed by straight lines, unless otherwise noted. Any vessel issued a limited access NE multispecies permit and fishing with trawl gear in the Atlantic Halibut Trawl Gear AM Area may only use a haddock separator trawl, as specified in § 648.85(a)(3)(iii)(A); a Ruhle trawl, as specified in § 648.85(b)(6)(iv)(J)(*3*); a rope separator trawl, as specified in § 648.84(e); or any other gear approved consistent with the process defined in § 648.85(b)(6). When in effect, a limited access NE multispecies permitted vessel with gillnet or longline gear may not fish or be in the Atlantic Halibut Fixed Gear AM Areas, unless transiting with its gear stowed in accordance with § 648.23(b), or such gear was approved consistent with the process defined in § 648.85(b)(6). If a sub-ACL for Atlantic halibut is allocated to another fishery, consistent with the process specified at § 648.90(a)(4), and AMs are developed for that fishery, the groundfish fishery AM shall only be implemented if the sub-ACL allocated to the groundfish fishery is exceeded (i.e., the sector and common pool catch for a particular stock, including the common pool's share of any overage of the overall ACL caused by excessive catch by other sub-components of the fishery pursuant to § 648.90(a)(5) exceeds the common pool sub-ACL) and the overall ACL is also exceeded.

ATLANTIC HALIBUT TRAWL GEAR AM AREA

Point	N. Latitude	W. Longitude
1	42°00′	69°20′
2	42°00′	68°20′
3	41°30′	68°20′
4	41°30′	69°20′

ATLANTIC HALIBUT FIXED GEAR AM AREA 1

Point	N. Latitude	W. Longitude
1	42°30′	70°20′
2	42°30′	70°15′
3	42°20′	70°15′
4	42°20′	70°20′

ATLANTIC HALIBUT FIXED GEAR AM AREA 2

Point	N. Latitude	W. Longitude
1	43°10′	69°40′
2	43°10′	69°30′
3	43°00′	69°30′
4	43°00′	69°40′

(*3*) *Atlantic wolffish.* If NMFS determines the overall ACL for Atlantic wolffish is exceeded, as described in this paragraph (a)(5)(i)(D)(*3*), by any amount greater than the management uncertainty buffer, the applicable AM areas shall be implemented, as specified in paragraph (a)(5)(i)(D) of this section. If the overall ACL is exceeded by 21 percent or more, the applicable large AM area(s) for the stock shall be implemented, as specified in paragraph (a)(5)(i)(D) of this section, and the Council shall revisit the AM in a future action. The AM areas defined below are bounded by the following coordinates, connected in the order listed by straight lines, unless otherwise noted. Any vessel issued a limited access NE multispecies permit and fishing with trawl gear in the Atlantic Wolffish Trawl Gear AM Area may only use a haddock separator trawl, as specified in § 648.85(a)(3)(iii)(A); a Ruhle trawl, as specified in § 648.85(b)(6)(iv)(J)(*3*); a rope separator trawl, as specified in § 648.84(e); or any other gear approved consistent with the process defined in § 648.85(b)(6). When in effect, a limited access NE multispecies permitted vessel with gillnet or longline gear may not fish or be in the Atlantic Wolffish Fixed Gear AM Areas, unless transiting with its gear stowed in accordance with § 648.23(b), or such gear was approved

consistent with the process defined in § 648.85(b)(6). If a sub-ACL for Atlantic wolffish is allocated to another fishery, consistent with the process specified at § 648.90(a)(4), and AMs are developed for that fishery, the groundfish fishery AM shall only be implemented if the sub-ACL allocated to the groundfish fishery is exceeded (i.e., the sector and common pool catch for a particular stock, including the common pool's share of any overage of the overall ACL caused by excessive catch by other sub-components of the fishery pursuant to § 648.90(a)(5) exceeds the common pool sub-ACL) and the overall ACL is also exceeded.

ATLANTIC WOLFFISH TRAWL GEAR AM AREA

Point	N. Latitude	W. Longitude
1	42°30′	70°30′
2	42°30′	70°15′
3	42°15′	70°15′
4	42°15′	70°10′
5	42°10′	70°10′
6	42°10′	70°20′
7	42°20′	70°20′
8	42°20′	70°30′

ATLANTIC WOLFFISH FIXED GEAR AM AREA 1

Point	N. Latitude	W. Longitude
1	41°40′	69°40′
2	41°40′	69°30′
3	41°30′	69°30′
4	41°30′	69°40′

ATLANTIC WOLFFISH FIXED GEAR AM AREA 2

Point	N. Latitude	W. Longitude
1	42°30′	70°20′
2	42°30′	70°15′
3	42°20′	70°15′
4	42°20′	70°20′

(*4*) *SNE/MA winter flounder.* If NMFS determines the overall ACL for SNE/MA winter flounder is exceeded, as described in this paragraph (a)(5)(i)(D)(*4*), by any amount greater than the management uncertainty buffer, the applicable AM areas shall be implemented, as specified in paragraph (a)(5)(i)(D) of this section. If the overall ACL is exceeded by 21 percent or more, the applicable large AM area(s) for the stock shall be implemented, as specified in paragraph (a)(5)(i)(D) of this section, and the Council shall revisit the AM in a future action. The AM areas defined below are bounded by the following coordinates, connected in the order listed by straight lines, unless otherwise noted. Any vessel issued a limited access NE multispecies permit and fishing with trawl gear in the SNE/MA Winter Flounder Trawl Gear AM Area may only use a haddock separator trawl, as specified in § 648.85(a)(3)(iii)(A); a Ruhle trawl, as specified in § 648.85(b)(6)(iv)(J)(*3*); a rope separator trawl, as specified in § 648.84(e); or any other gear approved consistent with the process defined in § 648.85(b)(6). If a sub-ACL for SNE/MA winter flounder is allocated to another fishery, consistent with the process specified at § 648.90(a)(4), and AMs are developed for that fishery, the groundfish fishery AM shall only be implemented if the sub-ACL allocated to the groundfish fishery is exceeded (i.e., the sector and common pool catch for a particular stock, including the common pool's share of any overage of the overall ACL caused by excessive catch by other sub-components of the fishery pursuant to § 648.90(a)(5) exceeds the common pool sub-ACL) and the overall ACL is also exceeded.

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 1

Point	N. Latitude	W. Longitude
1	41°10′	71°40′ (1)
2	41°10′	71°20′
3	41°00′	71°20′
4	41°00′	71°40′

[1] Point 1 connects to Point 2 along 41°10′N or the southern coastline of Block Island, RI, whichever is further south.

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 2

Point	N. Latitude	W. Longitude
1	41°20′	70°30′
2	41°20′	70°20′
3	41°00′	70°20′
4	41°00′	70°30′

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 3

Point	N. Latitude	W. Longitude
1	41°20′	69°20′
2	41°20′	69°10′
3	41°10′	69°10′
4	41°10′	69°20′

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 4

Point	N. Latitude	W. Longitude
1	41°20′	69°20′
2	41°20′	(1)

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 4—Continued

Point	N. Latitude	W. Longitude
3	(1)	69°00′
4	41°00′	69°00′
5	41°00′	69°10′
6	41°10′	69°10′
7	41°10′	69°20′

[1] The southwest-facing boundary of Closed Area I.

(E) [Reserved].

(ii) *AMs if the overall ACL for a regulated species or ocean pout stock is exceeded.* If the catch of any stock of regulated species or ocean pout by vessels fishing outside of the NE multispecies fishery; vessels fishing in state waters outside of the FMP; or vessels fishing in exempted fisheries, as defined in this part, exceeds the sub-component of the ACL for that stock specified for such fisheries pursuant to paragraphs (a)(4)(iii)(A) through (G) of this section, and the overall ACL for that stock is exceeded, then the amount of the overage of the overall ACL for that stock due to catch from vessels fishing outside of the NE multispecies fishery shall be distributed among components of the NE multispecies fishery based upon each component's share of that stock's ACL available to the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(H) of this section. Each component's share of the ACL overage for a particular stock would be then added to the catch of that stock by each component of the NE multispecies fishery to determine if the resulting sum of catch of that stock for each component of the fishery exceeds that individual component's share of that stock's ACL available to the NE multispecies fishery. If the total catch of that stock by any component of the NE multispecies fishery exceeds the amount of the ACL specified for that component of the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(H) of this section, then the AMs specified in paragraphs (a)(5)(i)(A) through (C) of this section shall take effect, as applicable. If the catch of any stock of regulated species or ocean pout by vessels outside of the FMP exceeds the sub-component of the ACL for that stock specified pursuant to paragraphs (a)(4)(iii)(A) through (C) of this section, but the overall ACL for that stock is not exceeded, even after consideration of the catch of that stock by other sub-components of the fishery, then the AMs specified in this paragraph (a)(5)(ii) shall not take effect.

(iii) *AMs if the incidental catch cap for the Atlantic herring fishery is exceeded.* At the end of the NE

multispecies fishing year, NMFS shall evaluate Atlantic herring fishery catch using VTR, VMS, IVR, observer data, and any other available information to determine whether a haddock incidental catch cap has been exceeded based upon the cumulative catch of vessels issued an Atlantic herring permit and fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3. If the catch of haddock by all vessels issued an Atlantic herring permit and fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, exceeds the amount of the incidental catch cap specified in § 648.85(d) of this section, then the appropriate incidental catch cap shall be reduced by the overage on a pound-for-pound basis during the following fishing year. Any overage reductions shall be announced by the Regional Administrator in the **Federal Register**, accordance with the Administrative Procedure Act, prior to the start of the next NE multispecies fishing year after which the overage occurred, if possible, or as soon as possible thereafter if the overage is not determined until after the end of the NE multispecies fishing year in which the overage occurred.

* * * * *

■ 15. In § 648.201, revise paragraph (a)(2) to read as follows:

§ 648.201 AMs and harvest controls.

* * * * *

(a) * * *

(2) When the Regional Administrator has determined that the GOM and/or GB incidental catch cap for haddock in § 648.85(d) has been caught, no vessel issued a Federal Atlantic herring permit and fishing with midwater trawl gear in the applicable Accountability Measure (AM) Area, i.e., the Herring GOM Haddock AM Area or Herring GB Haddock AM Area, as defined in § 648.86(a)(3)(ii)(A)(*2*) and (*3*) of this part, may not fish for, possess, or land herring in excess of 2,000 lb (907.2 kg) per trip in or from the applicable AM Area, unless all herring possessed and landed by a vessel were caught outside the applicable AM Area and the vessel complies with the gear stowage provisions specified in § 648.23(b) while transiting the applicable AM Area. Upon this determination, the haddock possession limit is reduced to 0 lb (0 kg) in the applicable AM area, for a vessel issued a Federal Atlantic herring permit and fishing with midwater trawl gear or for a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip, regardless of area fished or gear used, in the applicable AM area, unless the vessel also possesses a Northeast multispecies permit and is operating on a declared (consistent with § 648.10(g)) Northeast multispecies trip.

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 648

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 50; Interim Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 130219149–3397–02]

RIN 0648–BC97

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 50

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

ACTION: Interim final rule; emergency action; request for comments.

SUMMARY: NMFS partially approves Framework Adjustment 50 (Framework 50) to the Northeast (NE) Multispecies Fishery Management Plan (FMP), and implements the approved measures. NMFS also implements three parallel emergency actions to set fishing year (FY) 2013 catch limits for Georges Bank (GB) yellowtail flounder and white hake, and to modify the maximum Gulf of Maine (GOM) cod carryover available to sectors from FY 2012 to FY 2013. Framework 50 sets specifications for FYs 2013–2015, including 2013 total allowable catches (TACs) for U.S./Canada stocks, and revises the rebuilding program and management measures for Southern New England/Mid-Atlantic (SNE/MA) winter flounder. This final rule also implements FY 2013 management measures for the recreational and common pool fisheries and clarifies how to account for sector carryover for FY 2013 and for FY 2014 and beyond. These actions are necessary to prevent overfishing, rebuild overfished stocks, achieve optimum yield (OY), and ensure that management measures are based on the best available scientific information.

DATES: Effective May 1, 2013, except for:

The amendment to § 648.87 (b)(1)(i)(C) is effective May 3, 2013, through October 30, 2013.

The amendment to § 648.90 is effective May 2, 2013.

The specification of the white hake and GB yellowtail flounder catch limits under ''Annual Catch Limit Specifications'' in the preamble are effective May 3, 2013, through October 30, 2013.

Comments on the carryover measures for FY 2014 and beyond, and the re-estimation of the SNE/MA yellowtail flounder catch by scallop vessels, must be received by June 17, 2013.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2013–0053, by any of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA–NMFS–2013–0053*, click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Paper, disk, or CD–ROM comments should be sent to John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Interim Final Measures for NE Multispecies Sector Carryover.''
- *Fax:* (978) 281–9135, Attn: Sarah Heil.

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.

Copies of Framework 50, associated emergency rules, and other measures, the environmental assessment (EA), its Regulatory Impact Review (RIR), and the Final Regulatory Flexibility Act (FRFA) analysis prepared by the Council and NMFS are available from John K. Bullard, Regional Administrator, NMFS Northeast Regional Office (NERO), 55 Great Republic Drive, Gloucester, MA 01930. The FRFA analysis consists of the FRFA, public comments and responses, and the summary of impacts and alternatives contained in this final rule and Framework 50, Associated Emergency Rules, and Other Measures. The EA/RIR/FRFA is also accessible via the Internet at: *http://www.nero.noaa.gov/sfd/sfdmulti.html.*

FOR FURTHER INFORMATION CONTACT: Sarah Heil, Fishery Policy Analyst, phone: 978–281–9257, fax: 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

The FMP specifies management measures for 16 species in Federal waters off the New England and Mid-Atlantic coasts, including both large-mesh and small-mesh species. Small-mesh species include silver hake (whiting), red hake, offshore hake, and ocean pout; and large-mesh species include Atlantic cod, haddock, yellowtail flounder, pollock, American plaice, witch flounder, white hake, windowpane flounder, Atlantic halibut, winter flounder, Acadian redfish, and Atlantic wolffish. Large-mesh species, which are referred to as ''regulated species,'' are divided into 19 fish stocks, and along with ocean pout, make up the groundfish complex.

The New England Fishery Management Council (Council) developed and adopted Framework 50, in conjunction with Framework 48 to the FMP (Framework 48), based on the biennial review process established in the FMP to set annual catch limits (ACLs) and to revise management measures necessary to rebuild overfished groundfish stocks and achieve the goals and objectives of the FMP. The Council initially intended to set the specifications for FYs 2013–2015, including adoption of FY 2013 TACs for U.S./Canada stocks, through Framework 48. Framework 48 also includes measures to establish allocations of SNE/MA windowpane flounder and GB yellowtail flounder for some non-groundfish fisheries, modify sector management and groundfish fishery accountability measures (AMs), and help mitigate anticipated impacts of the FY 2013 catch limits. At its December 2012 meeting, the Council voted to remove the specifications from Framework 48 and initiate a separate specifications package (Framework 50) for final action at its January 2013 meeting. Due to the reductions in catch limits anticipated for FY 2013, the Council needed additional time to explore any flexibility that may be available for setting specifications, and to complete the necessary analyses for the proposed measures. The Council also needed additional time to develop new management measures for SNE/MA winter flounder that were expected to help mitigate the anticipated impacts of the FY 2013 catch limits. In addition, the results of the December 2012 benchmark assessments for GOM and GB cod were not yet available when the Council took final action on Framework 48, but became available prior to the Council's January 2013 meeting.

Disapproved Measures

FY 2013 GB Yellowtail Flounder Catch Limits

NMFS disapproves the FY 2013 Acceptable Biological Catch (ABC) of 1,150 mt (U.S. quota 495 mt) for GB yellowtail flounder that the Council proposed in Framework 50, on grounds that it is inconsistent with the necessary provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), particularly the National Standard 1 requirement to prevent overfishing, and the National Standard 2 requirement to use the best scientific information available. During the development of Framework 50, and in the proposed rule for this action, NMFS expressed concern about this ABC and cautioned that it may not be approvable, as it did not appear to be based on the best scientific information available and could lead to overfishing.

The 2012 Transboundary Resources Assessment Committee (TRAC) assessment for GB yellowtail flounder was completed in June 2012. A detailed summary of the 2012 TRAC assessment can be found at: *http://www2.mar.dfo-mpo.gc.ca/science/trac/tsr.html*. The 2012 TRAC noted that, in recent years, catches based on the approved assessment model (Split Series model) have not reduced fishing mortality below the fishing mortality limit reference (F_{ref}),[1] or increased spawning stock biomass (SSB) as expected. There was also a significant retrospective pattern in the 2012 assessment, which causes SSB to be overestimated and fishing mortality (F) to be underestimated. As a result, the TRAC recommended that 2013 catches should not be based on the assessment results without adjusting for the retrospective bias. The 2013 unadjusted catch from the Split Series model would be approximately 882 mt. This is the catch that would result from F that, if applied over the long term, would result in maximum sustainable yield (F_{MSY}). Based on the assessment results, 2013 catches should not be above 882 mt, and in order to account for scientific uncertainty in the assessment, should be considerably below this level to help ensure that overfishing does not occur.

The 2012 TRAC performed five sensitivity analyses to attempt to minimize the retrospective bias and evaluate a few potential factors (i.e., missing catch, an increased natural mortality rate (M), a combination of missing catch and increased M) that might explain the retrospective pattern in the assessment. The results from the sensitivity analyses help characterize the scientific uncertainty and risk in the 2013 catch advice, and were used by the TRAC as the basis of the 2013 catch advice. Based on the sensitivity analyses, a 2013 quota of 200 mt would have a high probability that F would be less than F_{ref}, and that SSB would increase. A 2013 quota between 400–500 mt would result in an F that is below F_{ref} (in one of the five sensitivity runs), or that SSB would increase (in the other four sensitivity runs). The 2012 TRAC results indicate that the lower end of the 2013 quota range would have a greater probability that F would be less than F_{ref}, and that the adult biomass would increase, than the higher end of the range.

The Council's Scientific and Statistical Committee (SSC) recommended a FY 2013 ABC for GB yellowtail flounder of 200–1,150 mt and determined that the overfishing limit (OFL) is unknown. The SSC noted that a 2013 catch limit of 200 mt would have a low probability of overfishing and would be expected to allow the stock to increase, and that a 2013 catch limit of 400–500 mt would have a greater probability of overfishing than 200 mt, but would likely allow some rebuilding. The SSC also noted that the rationale for a FY 2013 ABC of 400–500 mt is similar to the rationale of its ABC recommendation for FY 2012. The SSC recommended an ABC of 1,150 mt as a backstop measure only, and noted that unintentional bycatch may exceed 500 mt, but total removals should be less than the FY 2012 ABC of 1,150 mt. The SSC noted in its November 2012 report that its recommendation for 1,150 mt was qualitative and not based on the 2012 TRAC assessment, and concluded that this ABC represented a status quo catch limit relative to the FY 2012 ABC.

The SSC also recommended that there should be no directed fishery for GB yellowtail flounder, and that measures should be taken to reduce bycatch as much as possible. In its September 2012 report, the SSC noted that an ABC of 1,150 mt would only be appropriate when management measures have a high probability of resulting in low Fs. The SSC did not provide any detail on what it intended by its recommendation for reducing bycatch, or what management measures it expected the Council to modify to meet this recommendation. Nonetheless, the Council did not adopt or modify any management measures that would necessarily prevent targeting of GB yellowtail flounder, or result in a high probability of low Fs under this ABC alternative. The SSC did not endorse an FY 2013 ABC of 1,150 mt as an appropriate catch level for any directed fishing, and as a result, the Council's proposed ABC of 1,150 mt is not consistent with the SSC's recommendation.

Moreover, NMFS has determined that the 2012 TRAC assessment for GB yellowtail flounder represents the best scientific information available, and notes that the SSC did not reject the 2012 TRAC assessment. The recommendation for a FY 2013 ABC of 1,150 mt is higher than the catch levels suggested by the unadjusted Split Series model results (882 mt). The TRAC indicated that 2013 catches based on the unadjusted model would likely fail to achieve management objectives, and would not appropriately account for the retrospective bias in the assessment. Therefore, based on the 2012 assessment, a FY 2013 ABC of 1,150 mt would almost certainly fail to prevent overfishing. As a result, NMFS has determined that a 2013 catch of 1,150 mt is inconsistent with National Standards 1 and 2 of the Magnuson-Stevens Act, which requires that management measures must prevent overfishing and be based on the best scientific information available. Thus, NMFS disapproves the FY 2013 ABC of 1,150 mt adopted by the Council in Framework 50.

Approved Measures

The Framework 50 measures that are approved are described below. All of the measures in Framework 50 are approved except for the FY 2013 ABC for GB yellowtail flounder that was described in the previous section. This final rule also implements FY 2013 management measures for the common pool and recreational fisheries. These measures are not part of Framework 50, and are being implemented under Regional Administrator (RA) authority provided by the FMP.

In addition, this final rule implements three parallel emergency actions under authority provided in section 305(c) of the Magnuson-Stevens Act. The Magnuson-Stevens Act authorizes the Secretary of Commerce (Secretary) to implement emergency rules or interim measures if the Secretary finds that an emergency involving a fishery exists, or

[1] The fishing mortality limit reference (F_{ref}) for GB yellowtail flounder (0.25) was negotiated as part of the U.S./Canada Resource Sharing Understanding. The Transboundary Management Guidance Committee's harvest strategy is to maintain a low to neutral risk of exceeding F_{ref}. The F_{ref} for GB yellowtail flounder is equal to F_{MSY} (0.25) that is applied in the U.S. to calculate overfishing limits consistent with the Magnuson-Stevens Act. See Item 3 for more information on the joint (U.S./Canada) management of transboundary GB groundfish stocks.

that interim measures are needed to reduce overfishing. The Secretary can also implement emergency rules or interim measures if the Council finds that one of these factors exists and requests that the Secretary act. NMFS issued guidance defining when an emergency involving a fishery exists (62 FR 44421; August 21, 1997). This guidance defines an emergency as a situation that: (1) Arose from recent, unforeseen events; (2) presents a serious conservation or management problem in the fishery; and (3) can be addressed through interim emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and the deliberative consideration of the impacts on participants to the same extent as would be expected under the formal rulemaking process (if the emergency rule is being implemented without the opportunity for prior public comment). NMFS policy guidelines also state that an emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or preserve a significant economic opportunity that otherwise might be lost.

NMFS, on behalf of the Secretary, is using section 305(c) emergency rulemaking authority to:

- Implement FY 2013 GB yellowtail flounder catch limits that differ from the Council's recommended levels;
- Increase the FY 2013 white hake catch limits from those proposed in Framework 50; and
- Modify the maximum allowable carryover for GOM cod that is available to sectors from FY 2012 to FY 2013.

Rationale for how each of these actions satisfies the criteria for emergency rulemaking is provided within their respective sections later in this preamble.

An additional set of measures to modify sector carryover provisions for FY 2014 and beyond are being implemented under authority of section 305(d) of the Magnuson-Stevens Act, which says that the Secretary may independently promulgate regulations necessary to ensure that fishery management plans or amendments are carried out, and implemented, in accordance with the Magnuson-Stevens Act. These measures are necessary to reconcile conflicts between the sector carryover program and the conservation objectives of the FMP as well as to clarify how to account for carryover catch in a manner consistent with the National Standards of the Magnuson-Stevens Act.

1. SNE/MA Winter Flounder Rebuilding Program

The current rebuilding strategy for SNE/MA winter flounder was implemented in 2004 with a targeted rebuilding end date of 2014 with a median probability of success. In 2008, data showed that the stock would not rebuild by 2014, even in the absence of all fishing mortality, but would likely rebuild between 2015 and 2016. As a result, Amendment 16 to the FMP (Amendment 16) adopted management measures that would result in Fs as close to zero as practicable. The stock is not currently allocated to sectors, and possession is prohibited by commercial and recreational vessels.

A benchmark assessment was completed in June 2011 for SNE/MA winter flounder and concluded that there was less than a 1-percent chance that SNE/MA winter flounder would rebuild by 2014, even if no fishing mortality were allowed from 2012 to 2014. Based on the assessment results, NMFS determined that SNE/MA winter flounder was not making adequate rebuilding progress. Section 304(e)(7) of the Magnuson-Stevens Act says that, if the Secretary finds that an FMP has not resulted in adequate progress toward ending overfishing and rebuilding, the Secretary must immediately notify the Council and recommend conservation and management measures that would achieve adequate progress. Therefore, on behalf of the Secretary, NMFS notified the Council in May 2012 that the SNE/MA winter flounder rebuilding program was not making adequate progress. As a result, NMFS also notified the Council that it must implement a revised rebuilding plan for the stock within 2 years, or by May 1, 2014, consistent with the rebuilding requirements of the Magnuson-Stevens Act. In December 2012, the Council developed a proposal to re-specify the ABC for SNE/MA winter flounder to achieve an ACL of at least 1,400 mt while continuing to prevent overfishing. The Council also proposed to allocate this stock to sectors beginning in FY 2013. To allow the Council's proposed revisions to the management approach for SNE/MA winter flounder (see Item 2 of this preamble for more information), NMFS notified the Council that it must revise the rebuilding program for this stock.

Therefore, this action revises the rebuilding strategy for SNE/MA winter flounder to rebuild the stock by 2023 with a median probability of success. During the rebuilding program, catch limits will be set based on the F that would rebuild the stock within its rebuilding timeframe ($F_{rebuild}$). However, groundfish stock projections have recently demonstrated a tendency to overestimate stock growth. Therefore, short-term catch advice for SNE/MA winter flounder could reduce catches from $F_{rebuild}$ in order to account for the scientific uncertainty in the projections. If SNE/MA winter flounder stock size increases more rapidly than originally projected, $F_{rebuild}$ will be recalculated, which could allow increased catch limits in the future.

The minimum rebuilding time (T_{min}) is the amount of time a stock is expected to take to rebuild to its MSY biomass level in the absence of any fishing mortality. For SNE/MA winter flounder, T_{min} is 6 years (from 2013), or 2019. Because the stock can rebuild in less than 10 years in the absence of all fishing mortality, the maximum rebuilding period for SNE/MA winter flounder is 10 years. A rebuilding end date of 2023 rebuilds the stock as quickly as possible taking into account the needs of fishing communities. This rebuilding strategy would return greater net benefits than a rebuilding strategy that targets an end date between 2019 and 2023.

2. SNE/MA Winter Flounder Management Measures

Landing Restrictions

As described in Item 1 of this preamble, the prohibition on retention for SNE/MA winter flounder was adopted by Amendment 16 to keep Fs as close to zero as practicable in order to rebuild this stock. This measure has effectively reduced fishing mortality and overfishing is not occurring for this stock. At its December 2012 meeting, the Council developed measures to modify the management program for SNE/MA winter flounder as one way to help mitigate the anticipated impacts of the reductions in the FY 2013 catch limits.

This action allocates SNE/MA winter flounder to sectors, and as described below, subjects the stock to an inseason AM that closes the stock area to sectors once their Annual Catch Entitlement is caught. As adopted by Amendment 16, each vessel's potential sector contribution (PSC) for SNE/MA winter flounder will be calculated using dealer landings during FYs 1996 through 2006. In addition, this action allows commercial and recreational vessels to land SNE/MA winter flounder. Sector vessels are required to land all legal-sized SNE/MA winter flounder, and common pool vessels may land legal-sized fish within the trip limit, or any other inseason restrictions, specified by

the RA. The minimum fish size for SNE/MA winter flounder for both commercial and recreational vessels is 12 inches (30.5 cm). Initial FY 2013 trip limits for common pool vessels are provided in Item 8 of this preamble.

Allowing landings of SNE/MA winter flounder is expected to provide additional fishing opportunities for groundfish vessels in FY 2013 that will help offset low quotas for some groundfish stocks, and promote OY in the fishery. Landings of the stock will also provide the opportunity to collect biological samples from landed fish after possession has been prohibited in recent years.

Commercial Fishery AMs

Since Amendment 16, the AM for SNE/MA winter flounder has been zero possession, and there was no reactive AM for the stock. In December 2011, a Court order in *Oceana* v. *Locke* required that reactive AMs be developed for all of the stocks not allocated to sectors. As a result, Framework 48 proposed an area-based AM for commercial groundfish vessels that would implement gear restrictions for common pool and sector vessels in certain areas if the total ACL for SNE/MA winter flounder was exceeded. This action replaces this area-based AM for sector vessels with the standard inseason sector AM, since the stock is being allocated to sectors. All catch (landings and discards) of SNE/MA winter flounder will be attributed to a sector's ACE. Sector vessels will be required to stop fishing inseason in the SNE/MA winter flounder stock area once the entire sector's ACE is caught, unless the sector leases additional ACE. If a sector exceeds its ACE for the fishing year, it will be subject to an additional AM that will reduce the sector's ACE in the following fishing year by the amount of the overage.

This action also implements an area-based AM for common pool vessels. The AM will be triggered if the common pool sub-ACL is exceeded by more than the management uncertainty buffer. Currently, the management uncertainty buffer for the common pool fishery is 5 percent for SNE/MA winter flounder. The management uncertainty buffers can be revised each time the specifications are set, so the buffer used for the common pool fishery could change in future actions. The common pool fishery makes up only about 2 percent of the total catch of SNE/MA winter flounder, and other components of the fishery typically underharvest their portions of the ABC. As a result, triggering the common pool AM for this stock by an overage of the sub-ACL that exceeds the management uncertainty buffer is not expected to increase the likelihood that the total ACL would be exceeded, or that overfishing would occur, and will help achieve OY in the fishery.

The AM for common pool vessels requires that trawl vessels fishing on a NE multispecies day-at-sea (DAS) must use approved selective trawl gear in the SNE/MA Winter Flounder AM Areas. Approved gears include the separator trawl, the Ruhle trawl, the mini-Ruhle trawl, rope trawl, and any other gear authorized by the Council in a management action, or approved for use consistent with the process defined in § 648.85(b)(6). This area-based AM does not restrict common pool vessels fishing with longline or gillnet gear. If triggered, the AM will be implemented in the fishing year following the overage, and would be effective for the entire fishing year. The AM would account for an overage of the common pool sub-ACL of up to 20 percent. If the common pool fishery exceeds its sub-ACL by 20 percent or more, the AM will be implemented, and this measure will be reconsidered by the Council in a future action.

As adopted by Amendment 16, if the total ACL is exceeded, and the overage is caused by a sub-component of the fishery that is not allocated a sub-ACL, and does not have an AM, the overage will be distributed among the components of the fishery that do have a sub-ACL, and if necessary, the pertinent AM will be triggered. If sub-ACLs are allocated to additional fisheries in the future, and AMs developed for those fisheries, the AM for any fishery would only be implemented if it exceeds its sub-ACL, or if the total ACL for the stock is exceeded. If only one fishery exceeds it sub-ACL, only the AM for that fishery will be implemented.

3. U.S./Canada TACs

Eastern GB cod, eastern GB haddock, and GB yellowtail flounder are managed jointly with Canada through the U.S./Canada Resource Sharing Understanding (Understanding). Each year the Transboundary Management Guidance Committee (TMGC), a government-industry committee made up of representatives from the United States and Canada, recommends a shared TAC for each stock based on the most recent stock information and the TMGC harvest strategy. The TMGC's harvest strategy for setting catch levels is to maintain a low to neutral risk (less than 50 percent) of exceeding the fishing mortality limit reference for each stock (F_{ref} = 0.18, 0.26, and 0.25 for cod, haddock, and yellowtail flounder, respectively). The TMGC's harvest strategy also specifies that when stock conditions are poor, fishing mortality should be further reduced to promote rebuilding. The shared TACs are allocated between the United States and Canada based on a formula that considers historical catch percentages (10-percent weighting) and the current resource distribution based on trawl surveys (90-percent weighting). The U.S./Canada Management Area comprises the entire stock area for GB yellowtail flounder; therefore, the U.S. TAC for this stock is also the U.S. ABC. Eastern GB cod and haddock are sub-units of the total GB cod and haddock stocks. The U.S./Canada TACs for these stocks are a portion of the total ABC.

Assessments for the three transboundary stocks were completed in June 2012 by the TRAC. A detailed summary of the 2012 TRAC assessment can be found at: *http://www2.mar.dfo-mpo.gc.ca/science/trac/tsr.html*. The TMGC met in September 2012 to recommend shared TACs for FY 2013. Based on the results of the 2012 TRAC assessment, the TMGC recommended a shared TAC of 600 mt for eastern GB cod, 10,400 mt for eastern GB haddock, and 500 mt for GB yellowtail flounder. At its November 14, 2012, meeting, the Council recommended the TMGC's guidance for eastern GB cod and haddock for FY 2013, but it did not recommend the TMGC's guidance for GB yellowtail flounder. The Council selected a preferred-alternative for GB yellowtail flounder of 1,150 mt for FY 2013, which is more than double the TMGC's recommendation of 500 mt.

The 2013 U.S./Canada TACs and the percentage share for each country are listed in Table 1. This action approves the eastern GB cod and haddock TACs adopted in Framework 50. However, as described previously in this preamble, NMFS disapproves the FY 2013 GB yellowtail flounder ABC (1,150 mt) adopted by the Council in Framework 50. Because the Council typically sets specifications for multiple years at a time, Framework 47 to the FMP (Framework 47) (77 FR 26104; May 2, 2012) specified an ABC of 1,150 mt for GB yellowtail flounder for FYs 2012–2013. The FY 2013 ABC was based on the 2011 TRAC assessment, which was the best scientific information available, and the SSC and the Council fully intended to replace this ABC in a future management action based on the 2012 TRAC assessment. The FY 2013 ABC that was previously specified in Framework 47 (1,150 mt) is identical to the ABC proposed by the Council in Framework 50 that NMFS is

disapproving because it is would likely result in overfishing and would not be based on the best scientific information available. Thus, NMFS's disapproval of the FY 2013 ABC proposed in Framework 50 leaves the fishery with the same catch limit for this stock, as adopted by, and approved in, Framework 47. Due to serious conservation concerns, and the potential for this catch limit to cause harm to the resource, NMFS is instead implementing a FY 2013 ABC of 500 mt (U.S. TAC 215 mt) through emergency rulemaking, as more fully discussed later in this preamble (see Item 4).

The Understanding requires that any overages of the U.S. TACs for eastern GB cod, eastern GB haddock, or GB yellowtail flounder be deducted from the U.S. TAC in the following fishing year. If FY 2012 catch information indicates that the U.S. fishery exceeded its TAC for any of the shared stocks, NMFS is required to reduce the FY 2013 U.S. TAC for that stock. If an overage occurs, NMFS will announce the necessary overage deduction as soon as possible in FY 2013. As adopted in Framework 48, if any fishery that is allocated a portion of the U.S. TAC exceeds its allocation, which causes an overage of the U.S. TAC, the overage deduction will be applied to this fishery's sub-ACL in the following fishing year.

TABLE 1—FY 2013 U.S./CANADA TACS (MT, LIVE WEIGHT) AND PERCENTAGE SHARES

TAC	Eastern GB cod	Eastern GB haddock	GB yellowtail flounder emergency action
Total Shared TAC	600	10,400	500
U.S. TAC	96 (16%)	3,952 (38%)	215 (43%)
Canada TAC	504 (84%)	6,448 (62%)	285 (57%)

4. OFLs and ABCs

The OFL for each stock in the FMP is calculated using the estimated stock size and F_{MSY}. The SSC recommends ABCs for each stock that are lower than the OFLs to account for scientific uncertainty. In most cases, the ABCs are calculated using the estimated stock size for a particular year, and are based on the catch associated with 75 percent of F_{MSY}, or $F_{rebuild}$, whichever is lower. This is the Council's default ABC control rule that was adopted by Amendment 16. However, in recent years, catch projections for groundfish stocks have been overly optimistic. Catch projections often overestimate stock growth and underestimate fishing mortality. As a result, even catches that were substantially lower than the projected catch resulted in overfishing for some stocks. So, in many cases, the SSC has recommended ABCs that are lower than the catch associated with 75 percent of F_{MSY} or $F_{rebuild}$, or constant catches for FYs 2013–2015, in order to further account for scientific uncertainty. Appendix III to the Framework 50 EA provides additional detail on the OFLs and ABCs adopted by the Council for each stock (see **ADDRESSES** for information on how to get this document).

As part of the biennial review process for the FMP, the Council adopts OFLs and ABCs for 3 years at a time. Although it is expected that the Council will adopt new catch limits every 2 years, specifying catch levels for a third year ensures there are default catch limits in place in the event that a management action is delayed. This action adopts OFLs and ABCs for FYs 2013–2015 for most groundfish stocks, which are presented in Table 2, with a few exceptions that are described below. For GB cod, haddock, and yellowtail flounder, the Canadian share is deducted from the total ABC (see Table 1 for the Canadian share of these stocks). The U.S. ABC is the amount available to the U.S. fishery after accounting for Canadian catch.

FYs 2013–2014 catch limits for GB and GOM winter flounder and pollock were adopted in Framework 47 and are restated here. Also, as mentioned above, GB yellowtail flounder is managed jointly with Canada, and a TRAC assessment is conducted each year for the stock. As a result, catch limits are set annually for this stock, and this action only adopts catch limits for FY 2013. As described earlier in this rule, NMFS is disapproving the FY 2013 ABC for GB yellowtail flounder adopted by the Council in Framework 50 (1,150 mt). This action instead implements an OFL of 882 mt and an ABC of 500 mt through emergency rulemaking, based on the most recent assessment information, as more fully discussed later in this section.

Framework 50 adopted an FY 2013 ABC for white hake based on the 2008 benchmark assessment for this stock, which was the best scientific information available to the Council when it developed and took final action on Framework 50. National Standard 2 guidelines (50 CFR 600.315) require that each FMP (and by extension amendment and framework) must take into account the best scientific information available at the time, or preparation, of an action. The guidelines recognize that new information often becomes available between the initial drafting of an action and its submission to NMFS for final review. As a result, and based on established policy, this action approves the FY 2013 ABC for white hake that was adopted by the Council in Framework. However, a new stock assessment for white hake was completed in February 2013, and the final results of this assessment became available in April 2013. The assessment results support a higher FY 2013 ABC than what was adopted by the Council in Framework 50. Therefore, although this action technically approves the FY 2013 ABC for white hake specified in Framework 50, NMFS is simultaneously implementing an emergency rule, as requested by the Council at its April 2013 meeting, to increase the FY 2013 ABC for white hake based on the recent assessment. This emergency rule is described in detail later in this section.

TABLE 2—FYS 2013–2015 OFLS AND U.S. ABCS

[Live weight, mt]

Stock	2013		2014		2015	
	OFL	U.S. ABC	OFL	U.S. ABC	OFL	U.S. ABC
GB Cod	3,279	2,002	3,570	2,002	4,191	2,002
GOM Cod	1,635	1,550	1,917	1,550	2,639	1,550
GB Haddock	46,185	29,335	46,268	35,699	56,293	43,606
GOM Haddock	371	290	440	341	561	435
GB Yellowtail Flounder Emergency Action	882	215	.....	.....	.....	.....
SNE/MA Yellowtail Flounder	1,021	700	1,042	700	1,056	700
Cape Cod (CC)/GOM Yellowtail Flounder	713	548	936	548	1,194	548
American Plaice	2,035	1,557	1,981	1,515	2,021	1,544
Witch Flounder	1,196	783	1,512	783	1,846	783
GB Winter Flounder	4,819	3,750	4,626	3,598	.....	.....
GOM Winter Flounder	1,458	1,078	1,458	1,078	.....	.....
SNE/MA Winter Flounder	2,732	1,676	3,372	1,676	4,439	1,676
Redfish	15,468	10,995	16,130	11,465	16,845	11,974
White Hake Emergency Action	5,462	4,177	.....	.....	.....	.....
White Hake Proposed in Framework 50	5,306	3,638	.....	.....	.....	.....
Pollock	20,060	15,600	20,554	16,000	.....	.....
Northern Windowpane Flounder	202	151	202	151	202	151
Southern Windowpane Flounder	730	548	730	548	730	548
Ocean Pout	313	235	313	235	313	235
Atlantic Halibut	164	99	180	109	198	119
Atlantic Wolffish	94	70	94	70	94	70

Note: An empty cell indicates that no catch limit is adopted for these years. These catch limits will be specified in a future action.

FYs 2013–2015 Catch Limits for GOM Cod

A benchmark assessment was completed for GOM cod in December 2012, and the 55th Stock Assessment Review Committee (SARC 55) approved two different assessment models. One assessment model (base case model) assumes M = 0.2. The second assessment model (M_{ramp} model) assumes that M has increased from 0.2 to 0.4 in recent years, though the SARC did not conclude that M would remain 0.4 indefinitely. As a result, fishing mortality targets used in the catch projections from both models are based on biological reference points that assume M = 0.2. A detailed summary of the benchmark assessment is available from the Northeast Fisheries Science Center (NEFSC) at: *http://www.nefsc.noaa.gov/saw/saw55/crd1301.pdf*.

As more fully explained below, the SSC recommended two GOM cod constant catch ABC alternatives for FYs 2013–2015: 1,249 and 1,550 mt. The SSC noted that it preferred an ABC of 1,249 mt because it would help conserve the stock and increase the likelihood of rebuilding. Based on the two recommendations from the SSC, the Council selected a preferred alternative for a constant catch of 1,550 mt for FYs 2013–2015. Under the base case model, a constant ABC of 1,550 mt will have at least a 50-percent probability of avoiding overfishing. An ABC of 1,550 mt will be higher than 75% F_{MSY} until FY 2015, which is the Council's ABC control rule adopted in Amendment 16. Under the M_{ramp} model, the ABC implemented in this action is the F_{MSY} catch level in FY 2015, and is above F_{MSY} in FY 2013 and FY 2014. An ABC of 1,550 mt is expected to result in a dramatic reduction from current fishing mortality estimates and would also allow stock growth, but is a departure from the ABC control rule adopted by the Council in Amendment 16.

Amendment 16 specified that the ABC control rule should be used in the absence of information that allows a more explicit determination of scientific uncertainty for a stock. Amendment 16 also stated that, if information was available to more accurately characterize scientific uncertainty, it could be used by the SSC to set the ABC. Furthermore, National Standard 1 gives deference to SSCs to recommend ABCs to Fishery Management Councils that are departures from established control rules. In such situations, SSCs are expected to make use of the best scientific information available, and to provide ample justification on why the control rule is not the best approach for the particular circumstances.

The SSC determined that having two assessment models for GOM cod allowed for a better understanding of the nature and extent of the scientific uncertainty. As a result, the SSC concluded that both ABC alternatives appropriately use the assessment outcomes and account for scientific uncertainty. In addition, although multiple catch projections are available for GOM cod, the assessment did not evaluate an averaged output and did not recommend using an average of the two assessment models. Thus, in this case, NMFS has determined it is not appropriate to average the catch projections for GOM cod, and that all of the information must be considered. Lower catch limits will always increase the likelihood that stock growth will occur, and under this rationale, an ABC of 1,249 mt would have greater, and more immediate, increases in biomass than an ABC of 1,550 mt. However, in considering the assessment results and catch projections for both ABC alternatives, a constant catch ABC of 1,550 mt for FYs 2013–2015 will likely end overfishing and result in some stock rebuilding. This constant catch scenario also accounts for the uncertainty in the assessment and the SARC's conclusion that although M may have increased in recent years, it will likely return to 0.2 in the future.

Emergency Rule To Set FY 2013 GB Yellowtail Flounder Catch Limits

As noted earlier in this preamble, NMFS is disapproving the FY 2013 ABC for GB yellowtail flounder that the Council adopted in Framework 50 (1,150 mt), and is instead implementing a FY 2013 OFL of 882 mt and an ABC of 500 mt through emergency rulemaking. This situation meets the criteria for emergency action because it is necessary to address serious

conservation and management concerns resulting from recent, unexpected events. As noted earlier, the Council typically sets specifications for groundfish stocks for multiple years at a time. Although catch limits are set annually for GB yellowtail flounder because the stock is managed jointly with Canada, Framework 47 adopted ABCs for FYs 2012–2013 for the stock. The SSC recommended, and the Council adopted, a FY 2013 ABC of 1,150 mt in Framework 47 as a default catch limit with the intention that this ABC would be updated in a future management action based on the 2012 TRAC assessment. The ABCs adopted for GB yellowtail flounder in Framework 47 were based on the 2011 TRAC assessments and were consistent with the best scientific information available to the Council when it developed and took final action on Framework 47.

The proposed rule for this emergency action incorrectly described that if NMFS disapproved the ABC for GB yellowtail flounder proposed by the Council in Framework 50, there would be no catch limit specified for the fishery. Rather, since NMFS is disapproving the FY 2013 ABC for GB yellowtail flounder in Framework 50, the FY 2013 ABC previously specified in Framework 47 would go into effect on May 1, 2013. This ABC is identical to the ABC that NMFS is disapproving in Framework 50. As a result, based on the 2012 TRAC assessment, the default ABC would likely result in overfishing, which poses a serious conservation concern for the stock, and has the potential to cause harm to the resource. This would undermine the joint management of this stock with Canada under the Understanding, fail to end overfishing for the stock, and may not allow for any stock rebuilding.

In addition, this issue was controversial during the development of Framework 50, and both an ABC of 500 and 1,150 mt were considered by the Council based on the SSC's recommendations. The Council selected an FY 2013 ABC of 1,150 mt as the preferred alternative in Framework 50 at its November meeting. However, the Council delayed final action on Framework 50 until its January 2013 meeting. Due to the controversial nature of this issue, until the Council took final action on Framework 50, it was unclear whether the Council would select a different preferred alternative for GB yellowtail flounder. Although initial review by NMFS suggested that the Council's preferred alternative of 1,150 mt did not appear to be consistent with the best scientific information available, the SSC's recommendation was difficult to interpret, and NMFS requested specific public comment on this determination, and other factors that should be considered in setting the FY 2013 ABC for GB yellowtail flounder. NMFS proactively proposed an emergency rulemaking for concern that, in the event the FY 2013 ABC of 1,150 mt was disapproved, the Council would not have sufficient time to complete a management action and adopt a FY 2013 ABC for GB yellowtail flounder by May 1, 2013. Normally, the Council takes final action on a framework in November, and the action is submitted to NMFS in December for approval for the upcoming fishing year beginning on May 1. However, the Council did not take final action on Framework 50 until January 2013, and did not submit the document to NMFS for review and approval until March 22, 2013, which is nearly 3 months after NMFS typically receives the document. Thus, the lateness of the Council's decision, and the difficulty in interpreting the SSC's recommendation for GB yellowtail flounder, resulted in unforeseen events.

As a result of the default FY 2013ABC adopted in Framework 47 that would pose serious conservation concerns, and the unforeseen events described above, NMFS, on behalf of the Secretary, finds that a fishery-related emergency exists, and has determined that this situation meets the emergency criteria set forth by NMFS for emergency rulemaking (62 FR 44421; August 21, 1997).

This final rule implements a FY 2013 OFL of 882 mt and ABC of 500 mt. This ABC results in a U.S. quota of 215 mt after accounting for the Canadian share (see Table 1). The SSC determined that the OFL was unknown. However, the SSC's recommendation for FY 2013 was not based on the 2012 TRAC assessment, and the SSC noted that its ABC recommendation was qualitative. Based on the 2012 TRAC results, which NMFS has determined is the best scientific information available, and using the approved benchmark model that is used to determine stock status, NMFS has calculated the OFL using the standard methodology as defined by Amendment 16. As noted earlier in this section, and defined in Amendment 16, the OFL is calculated by applying F_{MSY} to a biomass estimate. The current assessment for GB yellowtail flounder uses the Split Series model to estimate current stock size and fishing mortality, and this model was approved at the last benchmark assessment for the stock. Using the split series model, the FY 2013 catches at F_{MSY} are 882 mt. Thus, NMFS is implementing a FY 2013 OFL of 882 mt through this final rule. However, as noted earlier in the summary of the 2012 assessment results, the 2012 TRAC recommended that 2013 catches should be considerably below this level to help ensure that overfishing does not occur.

A FY 2013 ABC of 500 mt is consistent with both the TMGC and SSC's recommendations, and is within the range of 2013 catch levels suggested by the sensitivity analyses conducted at the 2012 TRAC assessment. A 2013 catch level of 500 mt would allow some stock rebuilding, and is less than the 2013 catch level based on the unadjusted model results (882 mt) that the TRAC recommended should not be used as the basis for 2013 catch advice. The lower quota of 200 mt included in the 2012 TRAC results has a higher probability of not exceeding F_{ref}. But, a 2013 catch of 500 mt would have only a 4-percent chance of exceeding F_{ref} (0.25) in one of the sensitivity analyses performed by the TRAC. This catch level would also result in some stock rebuilding in the other four sensitivity analyses. The 2012 TRAC assessment did not calculate an average output for the models presented, and did not recommend averaging the sensitivity analyses as a basis for catch advice. Thus, NMFS has determined that it is not appropriate to average the five sensitivity analyses, and that all of the analyses should be considered in setting the 2013 ABC. A catch limit of 500 mt would balance the need to account for the retrospective bias in the assessment and allow some stock rebuilding, and would be substantially below the OFL for the stock.

The total ACL and the sub-ACLs for each component of the fishery that are implemented in this final rule under emergency authority based on a FY 2013 ABC of 500 mt are presented in Table 3 (Item 5 of this preamble). The common pool's sub-ACL is further divided into Trimester TACs (Table 7) and Incidental Catch TACs for the special management programs (Tables 6 and 8). The resultant ACLs implemented under Secretarial emergency authority are consistent with the Council's ACL derivation process adopted in Framework 50, and allocations of GB yellowtail flounder to the scallop and small-mesh fisheries adopted in Framework 48, and are based on the best scientific information available.

Emergency Rule To Set FY 2013 White Hake Catch Limits

A white hake benchmark stock assessment (SARC 56) was completed in February 2013. The results of the assessment just recently became available and were published in April

2013. The results of the assessment can be found on the NEFSC's Web site at: *http://www.nefsc.noaa.gov/publications/crd/crd1304/*. This new assessment indicates the white hake stock is no longer overfished and not subject to overfishing. The current projection indicates the stock should achieve its rebuilding target in 2014. In addition, the results of the assessment indicate that the FY 2013 ABC can be increased to 4,177 mt from the ABC that was proposed by the Council in Framework 50 (3,638 mt).

During the development of Framework 50, the Council and NMFS were aware that the new assessment could result in different status determination criteria, status, and catch advice for white hake. However, it was expected that a final report from the 56th SARC would not be available until late spring 2013. This is well after the Council took final action on Framework 50 in January 2013. Thus, as previously discussed, based on National Standard 2 guidelines and established policy, the Council proposed a FY 2013 ABC for white hake based on the 2008 benchmark assessment, which was the best scientific information available to the Council during the development of Framework 50.

The recently completed assessment for white hake is new information that was previously unavailable to either the Council, when it developed and took final action on Framework 50, or NMFS. Although the Council and NMFS anticipated the new assessment would be completed in February 2013, the final results of the assessment could not be predicted. In addition, because the final results of the assessment just recently became available in April 2013, there was no way for the Council to incorporate this new information and submit a management action to NMFS for consideration and implementation by the start of FY 2013 on May 1, 2013. The stock status change and higher catch available for FY 2013 are recently discovered and unforeseen circumstances and events.

NMFS has determined that the current situation is justified as an emergency action resulting from recent, unforeseen events because, by quickly implementing a quota increase for white hake based on the new assessment, economic opportunity that might otherwise be foregone can be avoided. An emergency action to increase the FY 2013 quota for white hake addresses a serious management concern regarding the severe negative impacts caused by low catch limits for many groundfish stocks, and, as explained in this section, the benefits of providing prior public comment on this action are outweighed by the immediate benefits accruing to fishermen. If the normal regulatory process were undertaken to implement the higher white hake catch limit, the increase would not be available until well after the start of FY 2013. White hake is a ubiquitous species in NE waters and, in recent fishing years, the utilization of the white hake catch limit has been high. The FMP requires that fishing effort be reduced, or stopped, if catch of a single stock is projected to reach an ACL, and that AMs be implemented if an ACL is exceeded, to payback an overage and to prevent the ACL from being exceeded again. In addition, some sectors have very small white hake ACE. By ensuring timely implementation of the higher catch limit, the likelihood that fishing operations will be constrained in some way by available white hake quota is reduced. Furthermore, the catch limit reductions for many key groundfish stocks will have substantial economic impacts on fishing operations in FY 2013. Thus, the timely implementation of the higher white hake quota may provide much needed and immediate economic benefits both as directed catch and on the sector lease market. At the request of the Council, NMFS is taking emergency action under section 305(c) of the Magnuson-Stevens Act to increase the FY 2013 catch limit from levels proposed in Framework 50 (78 FR 19368; March 29, 2013).

This final rule implements a FY 2013 ABC of 4,177 mt, in place of the FY 2013 ABC of 3,638 mt that was adopted by the Council in Framework 50, based on the recent assessment completed in February 2013. This ABC is based on 75 percent of F_{MSY}, which is the Council's ABC control rule. The FY 2013 ABC for white hake implemented through this emergency rule is 539 mt higher than the ABC proposed in Framework 50, which is a 15-percent increase. The ABC is further divided among the various components of the fishery based on the ACL derivation adopted by the Council in Framework 50. The total ACL and the sub-ACLs for each component of the fishery that are implemented through this emergency rule are presented in Table 3 (see Item 5). The common pool fishery's sub-ACL for white hake is further divided into Trimester TACs, which are presented in Table 7 (see Item 6).

The ABC and resultant ACLs implemented under Secretarial emergency authority are consistent with the Council's ABC control rule and ACL derivation process, and are based on the best scientific information available. In anticipation of potential changes to the status determination criteria (SDC) for white hake as a result of the new assessment, the Council included a preferred alternative in Framework 48 that would allow NMFS to implement updated white hake SDC for FY 2013 if the results were available prior to final rulemaking. As a result, and based on the final assessment report, NMFS published new white hake SDC in the final rule for Framework 48.

5. Annual Catch Limits

Unless otherwise noted below, the U.S. ABC for each stock (for each fishing year) is divided into the following fishery components to account for all sources of fishing mortality: State waters (portion of ABC expected to be caught from state waters by vessels that are not subject to the FMP); other sub-components (expected catch by non-groundfish fisheries); Atlantic sea scallop fishery; mid-water trawl fishery; small-mesh fisheries; commercial groundfish fishery; and recreational groundfish fishery. Expected catch from state waters and other sub-components is deducted from the ABC first, and the remaining portion of the ABC is the amount available to the fishery components that receive an allocation for the stock and that are subject to AMs. The scallop fishery receives an allocation for GB and SNE/MA yellowtail flounder and SNE/MA windowpane flounder. The mid-water trawl fishery receives an allocation for GB and GOM haddock, the recreational groundfish fishery receives an allocation for GOM cod and haddock, and the small-mesh fisheries receive an allocation for GB yellowtail flounder.

Once the ABC is divided, sub-annual catch limits (sub-ACLs) are set by reducing the amount of the ABC distributed to each component of the fishery to account for management uncertainty. Management uncertainty is the likelihood that management measures will result in a level of catch greater than expected. For each stock, management uncertainty is estimated using the following criteria: Enforceability, monitoring adequacy, precision of management tools, latent effort, and catch of groundfish in non-groundfish fisheries. Appendix III of the Framework 50 EA provides a detailed description of the process used to estimate management uncertainty and calculate ACLs for this action (see **ADDRESSES** for information on how to get this document).

The total ACL is the sum of all of the sub-ACLs and ACL sub-components, and is the catch limit for a particular year after accounting for both scientific and management uncertainty. Landings

and discards from all fisheries (commercial and recreational groundfish fishery, state waters, and non-groundfish fisheries) are counted against the catch limit for each stock. Components of the fishery that are allocated a sub-ACL for a particular stock are subject to AMs if the catch limit is exceeded. The state waters and other sub-components are not considered ACLs, and represent the expected catch by components of the fishery outside of the FMP that are not subject to AMs.

This action implements ACLs for each groundfish stock based on the ABCs implemented in Item 4 of this preamble. The ACLs for FYs 2013–2015 are listed in Tables 3 through 5. For stocks allocated to sectors, the commercial groundfish sub-ACL is further divided into the non-sector (common pool) sub-ACL and the sector sub-ACL, based on the total vessel enrollment in all sectors and the cumulative PSCs associated with those sectors. The distribution of the groundfish sub-ACL between the common pool and sectors shown in Tables 3 through 5 are based on FY 2013 PSCs and FY 2012 sector rosters. FY 2013 sector rosters will not be finalized until May 1, 2013, because owners of individual permits signed up to participate in sectors have until the end of FY 2012, or April 30, 2013, to drop out of a sector and fish in the common pool for FY 2013. Therefore, it is possible that the sector and common pool sub-ACLs listed in the tables below may change due to changes in the sector rosters. Updated sub-ACLs will be published in early May, if necessary, to reflect the final FY 2013 sector rosters as of May 1, 2013.

This action also adds SNE/MA yellowtail flounder to the annual process that re-estimates the expected scallop fishery catch in the fishing year. This process was originally adopted by the Council for GB yellowtail flounder in Framework 47. In Framework 50, as part of the specifications for the scallop fishery, the Council expanded this annual process to include SNE/MA yellowtail flounder. This measure was inadvertently omitted from the proposed rule, and as a result, is implemented in this action as an interim final rule. NMFS is accepting public comments on this measure for 45 days. The regulations implementing this measure have been deemed by the Council to be necessary and appropriate. A description of the method, consistent with the measure adopted in Framework 47, is below.

By January 15 of each fishing year, NMFS will re-estimate the scallop fishery's catch of SNE/MA yellowtail flounder. If projected catch by the scallop fishery is less than 90 percent of the scallop fishery's sub-ACL for SNE/MA yellowtail flounder, NMFS may reduce the scallop fishery sub-ACL to the amount expected to be caught, and increase the groundfish fishery sub-ACL for SNE/MA yellowtail flounder up to the difference between the original and revised estimates of the scallop fishery's catch. Any increase to the groundfish fishery sub-ACL will be distributed to sectors and the common pool. NMFS will not make any changes to the SNE/MA yellowtail flounder sub-ACL for the scallop fishery if the revised estimate indicates that the scallop fishery will catch 90 percent or more of its sub-ACL. Consistent with the Administrative Procedure Act (APA), NMFS will notify the public of any changes to the SNE/MA yellowtail flounder sub-ACLs. This measure is expected to prevent any loss of SNE/MA yellowtail flounder yield that may occur if the initial catch estimate of this stock by the scallop fishery is too high. Re-estimating the expected SNE/MA yellowtail flounder catch by the scallop fishery mid-season could allow additional SNE/MA yellowtail flounder yield by the commercial groundfish fishery, and will help achieve OY for this stock.

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Table 3 — FY 2013 Total ACLs, sub-ACLs, and ACL sub-components (mt, live weight)

Stock	Total ACL	Groundfish sub-ACL	Preliminary Sector sub-ACL	Common Pool sub-ACL	Recreational Fishery sub-ACL	Midwater Trawl Fishery sub-ACL	Scallop Fishery sub-ACL	Small-Mesh Fisheries sub-ACL	State Waters sub-component	Other sub-component
	A to H	A+B+C	A	B	C	D	E	F	G	H
GB Cod	1,907	1,807	1,777	30					20	80
GOM Cod	1,470	1,316	814	16	486				103	51
GB Haddock	27,936	26,196	26,124	72		273			293	1,173
GOM Haddock	274	261	186	1	74	3			4	6
GB Yellowtail Flounder Emergency Action	208.5	116.8	115.4	1.3			83.4	4.0		4.3
SNE/MA Yellowtail Flounder	665	570	456	114			61		7	28
CC/GOM Yellowtail Flounder	523	479	467	12					33	11
American Plaice	1,482	1,420	1,396	24					31	31
Witch Flounder	751	610	601	9					23	117
GB Winter Flounder	3,641	3,528	3,508	20						113
GOM Winter Flounder	1,040	715	690	24					272	54
SNE/MA Winter Flounder	1,612	1,210	1,068	142					235	168
Redfish	10,462	10,132	10,091	41					110	220
White Hake Emergency Action	3,974	3,849	3,818	31					42	84
White Hake Proposed in Framework 50	3,462	3,352	3,326	27					36	73
Pollock	14,921	12,893	12,810	83					936	1,092
Northern Windowpane Flounder	144	98		98					2	44
Southern Windowpane Flounder	527	102		102			183		55	186
Ocean Pout	220	197		197					2	21
Atlantic Halibut	96	52		52					40	5
Atlantic Wolffish	65	62		62					1	3

Table 4 — FY 2014 Total ACLs, sub-ACLs, and ACL sub-components (mt, live weight)

Stock	Total ACL	Groundfish sub-ACL	Preliminary Sector sub-ACL	Preliminary Common Pool sub-ACL	Recreational sub-ACL	Midwater Trawl Fishery sub-ACL	Scallop Fishery sub-ACL	Small-Mesh Fisheries sub-ACL	State Waters sub-component	Other sub-component
	A to H	A+B+C	A	B	C	D	E	F	G	H
GB Cod	1,907	1,807	1,777	30					20	80
GOM Cod	1,470	1,316	814	16	486				103	51
GB Haddock	33,996	31,879	31,792	87		332			357	1,428
GOM Haddock	323	307	218	2	87	3			5	7
GB Yellowtail Flounder										
SNE/MA Yellowtail Flounder	665	564	451	113			66		7	28
CC/GOM Yellowtail Flounder	523	479	467	12					33	11
American Plaice	1,442	1,382	1,359	23					30	30
Witch Flounder	751	610	601	9					23	117
GB Winter Flounder	3,493	3,385	3,366	20						108
GOM Winter Flounder	1,040	715	690	24					272	54
SNE/MA Winter Flounder	1,612	1,210	1,068	142					235	168
Redfish	10,909	10,565	10,522	43					115	229
White Hake										
Pollock	15,304	13,224	13,139	85					960	1,120
Northern Windowpane Flounder	144	98		98					2	44
Southern Windowpane Flounder	527	102		102			183		55	186
Ocean Pout	220	197		197					2	21
Atlantic Halibut	106	57		57					44	5
Atlantic Wolffish	65	62		62					1	3

Table 5 — FY 2015 Total ACLs, sub-ACLs, and ACL sub-components (mt, live weight)

Stock	Total ACL	Groundfish sub-ACL	Preliminary Sector sub-ACL	Preliminary Common Pool sub-ACL	Recreational sub-ACL	Midwater Trawl Fishery sub-ACL	Scallop Fishery sub-ACL	Small-Mesh Fisheries sub-ACL	State Waters sub-component	Other sub-component
	A to H	A+B+C	A	B	C	D	E	F	G	H
GB Cod	1,907	1,807	1,777	30					20	80
GOM Cod	1,470	1,316	814	16	486				103	51
GB Haddock	41,526	38,940	38,833	107		406			436	1,744
GOM Haddock	412	392	279	2	111	4			6	9
GB Yellowtail Flounder										
SNE/MA Yellowtail Flounder	665	566	453	113			64		7	28
CC/GOM Yellowtail Flounder	523	479	467	12					33	11
American Plaice	1,470	1,408	1,385	24					31	31
Witch Flounder	751	610	601	9					23	117
GB Winter Flounder										
GOM Winter Flounder										
SNE/MA Winter Flounder	1,612	1,210	1,068	142					235	168
Redfish	11,393	11,034	10,989	45					120	239
White Hake										
Pollock										
Northern Windowpane Flounder	144	98		98					2	44
Southern Windowpane Flounder	527	102		102			183		55	186
Ocean Pout	220	197		197					2	21
Atlantic Halibut	116	62		62					48	6
Atlantic Wolffish	65	62		62					1	3

6. Common Pool Trimester Total Allowable Catches

The common pool sub-ACL for each stock (except for SNE/MA winter flounder, windowpane flounder, ocean pout, Atlantic wolffish, and Atlantic halibut) is divided into trimester TACs. Table 6 shows the percentage of the common pool sub-ACL that is allocated to each trimester for each stock. The distribution of the common pool sub-ACLs into trimesters was adopted by Amendment 16 and is based on recent landing patterns. Once NMFS projects that 90 percent of the trimester TAC is caught for a stock, the trimester TAC area for that stock is closed for the remainder of the trimester. The area closure applies to all common pool vessels fishing with gear capable of catching the pertinent stock. The trimester TAC areas for each stock, as well as the applicable gear types, are defined at § 648.82(n)(2). This information can also be obtained from NERO (see **FOR FURTHER INFORMATION CONTACT**). Any uncaught portion of the trimester TAC in Trimester 1 or Trimester 2 will be carried forward to the next trimester (e.g., any remaining portion of the Trimester 1 TAC will be added to the Trimester 2 TAC). Overages of the trimester TAC in Trimester 1 or Trimester 2 will be deducted from the Trimester 3 TAC. Any overages of the total sub-ACL will be deducted from the following fishing year's common pool sub-ACL for that stock. Uncaught portions of the Trimester 3 TAC will not be carried over into the following fishing year.

The FYs 2013–2015 common pool trimester TACs are listed in Table 7 based on the ACLs and sub-ACLs implemented in this action (see Item 5 of this preamble). As described earlier, vessels have until April 30, 2013, to drop out of a sector, and common pool vessels may join a sector through April 30, 2013. If the sub-ACLs included in this rule change as a result of changes to FY 2013 sector rosters, the trimester TACs will also change. Based on the final sector rosters, NMFS will publish a rule in early May 2013, if necessary, to update the common pool trimester TACs, and notify the public of these changes.

TABLE 6—PERCENTAGE OF COMMON POOL SUB-ACL DISTRIBUTED TO EACH TRIMESTER

Stock	Percentage of common pool sub-ACL		
	Trimester 1	Trimester 2	Trimester 3
GB Cod	25	37	38
GOM Cod	27	36	37
GB Haddock	27	33	40
GOM Haddock	27	26	47
GB Yellowtail Flounder	19	30	52
SNE/MA Yellowtail Flounder	21	37	42
CC/GOM Yellowtail Flounder	35	35	30
American Plaice	24	36	40
Witch Flounder	27	31	42
GB Winter Flounder	8	24	69
GOM Winter Flounder	37	38	25
Redfish	25	31	44
White Hake	38	31	31
Pollock	28	35	37

Table 7—FYs 2013-2015 Common Pool Trimester TACs (mt, live weight)

Stock	2013			2014			2015		
	Trimester 1	Trimester 2	Trimester 3	Trimester 1	Trimester 2	Trimester 3	Trimester 1	Trimester 2	Trimester 3
GB Cod	7.4	10.9	11.2	7.4	10.9	11.2	7.4	10.9	11.2
GOM Cod	4.21	5.62	5.77	4.2	5.6	5.8	4.2	5.6	5.8
GB Haddock	19.4	23.7	28.7	23.6	28.9	35.0	28.8	35.2	42.7
GOM Haddock	0.4	0.3	0.6	0.4	0.4	0.7	0.5	0.5	0.9
GB Yellowtail Flounder Emergency Action	0.3	0.4	0.7						
SNE/MA Yellowtail Flounder	23.9	42.2	47.9	23.7	41.8	47.4	23.8	41.9	47.6
CC/GOM Yellowtail Flounder	4.1	4.1	3.5	4.1	4.1	3.5	4.1	4.1	3.5
American Plaice	5.7	8.5	9.5	5.5	8.3	9.2	5.6	8.5	9.4
Witch Flounder	2.5	2.9	3.9	2.5	2.9	3.9	2.5	2.9	3.9
GB Winter Flounder	1.6	4.9	14.1	1.6	4.7	13.6			
GOM Winter Flounder	9.0	9.3	6.1	9.0	9.3	6.1			
Redfish	10.3	12.7	18.1	10.7	13.3	18.8	11.2	13.9	19.7
White Hake Emergency Action	11.8	9.6	9.6						
White Hake Proposed in Framework 50	10.2	8.3	8.3						
Pollock	23.3	29.1	30.8	23.9	29.9	31.6			

7. Common Pool Incidental Catch Total Allowable Catches and Allocations to Special Management Programs

Incidental catch TACs are specified for certain stocks of concern (i.e., stocks that are overfished or subject to overfishing) for common pool vessels fishing in the special management programs (i.e., special access programs (SAPs) and the Regular B DAS Program), in order to limit the catch of these stocks under each program. Table 8 shows the percentage of the common pool sub-ACL allocated to the special management programs and the FYs 2013–2015 Incidental Catch TACs for each stock. Beginning in FY 2013, GB winter flounder and SNE/MA yellowtail flounder are removed from the list of stocks of concern because the stocks are no longer overfished and overfishing is not occurring. In addition, the emergency rulemaking to increase the FY 2013 ABC for white hake removes white hake from the list of stocks of concern because the stock is no longer overfished and overfishing is not occurring. GB winter flounder and white hake are projected to be rebuilt by 2014, and SNE/MA yellowtail flounder was declared rebuilt in November 2012. Any catch on a trip that ends on a Category B DAS (either Regular or Reserve B DAS) is attributed to the Incidental Catch TAC for the pertinent stock. Catch on a trip that starts under a Category B DAS and then flips to a Category A DAS is not counted against the Incidental Catch TACs. Any catch from these trips would be counted against the common pool sub-ACL.

The Incidental Catch TAC is further divided among each special management program based on the percentages listed in Table 9. The FYs 2013–2015 Incidental Catch TACs for each special management program are listed in Table 10. The FY 2013 sector rosters will not be finalized until May 1, 2013, for the reasons mentioned earlier in this preamble. Therefore, the common pool sub-ACL may change due to changes to the FY 2013 sector rosters. Updated incidental catch TACs will be published in a future adjustment rule, if necessary, based on the final sector rosters as of May 1, 2013.

TABLE 8—FYS 2013–2015 COMMON POOL INCIDENTAL CATCH TACS

[Mt, live weight]

Stock	Percentage of common pool sub-ACL	2013	2014	2015
GB Cod	2	0.6	0.6	0.6
GOM Cod	1	0.2	0.2	0.2
GB Yellowtail Flounder Emergency Action	2	0.03		
CC/GOM Yellowtail Flounder	1	0.1	0.1	0.1
American Plaice	5	1.2	1.2	1.2
Witch Flounder	5	0.5	0.5	0.5
SNE/MA Winter Flounder	1	1.4	1.4	1.4

TABLE 9—PERCENTAGE OF INCIDENTAL CATCH TACS DISTRIBUTED TO EACH SPECIAL MANAGEMENT PROGRAM

Stock	Regular B DAS program (percent)	Closed area I hook gear haddock SAP (percent)	Eastern US/CA haddock SAP (percent)
GB Cod	50	16	34
GOM Cod	100		
GB Yellowtail Flounder	50	50	
CC/GOM Yellowtail Flounder	100		
American Plaice	100		
Witch Flounder	100		
SNE/MA Winter Flounder	100		

TABLE 10—FYS 2013–2015 INCIDENTAL CATCH TACS FOR EACH SPECIAL MANAGEMENT PROGRAM

[Mt, live weight]

Stock	Regular B DAS program			Closed area I hook gear haddock SAP			Eastern U.S./Canada haddock SAP		
	2013	2014	2015	2013	2014	2015	2013	2014	2015
GB Cod	0.3	0.3	0.3	0.1	0.1	0.1	0.2	0.2	0.2
GOM Cod	0.2	0.2	0.2	.....	.....	.....	.....	.....	.....
GB Yellowtail Flounder Emergency Action	0.01	.....	.....	.....	.....	.....	0.01	.....	.....
CC/GOM Yellowtail Flounder	0.1	0.1	0.1	.....	.....	.....	.....	.....	.....
American Plaice	1.2	1.2	1.2	.....	.....	.....	.....	.....	.....
Witch Flounder	0.5	0.5	0.5	.....	.....	.....	.....	.....	.....
SNE/MA Winter Flounder	1.4	1.4	1.4	.....	.....	.....	.....	.....	.....

8. Annual Measures for FY 2013 Under RA Authority

The FMP provides authority for the RA to implement certain types of management measures for the common pool fishery, the U.S./Canada Management Area, and Special Management Programs on an annual basis, or as needed. These measures are not part of Framework 50, and were not specifically proposed by the Council, but are implemented in conjunction with Framework 50 for expediency purposes and because they relate to the specifications adopted in Framework 50. The RA can modify these measures if current information indicates changes are necessary. Any inseason adjustments to these measures will be implemented through an inseason action consistent with the APA.

The RA has the authority to modify common pool trip limits in order to prevent exceeding the common pool sub-ACLs and facilitate harvest so total catch approaches the common pool sub-ACLs. Table 11 provides the initial FY 2013 trip limits for common pool vessels. Table 12 provides the initial FY 2013 cod trip limits for vessels fishing with a Handgear A, Handgear B, or Small Vessel Category permit. These FY 2013 trip limits were developed after considering changes to the FY 2013 common pool sub-ACLs and sector rosters, trimester TACs for FY 2013, catch rates of each stock during FY 2012, public comments received, and other available information. NMFS will monitor common pool catch using dealer-reported landings, VMS catch reports, and other available information, and if necessary, will adjust the common pool management measures to help ensure the common pool fishery catches, but does not exceeds its sub-ACLs.

The default cod trip limit is 300 lb (136.1 kg) per trip for Handgear A vessels, unless either the GOM or GB cod trip limit applicable to vessels fishing under a NE multispecies DAS is adjusted below 300 lb (136.1 kg). If the trip limit for NE multispecies DAS vessels drops below 300 lb (136.1 kg), the Handgear A trip limit must be adjusted to be the same. The regulations also require that the Handgear B vessel trip limit for GOM and GB cod be adjusted proportionally (rounded up to the nearest 25 lb (11.3 kg)) to the default cod trip limits applicable to NE multispecies DAS vessels. The default cod trip limit for NE multispecies common pool vessels fishing under a Category A DAS is 800 lb (362.9 kg) per DAS for GOM cod and 2,000 lb (907.2 kg) per DAS for GB cod. For vessels fishing under a Category A DAS, the initial FY 2013 trip limit for GOM cod is 88 percent lower than the default limit specified in the regulations. Therefore, the initial FY 2013 GOM cod trip limits for Handgear A and B vessels are adjusted downwards, as required, from the default cod trip limit for these vessels. The default cod trip limits for GB cod for Handgear A and B vessels are implemented for FY 2013.

Vessels with a Small Vessel category permit can possess up to 300 lb (136.1 kg) of cod, haddock, and yellowtail flounder combined per trip. For FY 2013, the maximum amount of cod and haddock (within the 300-lb (136.1-kg) trip limit) is adjusted proportionally to the trip limits applicable to NE multispecies DAS vessels (see Table 12). Vessels with a Small Vessel category permit can possess a maximum of 100 lb (45.4 kg) of GOM cod and 100 lb (45.4 kg) of GOM haddock within their 300-lb (136.1-kg) trip limit of cod, haddock, and yellowtail flounder, combined.

TABLE 11—INITIAL FY 2013 COMMON POOL TRIP LIMITS

Stock	Initial FY 2013 trip limit
GOM cod	100 lb (45.4 kg) per DAS, up to 300 lb (136.1 kg) per trip.
GB cod	2,000 lb (907.2 kg) per DAS, up to 20,000 lb (9,072 kg) per trip.
GOM haddock	100 lb (45.4 kg) per trip.
GB haddock	10,000 lb (4,536 kg) per trip.
GOM winter flounder	500 lb (226.8 kg) per trip.
SNE/MA winter flounder	5,000 lb (2,268 kg) per DAS up to 15,000 lb (6,804 kg) per trip.
GB winter flounder	1,000 lb (453.6 kg) per trip.
CC/GOM yellowtail flounder	500 lb (226.8 kg) per DAS, up to 2,000 lb (907.2 kg) per trip.
GB yellowtail flounder	100 lb (45.4 kg) per trip.
SNE/MA yellowtail flounder	2,000 lb (907.2 kg) per DAS, up to 6,000 lb (2,722 kg) per trip.
American plaice	unrestricted.
Pollock	10,000 lb (4,536 kg) per trip.
Witch flounder	500 lb (226.8 kg) per trip.
White hake	500 lb (226.8 kg) per trip.
Redfish	unrestricted.

TABLE 12—INITIAL FY 2013 COD TRIPS LIMITS FOR HANDGEAR A, HANDGEAR B, AND SMALL VESSEL CATEGORY PERMITS

Permit	FY 2013 GOM cod trip limit	FY 2013 GB cod trip limit
Handgear A	100 lb (45.4 kg) per trip	300 lb (136.1 kg) per trip.
Handgear B	25 lb (11.3 kg) per trip	75 lb (34.0 kg) per trip.
Small Vessel Category	300 lb (136.1 kg) of cod, haddock, and yellowtail flounder combined; Maximum of 100 lb (45.4 kg) of GOM cod and 100 lb (45.4 kg) of GOM haddock within the 300-lb combined trip limit.	

The RA has the authority to determine the allocation of the total number of trips into the Closed Area II Yellowtail Flounder/Haddock SAP based on several criteria, including the GB yellowtail flounder TAC and the amount of GB yellowtail flounder caught outside of the SAP. In 2005, Framework 40B to the FMP (70 FR 31323; June 1, 2005) implemented a provision that no trips should be allocated to the Closed Area II

Yellowtail Flounder/Haddock SAP if the available GB yellowtail flounder catch is insufficient to support at least 150 trips with a 15,000-lb (6,804-kg) trip limit (i.e., 150 trips of 15,000 lb (6,804 kg)/trip, or 2,250,000 lb (1,020,583 kg). This calculation accounts for the projected catch from the area outside of the SAP. Based on the GB yellowtail flounder sub-ACL implemented in this action through emergency rulemaking (257,500 lb (116,800 kg)), there is insufficient GB yellowtail flounder to allocate any trips to the SAP, even if the projected catch from outside the SAP area is zero. Therefore, this action allocates zero trips to the Closed Area II Yellowtail Flounder/Haddock SAP for FY 2013. Vessels could still fish in this SAP in FY 2013 using a haddock separator trawl, a Ruhle trawl, or hook gear. Vessels may not fish in this SAP using flounder nets.

9. FY 2013 Recreational Fishing Measures

Framework 48 modified the recreational fishery AM and gave the RA authority to adjust recreational management measures for the upcoming fishing year to ensure the recreational fishery catches, but does not exceed, its sub-ACL. These measures are not part of Framework 50, but are implemented in conjunction with Framework 50 for expediency purposes and because they relate to the specifications adopted in Framework 50. The Council convened its Recreational Advisory Panel (RAP) on February 15, 2013, in order to provide NMFS guidance on FY 2013 management measures. For GOM cod, the RAP recommended a 9-fish possession limit and a minimum fish size of 19 in (48.3 cm). These are status quo management measures from FY 2012. For GOM haddock, the RAP recommended an unlimited possession limit (status quo from FY 2012) and an increase to the minimum fish size from 18 in (45.7 cm) to 21 in (53.3 cm).

Consistent with the RAP's recommendation, this action implements a 9-fish possession limit and a minimum fish size of 19 in (48.3 cm) for GOM cod in FY 2013. For GOM haddock, this action implements an unlimited possession limit and a minimum fish size of 21 in (53.3 cm) for FY 2013. The FY 2013 recreational management measures are presented in Table 13. These measures were developed using the Bio-economic Length-Structured Angler Simulation Tool, which was developed by the NEFSC. This model was peer-reviewed by a panel that consisted of members of the New England Fishery Management Council and Mid-Atlantic Fishery Management Council's SSCs, as well as an outside expert in recreational fisheries economics.

Analysis shows that recreational removals would likely decline in FY 2013, primarily due to changing stock conditions. As a result, FY 2013 recreational measures are not drastically different than the FY 2012 measures, even though the reductions in the FY 2013 catch limits are relatively large. This action increases the minimum fish size from 18 in (45.7 cm) to 21 in (53.3 cm), for GOM haddock, with no bag limit. The bag limit for GOM haddock does not affect recreational haddock mortality very much because analysis shows that there would be fewer trips encountering legal-sized haddock in FY 2013. This translates into lower expected fishing effort and landings. The minimum fish size for GOM haddock has a greater impact on recreational haddock and cod catch, as well as the total number of recreational trips. Analysis shows that the FY 2013 recreational measures in this action would have more than a 50-percent probability of preventing overages of the recreational sub-ACLs for GOM cod and haddock.

TABLE 13—FY 2013 RECREATIONAL MANAGEMENT MEASURES FOR GOM COD AND HADDOCK

Stock	Bag limit	Minimum size
GOM Cod	9	19 in (48.3 cm).
GOM Haddock.	Unlimited	21 in (53.3 cm).

10. Carryover of Unused Sector Annual Catch Entitlement

Overview of measures for FY 2013. NMFS is taking the carryover-related actions described in the Framework 50 proposed rule (78 FR 19368; March 29, 2013). Specifically, NMFS is using emergency rulemaking authority to reduce the amount of unused FY 2012 GOM cod sector ACE that may be carried over for use in FY 2013. This is necessary to ensure the total potential catch (i.e., ACL + potential carryover catch) does not exceed the stock's overfishing limit. Consistent with the approach outlined in the proposed rule, NMFS is not modifying the status quo carryover amounts specified at § 648.87(a)(1)(i)(C) for all other carryover-eligible stocks. In addition, under its rulemaking authority at section 305(d) of the Magnuson-Stevens Act, NMFS clarifies that it will account for any carryover used by sectors in FY 2013 consistent with the past two fishing years (2011 and 2012) by not attributing the 2012 carryover to the sector sub-ACL in determining if an overage has occurred and AMs triggered. NMFS also clarifies how it will account for carryover catch for FY 2014 and beyond.

The emergency action and carryover accounting practice for FY 2013, as more fully explained in the proposed rule and Comments and Responses, are a 1-year bridge to FY 2014 accounting practices to ensure stability and predictability for sectors in transitioning from FY 2012 to FY 2013. As explained below, NMFS is using its 305(d) authority to ensure that carryover provisions are fully consistent with National Standard 1 guidance, other National Standards and the Magnuson-Stevens Act in the context of the unusual circumstances presented this fishing year.

GOM cod emergency measures. Pursuant to NMFS emergency rulemaking authority at section 305(c) of the Magnuson-Stevens Act, this action reduces the 10-percent maximum carryover allowance from FY 2012 to FY 2013. The carryover provided under § 648.87(a)(1)(i)(C) for GOM cod ACE is reduced from 10 percent to 1.85 percent. This action is necessary to better ensure that the GOM cod stock is no longer subject to overfishing in FY 2013.

To utilize Magnuson-Stevens Act section 305(c) emergency rulemaking, NMFS, on behalf of the Secretary, must make determinations that a situation satisfies the emergency criteria set forth in statute and NMFS policy guidance. NMFS guidance (62 FR 44421; August 21, 1997) for defining an emergency establishes than an emergency situation exists as situations that result from recent, unforeseen event(s), poses a serious conservation or management problem in the fishery in question, and can be addressed through emergency rulemaking whose benefits outweigh the value of the normal Administrative Procedure Act (APA) notice-and-comment rulemaking process if the emergency is implemented without prior public comment. Because this emergency is being implemented after the opportunity for public comment, it is not necessary to show the benefits of the emergency action outweigh the value of the normal APA process.

Analysis indicates that providing up to 10 percent of the FY 2012 GOM cod sector ACE as carryover in FY 2013 would result in a total potential catch that is 12 percent above the OFL of 1,635 mt. Though the potential catch may not be fully caught in FY 2013, NMFS considers that allowing a potential catch in excess of OFL poses

a serious conservation and management threat to the GOM cod fishery that results from recent, unforeseen events. The updated stock status and catch advice resulting from the December 2012 SARC 55 GOM cod stock assessment was not finalized and presented until January 2013 just before the January 29–31 Council meeting. Consequently, the potential impact of a full 10-percent carryover was not fully evaluated until March 22, 2013, when the Council formally submitted Framework 50. The submitted analysis contained the critical examination of the potential impact of not only the Council's recommended catch limits, but also the potential impact of allowing up to 10 percent carryover for all stocks. By this time it was clearly too late for the Council to act before the beginning of FY 2013 and the only recourse to address the very real potential of overfishing of GOM cod due to the carryover provision was this emergency action. Accordingly, NMFS finds that all the necessary criteria set forth in statute and guidance concerning emergency actions under section 305(c) have been met. Therefore, to prevent potential overfishing the GOM cod stock in FY 2013, NMFS is compelled, and authorized, to take action to reduce GOM cod maximum carryover to 1.85 percent.

Carryover for other stocks in FY 2013. Current regulatory provisions based on Amendment 16, allow up to 10 percent of unused FY 2012 ACE for all stocks except GB yellowtail flounder to be carried over for use in FY 2013. GB yellowtail flounder ACE is not eligible to be carried over because no such provision exists in the Understanding, under which the stock is jointly managed. Neither Amendment 16, nor the implementing regulations, however, clarified how allowed carryover was to be accounted for in light of ACEs and ACLs and AMs. Without such clarification, as NMFS has recently advised on several occasions, carryover may result in sectors exceeding their ACEs and ACLs without triggering AMs thus potentially jeopardizing conservation objectives. Further, if all catch, including carryover is attributed to ACLs the potential catch would often exceed ACLs and in some circumstances like FY 2013 exceed ABC. NMFS has determined that allowing a carryover system that provides a potential catch level greater than ACL or ABC is not consistent with National Standard 1. More extensive discussion of why the Amendment 16 carryover program is inconsistent with National Standard 1 can be found in the preamble of the proposed rule and in the Comments and Responses section of this rule.

This action provides clarification for 2013 on a transitional basis, and for 2014 and beyond if the Council fails to take action to address carryover concerns to address the apparent conflict between the implementation of the carryover provision and the National Standard 1 Guidelines.

As more fully explained and justified in the proposed rule, and taking into account comments on the proposed rule, NMFS will continue in FY 2013 to account for any carryover catch used independent of the sector sub-ACL as it has in the last 2 years. This means that for carryover amounts for FY 2013 only, up to 1.85 percent for GOM cod and up to 10 percent of the FY 2012 sector ACE for all other carryover-eligible stocks, NMFS will first attribute FY 2013 catches to the available carryover for each stock but not against the FY 2013 ACEs and ACLs for accountability purposes. For example, if a sector harvests 97 percent of a carryover-eligible stock other than GOM cod, the sector would be permitted to use 3 percent of its FY 2012 ACE in FY 2013. NMFS would count this 3 percent first and, once the 3 percent is fully utilized, begin counting any catch thereafter against the sector's FY 2013 ACE. AMs would not be triggered using catches attributed to carryover amounts in FY 2013.

This approach has not been problematic for the last two years as the total catch, inclusive of carryover utilized, has not caused any fishery-level ACLs to be exceeded. The use of carryover caused the total sector catch of white hake to exceed the sector sub-ACL in 2011; however, given NMFS' carryover accounting practice and that the total white hake ACL was not exceeded, no AM was required. Additional information and discussion on the FYs 2010 and 2011 carryover accounting is provided in the proposed rule preamble and Appendix V to the Framework 50 EA and is not repeated here.

As more fully explained and justified in the proposed rule and the responses to comments, NMFS found the timing complications previously outlined in this section, at-sea safety concerns, and the need to provide a reasonable and fair transition from the current carryover accounting method to that for 2014 and beyond compelling reasons to not change for FY 2013 how carryover has been accounted for in FYs 2011 and 2012.

NMFS is confident that continuing the past carryover accounting practice on a transitional 1-year basis only will not result in overfishing in FY 2013 and will not undermine longer term conservation objectives. More extensive discussion and rationale for this conclusion is provided in Appendix V to the Framework 50 EA, and is not repeated here. NMFS acknowledges that this approach for FY 2013 does not precisely meet all provisions of the National Standard 1 guidelines or previously provided NMFS guidance. National Standard 1 guidelines specify at 50 CFR 600.310(h)(3) that there are limited circumstances that may not fit standard approaches to management measures set forth in the guidelines, and, that alternative approaches may be used if they are consistent with the Magnuson-Stevens Act. Although NMFS recognizes that varying from the standard approach to management measures specified in National Standard 1 Guidelines is not favored and should be undertaken very sparingly, the unusual and intractable circumstances presented for FY 2013 clearly qualify as the limited circumstances contemplated by the guidelines for flexibility in complying with the standard approach. NMFS finds, therefore, that it has authority and justification for accounting for carryover catch in FY 2013 as proposed and that this approach is consistent with the Magnuson-Stevens Act.

Carryover From FY 2013 to FY 2014 and Beyond

NMFS proposed new regulatory text under its Magnuson-Stevens Act section 305(d) authority to clarify how to account for carryover for purposes or ACE and ACLs beginning in FY 2014 and beyond in the March 29, 2013, proposed rule (62 FR 44421). Neither Amendment 16, nor its implementing regulations, provided any type of implementation provisions with respect to carryover, leaving it to NMFS to fill in the regulatory gaps. As more fully explained in the proposed rule and in response to comments, NMFS concludes that the application of the current carryover provision, without this clarification, could lead to inconsistencies with overarching provisions of the Magnuson-Stevens Act and National Standard 1 concerning overfishing and appropriate catch limits. The clarification provided by this action, therefore, is not only justified, but compelled, by section 305(d) of the Magnuson-Stevens Act, which authorizes NMFS, by delegation from the Secretary, to promulgate regulations to ensure that carrying out Council recommended measures are consistent with the Magnuson-Stevens Act and other applicable law.

To be clear, the new regulatory text does not change the allowance of up to 10 percent carryover of uncaught allocations from the previous year as contended by the Council and others in comments on the proposed rule. Rather, the regulatory text specifies how carryover accounting is to be approached for purposes of ACE and ACL. The new text specifies that an automatic *de minimus* amount of carryover will not be counted against ACE or ACL in order to provide some incentive for vessels not to risk safety at sea in the last part of the fishing year. The *de minimus* amount has not yet been determined and NMFS is seeking additional comment on this before deciding the amount. The final rule specifies that changes to the *de minimus* amount shall be specified and announced at least 6 months before the end of a FY consistent with the APA.

For carryover used above this *de minimus* amount, NMFS would count any used carryover catch against the sector sub-ACL for the purposes of determining the appropriate AMs, but not against the sector's ACE. If the overall ACL for a stock is not exceeded, carryover would not be counted toward the AM determination even if a particular sub-ACL was exceeded. In a change from the proposed rule, to ensure that this new text is a clarification and not a change to existing carryover provisions, it provides that the amount of permissible carryover could be reduced, on an annual basis, if requested by the Council. Such a reduction may be warranted, for example, in years where the catch limit is substantially reduced from one year to the next (e.g., FY 2012 to FY 2013 catch reductions).

Based on the public comments received and in acknowledgement that there is sufficient time for carryover to be further discussed and revised through the Council process, NMFS is implementing the proposed measures as an interim final rule to become effective at the start of FY 2014 on May 1, 2014. Additional public comment will be solicited on NMFS's proposed measures for an additional 45 days. NMFS views this as an appropriate approach to foster additional public discussion and allow for possible Council development of carryover provisions that are consistent with applicable legal requirements while ensuring approvable carryover provisions act as a backstop should the Council elect not to develop a new carryover approach for FY 2014 and beyond.

NMFS views the proposed *post hoc* clarification text as an appropriate balance between the intent of the Council-developed Amendment 16 program and the need to have in place compliant measures. It preserves some amount of year-to-year carryover that can be counted on by industry to promote at-sea safety and to better plan end-of-year fishing operations, while ensuring that carryover does not interfere with the ACL–ACE–AM system designed by Amendment 16. Specifically, NMFS believes the proposed approach satisfies the requirements to attribute all sources of fishing mortality to an annual catch component with associated AMs, as outlined by the Magnuson-Stevens Act. The approach allows for potential carryover but ensures that, if ACL overages occur as a result of its use, accountability is maintained.

Because the measures are being implemented as an interim final rule and have a 1-year delay in effectiveness, NMFS may conduct additional rulemaking to make final these measures or to propose alternate NMFS or Council-recommended measures before the start of FY 2014. NMFS will further consider the comments received on Framework 50 as well as any submitted on the interim final rule when either making final the section 305(d) clarification or implementing Council-recommended measures for FY 2014.

Comments and Responses on Measures Proposed in the Framework 50 Proposed Rule

NMFS received 486 comments during the comment period on the Framework 50 proposed rule. Public comments were submitted by the Council, two state marine fishery agencies, three non-governmental organization (NGOs), six industry groups, 28 recreational fishermen, including one charter boat organization, and 446 individuals. NMFS requested specific comment on the FY 2013 ABC for GB yellowtail flounder, including the economic impacts of the FY 2013 catch limit, NMFS's proposed carryover accounting approach for FY 2014 and beyond, and the proposed common pool trip limits for FY 2013. Responses to these comments are below, and when possible, responses to similar comments on the proposed measures have been consolidated. Only comments that directly addressed the proposed measures, or the analyses used to support these measures, are addressed.

SNE/MA Winter Flounder Rebuilding Program

Comment 1: Two industry groups supported the revised rebuilding program for SNE/MA winter flounder.

Response: NMFS agrees with these commenters. In May 2012, NMFS notified the Council that SNE/MA winter flounder was not making adequate rebuilding progress, and as a result, the Council was required to revise the rebuilding program for this stock within 2 years, or by May 1, 2014. The revised rebuilding program implemented in this action is consistent with the Council's mandate to devise a new rebuilding strategy for the stock while continuing to prevent overfishing. As stated in Item 1 of this preamble, projections indicate that SNE/MA winter flounder can rebuild by 2019 in the absence of all fishing mortality. As a result, the maximum rebuilding period is 10 years. Taking into account the needs of fishing communities, as provided in section 304(e)(4) of the Magnuson-Stevens Act, the rebuilding strategy adopted in this action would rebuild the stock by 2023 with a median probability of success. In addition, the revised rebuilding program appropriately accounts for scientific uncertainty associated with long-term projections by providing that short-term catch advice can be reduced from $F_{rebuild}$.

Comment 2: One industry group commented that the biological reference points for SNE/MA winter flounder are based on long-term projections that are highly uncertain. The commenter stated that, as a result, fishing mortality targets have been set below $F_{rebuild}$ to account for this uncertainty, which will result in forfeiting near-term yields.

Response: The revised rebuilding strategy implemented in this action is based on the best scientific information available. NMFS agrees that the long-term projections are uncertain. Considerable evidence has demonstrated that many groundfish stock projections in recent years have overestimated stock growth. Given the relative infrequency of groundfish stock assessments, there is often a considerable lag between the terminal year on an assessment and the year of the catch advice. As a result, when catches are based on only $F_{rebuild}$, they are often based on assumptions used in the projection, rather than any real evidence that the stock biomass has increased. The rebuilding strategy implemented in this action explicitly acknowledges this issue and allows short-term catch advice to be less than $F_{rebuild}$ in order to account for uncertainty. If an assessment indicates the stock is rebuilding more rapidly than originally predicted, $F_{rebuild}$ will be recalculated, and catches could be increased. An assessment update is preliminarily scheduled for 2014,

although this schedule may change depending on assessment needs and priorities. This action implements ABCs for FYs 2013–2015, so presumably, if any update is completed in 2014, $F_{rebuild}$ would be recalculated, and if the stock is rebuilding faster than predicted, catches could be increased.

The SSC noted in its ABC recommendation for this stock that a constant catch of 1,676 mt for FYs 2013–2015 is based on the long-term yield expected if recruitment of the stock follows more recent trends, as opposed to the longer term trend used in the assessment. The SSC also stated that recent recruitment has been consistently below the recruitment predicted in the assessment, which could be indicative of an environmental change, or a poor model fit. Due to the uncertainty in the projections, and recruitment that is consistently less than expected, NMFS thinks it is appropriate to reduce catches below $F_{rebuild}$ to account for these uncertainties even though this may result in forfeiting near-term yields. This will help ensure that the stock rebuilds on time, and will also help ensure that overfishing does not occur.

Comment 3: One NGO stated that increasing fishing mortality on a stock that is not making adequate rebuilding progress is inappropriate.

Response: Amendment 16 adopted a rebuilding strategy for SNE/MA winter flounder that would keep fishing mortality as close to zero as possible and rebuild the stock by 2014. NMFS notified the Council in May 2012 that SNE/MA winter flounder was not making adequate rebuilding progress, and as a result, was required to revise the rebuilding program for this stock within 2 years, or by May 1, 2014. Framework 50 responds to this requirement consistent with Magnuson-Stevens Act and National Standards. The Council calculated the maximum rebuilding time period for this stock appropriately. Further, a rebuilding end date of 2023 has a median probability of success, which is consistent with the relevant case law. Fishing mortality may increase compared to recent years because the rebuilding strategy no longer aims to keep fishing morality as close to zero as possible. However, the FYs 2013–2015 ABCs are consistent with the revised rebuilding program, and are actually lower than $F_{rebuild}$ in order to account for scientific uncertainty in the projections. Reducing catches from $F_{rebuild}$ will help increase the chances that rebuilding will occur on schedule because the realized recruitment, which is less than the recruitment predicated in the assessment, was used to inform catch advice.

Southern New England/Mid-Atlantic Winter Flounder Management Measures

Comment 4: One NGO opposed reopening a directed fishery on SNE/MA winter flounder to mitigate economic impacts of catch limit reductions for other groundfish stocks. The commenter proposed that, if economic mitigation was critical, the groundfish fleet could have been allowed to land its bycatch of SNE/MA winter flounder that is caught while prosecuting other fisheries.

Response: The new rebuilding plan and management strategy for SNE/MA winter flounder is not being done only to mitigate economic impacts, but rather to implement a new rebuilding strategy as allowed by the Magnuson-Stevens Act when a management plan is not making adequate progress. The revised management plan takes into account all National Standards, including the requirement to mitigate negative impacts on the fishing community, to the extent practicable, in light of conservation requirements. The Groundfish Plan Development Team presented the idea to the Council's Groundfish Committee that, if the catches under the revised rebuilding strategy were too low to allocate the stock to sectors, a trip limit could be used for sector and common pool vessels. This trip limit would have allowed vessels to land a small amount of SNE/MA winter flounder, which may have provided a small economic benefit to the fishery. In this case, the reactive area-based AM that was initially proposed in Framework 48 would have been implemented. If vessels are allowed to land the stock, regardless of whether trip limits were implemented, or the stock was allocated to sectors, the FYs 2013–2015 ABCs were developed first, consistent with the revised rebuilding program. Allocating the stock to sectors provides a greater amount of catch accountability in the fishery, and if a sector catches its entire ACE, it must stop fishing in the SNE/MA winter flounder stock area, unless it leases additional ACE for this stock. This helps prevent overages of the ACLs, and better ensures that overfishing will not occur. Allocating the stock to sectors also provides the greatest amount of flexibility for groundfish vessels.

Comment 5: One individual, one state, and two industry groups supported the allocation of SNE/MA winter flounder to sectors and stated that this will ensure accountability and would provide a small amount of economic relief for groundfish vessels.

Response: NMFS agrees that allocating the stock to sectors ensures the greatest amount of catch accountability. As noted earlier, because sectors are prohibited from fishing in a stock area if they do not have any ACE for the pertinent stock, this helps ensure that ACLs are not exceeded, and helps ensure that overfishing does not occur. Based on analysis completed by the Council for Framework 50, although other stocks will still be limiting for groundfish vessels, it appears that this measure could provide additional fishing opportunities, and potentially provide an additional $5.4 million in ex-vessel revenues in FY 2013.

FY 2013 GB Yellowtail Flounder Catch Limits

Comment 6: Two industry groups and one state marine fisheries agency supported the Council's preferred alternative for GB yellowtail flounder (a FY 2013 ABC of 1,150 mt), and stated that this ABC proposed by the Council in Framework 50 was based on the SSC's recommendation. Two of these commenters were disappointed that a stronger effort was not made to reconvene the TMGC in order to renegotiate the 2013 quota for GB yellowtail flounder after the Council adopted a higher quota than what was recommended by the TMGC, and that the industry should not suffer because the Council did not reconcile the higher quota with the TMGC. The state also noted that the TRAC assessment for GB yellowtail flounder was at odds with a yellowtail flounder tagging study completed by the University of Massachusetts Dartmouth School for Marine Science and Technology (SMAST).

Response: This final rule disapproves the FY 2013 ABC for GB yellowtail flounder that the Council proposed in Framework 50 because it would likely not end overfishing for the stock and would not be based on the best scientific information available, not because the ABC recommended by the Council is inconsistent with the TMGC's recommendation. These reasons are more fully discussed earlier in this preamble, and are not repeated here (see Disapproved Measures and Item 4 of this preamble).

With respect to the comment regarding reconvening the TMGC, the Council did not pass any motion to reconvene the TMGC and renegotiate the TMGC's recommendation for 2013 catches of GB yellowtail flounder. But, in addition, based on preliminary information during the development of

Framework 50, the Council's ABC recommendation of 1,150 mt did not appear to be based on the 2012 TRAC assessment, which Canada had supported as the best scientific information available. Moreover, Canada expressed concern for the SSC's recommendation of 1,150 mt in that it appeared to be arbitrary, and not based on the 2012 assessment. For all of these reasons, NMFS does not believe it would have been appropriate, or warranted, to request that the TMGC re-negotiate the 2013 quota for GB yellowtail flounder.

There have been multiple instances in recent years where the TMGC has reconvened, at the request of the Council and NMFS, in order to re-negotiate the TMGC's recommendations. In one of these cases, for FY 2011, reconvening the TMGC resulted in the TMGC recommending a higher GB yellowtail flounder quota than initially agreed upon in order to respond to new U.S. law that had recently been enacted (the International Fisheries Agreement Clarification Act). In this case, the renegotiated quota was consistent with the best scientific information available and other applicable law. NMFS agrees that, under special circumstances, the TMGC should be reconvened if the respective U.S. or Canadian management bodies have quota recommendations that differ from the TMGC. However, the TMGC provides catch recommendations based on the annual TRAC assessments that are conducted annually for each stock. Therefore, special circumstances that would warrant reconvening the TMGC would likely be the result of new, recently discovered information that becomes available after the TMGC meets, or if the TMGC's recommendations are determined to be inconsistent with the conservation objectives of the FMP or Magnuson-Stevens Act requirements. Moreover, as discussed in more detail earlier in this preamble, NMFS has made a final determination that a 2013 ABC of 1,150 mt is not consistent with the best scientific information available, would likely fail to end overfishing for the stock, and would undermine the conservation objectives of the FMP. NMFS voiced these concerns during the development of Framework 50, and does not agree with the commenter that NMFS did not provide guidance and advice on how best to approach the ABC recommendation of 1,150 mt with Canada. For all of these reasons mentioned above, NMFS does not agree that the TMGC should have been reconvened given the results of the 2012 TRAC assessment, and the inconsistencies in the SSC's recommendation with these assessment results.

The SMAST yellowtail flounder tagging study was not submitted, or presented, at the 2012 TRAC meeting, and as a result, was not able to be considered as part of the 2012 assessment. However, since this issue has been raised, the NEFSC has met with SMAST scientists to discuss the results of the tagging study. NEFSC and SMAST scientists identified additional analyses that should be conducted to address some concerns with the initial results of the tagging study. These additional analyses are scheduled to be presented at the June 2013 TRAC assessment for GB yellowtail flounder. NMFS supports the continued discussions of this tagging study in order to incorporate these results into the next assessment, and agrees that additional information like this could better inform the assessment.

Comment 7: Two industry groups and one state marine fisheries agency opposed the proposed emergency rulemaking to implement a FY 2013 ABC of 500 mt for GB yellowtail flounder and stated that NMFS does not have the authority to do this. The state marine fishery agency also commented that the proposed emergency rulemaking is not consistent with the SSC's recommendation.

Response: NMFS disagrees that it does not have the authority to disapprove the Council's recommended ABC of 1,150 mt, and instead, implement an ABC of 500 mt. As specified in the Magnuson-Stevens Act, NMFS, on behalf of the Secretary, must ensure that any FMP (and by extension framework and amendment) be carried out in accordance with provisions in the Magnuson-Stevens Act. Thus, once a plan is submitted to NMFS for review and approval, NMFS must make the final determination that the plan, along with its corresponding measures, is consistent with the Magnuson-Stevens Act and the National Standards. As discussed at length earlier in this preamble (see Disapproved Measures), NMFS is disapproving the ABC of 1,150 mt that was adopted by the Council in Framework 50 because it would likely fail to prevent overfishing, and is not based on the best scientific information available, which violates National Standards 1 and 2 of the Magnuson-Stevens Act. Through emergency authority, this final rule implements a FY 2013 ABC of 500 mt that is consistent with the best scientific information available and the SSC and TMGC's recommendation, as well as NMFS guidance on emergency rules. This action is discussed at length in a previous section of this preamble, and so is not repeated here (see Item 4 of this preamble).

NMFS disagrees with the comment that a FY 2013 ABC of 500 mt is not consistent with the SSC's recommendation. The SSC's final report on 2013 catch limits for GB yellowtail flounder recommended a range of ABCs from 200–1,150 mt. The Council selected the highest possible ABC from this range, which NMFS has determined would likely not end overfishing for this stock and is not consistent with the best scientific information. The details of the SSC's recommendations have been discussed in detail in previous sections of this preamble, and are not repeated here. However, the SSC recommended a FY 2013 ABC of 1,150 mt as a backstop measure only for a bycatch-only fishery, and also recommended a range of FY 2013 ABCs consistent with the range of catch advice provided by the 2012 TRAC assessment (200–500 mt). Thus, although the statutory requirement to abide by the SSC's recommendation only applies to the Council, the emergency rulemaking is consistent with the SSC's recommendations. Moreover, even if 1,150 mt was not determined to violate Magnuson-Stevens Act requirements, selecting an ABC that is below the highest catch level recommended by the SSC does not make an ABC inconsistent with the SSC's recommendations. The SSC's ABC recommendation is a limit, which the Council cannot go above. However, this does not, and should not, preclude the Council from selecting an ABC that is lower than the SSC's catch advice.

Comment 8: Two industry groups and one state marine fishery agency commented that a FY 2013 ABC of 500 mt will result in economic disaster and fishery closures.

Response: Available analysis does show that a FY 2013 ABC of 500 mt (U.S. quota 215 mt) will have economic impacts on groundfish and scallop vessels, and coupled with reductions in catch limits for other key groundfish stocks, this action could have severe, negative impacts on the fishery. These reductions are necessary in order to meet conservation objectives and satisfy applicable Magnuson-Stevens Act requirements that require conservation measures even if it results in severe negative economic impacts. Nevertheless, there are numerous mitigation measures that are already in place, or are being implemented in connection with this action, to help mitigate negative impacts of low catch limits in FY 2013. In addition, NMFS is

seeking other ways to reduce these impacts. Most directly related to the availability of GB yellowtail flounder quota, the TMGC began developing a quota trading mechanism to be used to trade quota between the U.S. and Canada. In February 2013, the TMGC drafted a series of guiding principles that should be used by both countries in developing and implementing trades. In April 2013, the TMGC recommended these guiding principles to the U.S./Canada Steering Committee, and also recommended that a pilot project be developed with candidate stocks (GB yellowtail flounder and eastern GB haddock). The U.S./Canada Steering Committee agreed to move forward with development of a trading mechanism. The next step for the Council and NMFS will be to outline how a trading mechanism would be implemented in U.S., and what modifications would be required to the FMP. NMFS is committed to developing a trading mechanism that can provide for additional fishing opportunities for U.S. vessels, and will support the Council in moving this issue forward. Trading quota with Canada would provide additional fishing opportunities for U.S. vessels faced with a dramatic reduction in the GB yellowtail flounder quota, and if possible, NMFS supports any potential trade that could occur in FY 2013.

This final rule provides additional fishing opportunities by allocating SNE/MA winter flounder to sectors and allowing commercial and recreational vessels to land this stock. This is expected to provide additional fishing opportunities and has the potential to provide an additional $5.4 million in ex-vessel revenue than if possession of the stock continued to be prohibited in FY 2013. This final rule also implements an emergency rulemaking to increase the FY 2013 ABC for white hake based on the new assessment that was completed in February 2013. Additional white hake quota may provide additional fishing opportunities as it reduces the likelihood that groundfish vessels would be constrained by available white hake quota. In addition, Framework 48 reduces the minimum fish size for yellowtail flounder, cod, haddock, and other groundfish stocks. This measure is expected to reduce regulatory discards for these stocks, which analysis shows may increase trip revenues and help achieve the economic benefits of OY. Framework 48 also adopts a measure that allows sector vessels to request access to the year-round groundfish closed areas in order to provide additional opportunity for vessels to target healthy stocks that may be more abundant in these areas. NMFS is considering and analyzing sector requests through a separate rulemaking in FY 2013 as a potential way to increase the likelihood of achieving OY and mitigating economic impacts of the FY 2013 catch limits. NMFS has also approved 23 regulatory exemptions requested by sectors in the final rule for FY 2013 Sector Operations Plans and Contracts, and Allocation of ACE. These exemptions are meant to provide sector vessels the greatest amount of flexibility possible to make business plans and harvest available ACE in FY 2013.

More importantly, NMFS intends to pay for at-sea monitoring costs for the groundfish fishery in FY 2013 to help provide some economic relief to vessels. NMFS has also implemented emergency measures to temporarily suspend monkfish trip limits for some groundfish vessels and provide additional fishing opportunities that could increase landings and revenues. Cumulatively, all of these measures are expected to help mitigate the anticipated impacts of the catch limit reductions for many key groundfish stocks in FY 2013. The Council, and NMFS, will continue to develop measures that can provide some economic relief to the fishery and help vessels target healthy groundfish stocks.

Comment 9: Three NGOs supported disapproval of the FY 2013 ABC of 1,150 for GB yellowtail flounder that was proposed by the Council in Framework 50. Two of these organizations support the proposed emergency rule to implement a FY 2013 ABC of 500 mt; however one NGO opposed this action, and stated that this situation does not meet the required emergency criteria.

Response: NMFS agrees with the comments that the FY 2013 ABC of 1,150 mt for GB yellowtail flounder should be disapproved. NMFS is disapproving this ABC in Framework 50, and through this final rule, is implementing a FY 2013 ABC of 500 mt through an emergency rule. This issue is discussed in detail earlier in this preamble (see Disapproved Measures and Item 4 of this preamble), and is not repeated here.

NMFS disagrees that this situation does not meet the required emergency criteria. The commenter stated that the FY 2013 ABC of 1,150 mt proposed in Framework 50 should be disapproved and the issue be remanded back to the Council for action. NMFS finds this suggestion irresponsible and impractical, as it would pose harm to the resource, cause severe disruption to the fishery, and undermine the joint management of this stock with Canada under the Understanding. As described at length in Item 4 of this preamble, setting an ABC of 500 mt for this stock meets emergency rule guidance provided by the NMFS. The need for this emergency is based on recent, unforeseen events given that the Council did not take final action on Framework 50 until January 2013. This is nearly 2 months after the Council typically takes final action on groundfish management actions in order to submit the action to NMFS for review and implementation by the start of the groundfish fishing year on May 1. As previously outlined in this rule, there were a number of factors that contributed to the recent, and unforeseen, events that justified an emergency action in this situation. The commenter did not provide any realistic alternative to the emergency rule to implement a FY 2013 ABC of 500 mt for GB yellowtail flounder. In addition, the proposal to remand the issue back to the Council for action ignores the negative biological, social, and economic impacts that no action would have on the resource and the fishery. As outlined here, and previously in the preamble of this rule, this situation does meet the necessary emergency rulemaking criteria and is consistent with the applicable Magnuson-Stevens Act requirements, as well as the policy guidelines for the use of emergency rules previously published by NMFS (62 FR 44421; August 21, 1997).

Comment 10: One industry group commented that the scallop fishery's allocation of GB yellowtail flounder under a FY 2013 ABC of 1,150 mt would probably prevent overages, but does not provide 100 percent of the scallop fishery's need.

Response: Framework 48 adopts a fixed allocation of the U.S. ABC for GB yellowtail flounder. In FY 2013, Framework 48 implements an allocation of 40 percent of the U.S. ABC, and in FY 2014 and beyond, the scallop fishery will receive 16 percent of the U.S. ABC. The emergency rule implemented in this action implements a FY 2013 ABC of 500 mt for GB yellowtail flounder, which results in a scallop fishery sub-ACL of 83.4 mt (40 percent of the U.S. ABC of 215 mt). Framework 24 to the Atlantic Sea Scallop FMP (Framework 24) adopted management measures for the scallop fishery for FY 2013. The amount of GB yellowtail flounder expected to be caught by the scallop fishery under the preferred alternative in Framework 24 was estimated between 40.7 mt at the low end, to 152.8 mt at the high end. The medium

estimate of GB yellowtail flounder expected to be caught by scallop vessels in FY 2013 is 83.4 mt. These estimates do have some uncertainty. If the realized catch of the scallop fishery is between the low and medium estimates, then it is unlikely that the FY 2013 sub-ACL will be constraining for the scallop fishery, and that the scallop fishery's AM would be triggered. If scallop fishery catches of GB yellowtail flounder in FY 2013 are closer to the high end, the FY 2013 allocation could be constraining, and may trigger the scallop fishery's AM. However, there are some measures that may help mitigate this, and a bycatch avoidance program that will help ensure scallop vessels avoid GB yellowtail flounder hotspots. These measures are discussed in more detail below.

Due to the declining status of GB yellowtail flounder, and the low U.S. ABC for the stock in FY 2013, it is possible that scallop vessels could be constrained by their allocation. However, Framework 47 adopted a measure that provides flexibility for the scallop fishery, and can help mitigate low GB yellowtail flounder quotas. This measure specifies that the scallop fishery's AM for GB yellowtail flounder is only triggered if the scallop fishery exceeds its sub-ACL by 50 percent or more, or if the scallop fishery exceeds its sub-ACL and the total ACL is also exceeded. This measure functions as a ''pseudo'' quota transfer from the groundfish fishery to the scallop fishery in order to balance the need to achieve OY in the fishery, prevent loss of scallop yield, and prevent overfishing for the stock.

In addition, the scallop fishery has used a bycatch avoidance program developed by the SMAST. This program has been successful in recent years to help scallop vessels target areas with high scallop yield, while avoiding hotspots of yellowtail flounder. SMAST has announced that it is expanding this program for the 2013 fishing year to help mitigate the low quotas for GB yellowtail flounder. NMFS expects that this program will continue to reduce the bycatch of GB yellowtail flounder in the scallop fishery, and supports the expansion of this program to maximize benefits to the scallop fishery.

FYs 2013–2015 GOM Cod Catch Limits

Comment 11: One industry group and one state marine fishery agency opposed the GOM cod catch limits proposed in Framework 50 and stated that these catch limits are too low. These commenters supported the Council's request to NMFS to implement interim measures in FY 2013 to further reduce but not end overfishing for GOM cod.

Response: NMFS disagrees that the FYs 2013–2015 catch limits for GOM cod are too low in light of best available scientific information. The catch limits adopted in Framework 50 are necessary to end overfishing for GOM cod and allow some stock rebuilding. These catch limits are based on the December 2012 benchmark assessment, which was completed at the request of the Council and industry to address outstanding issues from the December 2011 benchmark assessment for this stock (i.e., discard mortality rates, fishery selectivity, etc.).

In May 2012, NMFS notified the Council that based on the results from the December 2011 assessment for GOM cod, the stock was overfished and overfishing was occurring. In addition, the results of the assessment indicated that the stock was not making adequate rebuilding progress. These assessment results resulted in a significantly revised scientific understanding of the status of this stock. As a result, NMFS notified the Council that it must implement a revised rebuilding program for GOM cod within 2 years, or by May 1, 2014, and that it must end overfishing within 1 year, or by May 1, 2013. For FY 2012, NMFS implemented interim measures to reduce but not end overfishing for GOM cod while the Council responded to the new assessment information and developed appropriate management measures to end overfishing for the stock.

The interim measures implemented by NMFS were only a 1-year temporary exception to the Magnuson-Stevens Act requirement to end overfishing immediately. Section 304(e)(6) of the Magnuson-Stevens Act allows a temporary exception to the requirement to end overfishing immediately in certain narrow circumstances during the development or revision of a rebuilding plan. When NMFS implemented the interim measures for FY 2012, it determined that the application of this exception was limited to 1 year, as constrained by the limited authority provided in 305(c). The Council and others have argued that the Secretary may issue back-to-back interim actions to span the full 2 years the Council may take to revise the rebuilding program for GOM cod. To be consistent with relevant provisions of the Magnuson-Stevens Act, and in light of its clear mandate to end overfishing, a second year of interim measures for GOM cod is not justified unless a change in circumstances has created a new emergency situation that would permit such action. There are no new circumstances that would give rise to a new set of interim measures for FY 2013. Also, as noted by one of the commenters, GOM cod abundance is low. NMFS has repeatedly said, because of the status of the stock, allowing overfishing for another year on this stock would not be prudent. Framework 50 adopts FYs 2013–2015 specifications consistent with the best scientific information available that will end overfishing for the stock. Thus, this final rule appropriately responds to the Council's requirement that it must end overfishing for GOM cod by May 1, 2013.

Comment 12: Three NGOs opposed the FYs 2013–2015 catch limits for GOM cod and stated that these specifications are too high, and deviate from the Council's ABC control rule. These comments also noted that the preferred alternative for GOM cod is not consistent with the SSC's recommendation.

Response: NMFS disagrees. The FYs 2013–2015 catch limits for GOM cod are not too high because they are consistent with best scientific information available. The GOM cod specifications implemented in this action were developed using the results of the December 2012 benchmark assessment for the stock and are consistent with the SSC's recommendation. As discussed in detail in Item 4 of this preamble, the SSC recommended two constant ABCs for FYs 2013–2015: 1,249 and 1,550 mt. Although the SSC preferred a constant catch ABC of 1,249 mt because it increases the likelihood of stock rebuilding, the SSC also recommended a constant catch ABC of 1,550 mt for reasons that are summarized below and discussed more fully in Item 4 of this preamble.

The December 2012 benchmark assessment for GOM cod provided a unique situation because two assessment models were approved. NMFS discussed the details of these two models, which resulted in the two ABC alternatives recommended by the SSC, as well as the SSC's rationale for recommending an ABC for GOM cod that deviates from the Council's ABC control rule, in Item 4 of this preamble. This discussion is not repeated here. However, NMFS has determined that the SSC's recommendation for a FY 2013–2015 ABC of 1,550 mt is consistent with the relevant sections of the Magnuson-Stevens Act and Amendment 16, and that the SSC adequately justified why the available information provided a better understanding of the scientific uncertainty in the assessment.

Moreover, both ABC alternatives are substantially lower than the FY 2012 catch limits, and will result in significant reductions in commercial catches compared to FY 2012. Both ABCs would also result in similar projected stock increases. Because both ABC alternatives are consistent with the relevant provisions of Magnuson-Stevens Act and would likely end overfishing in FY 2013, it is important to consider the needs of fishing communities. Although the differences in revenue between a FY 2013 ABC of 1,249 and 1,550 mt are relatively small, these differences are not insignificant given the dramatic reductions the groundfish fishery is facing in FY 2013. To ignore an alternative that meets the conservation objectives of the FMP and the Magnuson-Stevens Act and that could help mitigate some of the economic impacts of this action would not be consistent with National Standard 8.

FYs 2013–2015 Catch Limits

Comment 13: A NGO commented that the FYs 2013–2015 specifications are not precautionary enough given the uncertainties in the assessments. One individual opposed the catch limits stating that they are too high, but did not provide any specific rationale. The NGO, in addition to 438 individuals, commented that there should be no directed fishing for cod.

Response: NMFS disagrees that the FYs 2013–2015 specifications are not precautionary enough in light of best scientific information available. As discussed in detail in Item 4 of this preamble, and Appendix I of the EA (see **ADDRESSES**), there are a number of stocks for which constant catch ABCs are adopted for FYs 2013–2015 specifically to account for the scientific uncertainty in the assessments and catch projections. In these cases, ABC is set at 75% F_{MSY} for FY 2013, consistent with the ABC control rule, but is held constant for FY 2014 and 2015. This results in a larger buffer between the OFL and ABC in FYs 2014–2015 than the ABC control rule would, if applied, and as a result is actually more precautionary to address uncertainties in the assessments. A full description of the analyses completed to develop the ABC recommendations is not repeated here.

Moreover, the commenter took an excerpt of the proposed rule to this action out of context. The commenter cited language from the proposed rule that explained the Council recommended the ABCs provided by the SSC, which are the highest allowed, for all stocks except GB yellowtail flounder as evidence that the specifications are not sufficiently precautionary. However, this rationale in the proposed rule was provided to explain why, under the Initial Regulatory Flexibility Act (IRFA), there were no other alternatives to the FYs 2013–2015 ABCs proposed in Framework 50 that would mitigate the economic impacts of this action. This comment was taken out of context, and is not indicative that the catch limits in this action are not precautionary enough. As already noted, the specifications implemented in this action are based on the best scientific information available, and are consistent with conservation objectives of the FMP and applicable law. Also, as discussed in Items 1 and 4, for many stocks, specific action has been taken to attempt to account for uncertainty in catch projections (e.g., constant catch ABCs, catches lower than $F_{rebuild}$, etc.). NMFS believes that this increases the likelihood that overfishing will not occur, and that stock rebuilding occurs on schedule.

NMFS disagrees with the commenters' proposal that the fishery should be closed to directed fishing for cod. Given the low quotas for both cod stocks beginning in FY 2013, it is unlikely that cod will be a primary directed species. Rather, most groundfish vessels will likely use their available cod quota to prosecute other fisheries. The initial FY 2013 cod trip limits for common pool vessels are so low that they will likely preempt these vessels from any directed fishing on cod. However, it is unclear whether the commenter intended that trip limits should be extended for sector vessels in order to prevent directed fishing, or whether possession of the stock should be prohibited. Regardless, both the commercial and recreational groundfish fisheries receive allocations of cod, which, in addition to other management measures and AMs, help prevent catches from exceeding these sub-ACLs. In addition, sector vessels have the flexibility to make business plans and fish as efficiently as possible in order to maximize revenues with available allocations. NMFS disagrees that trip limits would be appropriate for sector vessels, and believes this is contrary to the intent of Amendment 16 and the sector management program. The Council is required to revise the rebuilding program for GOM cod by May 1, 2014, and the Council could consider a rebuilding strategy that would keep fishing mortality as close to zero as possible, or that would necessarily prevent directed fishing on GOM cod. Similarly, the Council could adopt management measures in its next action that would necessarily prevent directed fishing for GB cod.

Comment 14: One industry group opposed the FYs 2013–2015 catch limits for GOM haddock that were adopted in Framework 50 and stated that the management of GOM and GB haddock ignores known spillover of GB haddock into the GOM.

Response: The FYs 2013–2015 ABCs for GOM haddock are based on the best scientific information available, and are necessary to end overfishing for the stock. The issue of GB haddock spillover into the GOM was recently raised in early 2013. As a result, the Council tasked the Groundfish Plan Development Team (PDT) and the SSC to examine the potential spillover. The Groundfish PDT continues to analyze the potential mixing of these two stocks. However, to date, no analysis is conclusive, and it appears than even if mixing can be demonstrated, it would be difficult to quantify mixing rates sufficient to adjust catch advice. At its April 16, 2013, meeting, the Council's Groundfish Committee passed a motion requesting that NMFS implement an emergency action to allow 10 percent of the GB and GOM haddock catch limits to be used interchangeably to address potential stock mixing.

Currently, there is no conclusive analysis on potential mixing of GB and GOM haddock, and as a result, it does not appear that there is any peer-reviewed scientific information available that would support any management action at this time. NMFS supports the ongoing analysis of this issue by the Groundfish PDT and SSC. Once the analysis is complete, NMFS will continue to work with the Council on this issue.

Comment 15: One NGO generally supported the proposed catch limits, with the exception of GOM cod and GB yellowtail flounder, but noted concerns for the methods used to evaluate management uncertainty. The NGO requested that NMFS and the Council should develop a more rigorous analysis of the various components of management uncertainty.

Response: Appendix II to Framework 44 to the FMP (Framework 44) discusses the elements of management uncertainty that are taken into account to reduce the ABC to the ACL. This appendix can be accessed here: *http://www.nefmc.org/nemulti/index.html*. Framework 44 set the default management uncertainty buffer for the groundfish fishery at 5 percent for most stocks. For stocks with less management uncertainty, the ACL is set at 97 percent of the ABC (e.g., stocks with no state waters catch), for

stocks with more management uncertainty (e.g., zero possession stocks), the ACL is set at 93 percent of the ACL. These buffers are more fully discussed in Appendix II to Framework 44 and Appendix II to Framework 50, and are not repeated here. However, the management uncertainty buffers are revisited each time the Council sets specifications. Since the adoption of the ''default'' management uncertainty buffers in Framework 44, the Council has reviewed and modified the management uncertainty buffers multiple times.

During the development of Framework 50, the Groundfish PDT reviewed the management uncertainty buffers and recommended a number of changes to the Council, which the Council adopted in this action. The Council did discuss increasing the management uncertainty buffer for all stocks because of evidence that fishing behavior may differ on observed and unobserved trips, which could underestimate discards. However, the Groundfish PDT was unable to estimate the amount of suspected bias of observed trips in order to establish the correct buffer, and the management uncertainty buffer was not increased. Because total catches of most allocated stocks has been below 90 percent of the total ACL in recent years, it was determined that this would likely reduce the risk that actual catches would exceed the ACL if there was any potential bias in discard estimates.

NMFS agrees that it would be beneficial to complete additional analysis to attempt to quantify various components of management uncertainty. However, it is often difficult to quantify these components, or make definitive conclusions on these types of analyses, since data must be used to infer activity that may not be observed or documented. NMFS supports the continued improvement of available analyses, and expects that as additional data become available, these types of analyses will improve. NMFS will continue to urge the Council to routinely review the management uncertainty buffers for their appropriateness.

Comment 16: One state marine fisheries agency commented that the amount of the ABC set aside for state waters catch is guesswork, and does not reflect past history of what was caught from state waters by state-only vessels.

Response: NMFS disagrees. The amount of the ABC set aside for states waters is not ''guesswork.'' The Groundfish PDT provides analysis to the Council that looks at recent years' catch of groundfish stocks in state waters. This review is done each time specifications are set for groundfish stocks. As additional years of catch data become available, NMFS expects that the amount estimated for state waters catch will become increasingly more accurate. However, it is often difficult to anticipate how catch in state waters will change in response to a Federal management action, state waters trip limits, or variability in the catch limits for groundfish stocks. As the commenter accurately points out, the amount of the ABC set aside for state waters is not an allocation, and is not considered an ACL, because there is no associated AM should state waters catch exceed the allotted amount. NMFS also notes that the Council can adopt different percentages for the amount of ABC set aside for state waters. The ABC distribution implemented in this final rule is consistent with the Council's preferred alternative for FYs 2013–2015 catch limits.

FY 2013 Common Pool Management Measures

Comment 17: One industry group supported the concept of the GOM cod trip limit for Handgear A vessels to be no lower than 100 lb (45.4 kg), and up to the maximum 300 lb (136.2 kg) allowed, and stated that trip limits should be charged in 100-lb (45.4-kg) increments to make it easier to quantify when the trip limit is increased. The commenter also noted that the GOM cod trip limit should be low enough to prevent shutting down the common pool fishery before the end of the first trimester.

Response: NMFS agrees. This final rule implements an initial FY 2013 GOM cod trip limit of 100 lb (45.4 kg) for Handgear A vessels. The initial GOM cod trip limit is reduced from the 300 lb (136.2 kg) maximum, as required, to be the same as the trip limit applicable to common pool vessels fishing under a Category A DAS. This low initial trip limit is to ensure that the common pool fishery does not exceed its Trimester TACs, or its sub-ACL. In addition, if catch information indicates that the common pool fishery will prematurely catch its trimester TAC for any stock, NMFS does have the ability to adjust the applicable trip limits for common pool vessels and will do so to help ensure that the trimester TAC is not exceeded. NMFS agrees that trip limits, and any other applicable management measures, should be aimed to allow the common pool fishery to approach, but not exceed its TAC each trimester.

Comment 18: One individual commented that the trip limit for SNE/MA winter flounder should be 500 lb (226.8 kg) per DAS, though it was not clear whether the commenter supported this trip limit for common pool vessels or the entire commercial groundfish fishery (sector and common pool vessels). This individual commented that there should be no differential DAS counting in SNE.

Response: Available information and analysis based on recent common pool effort, indicates that the common pool fishery will likely only catch approximately 18 to 65 percent of its sub-ACL for SNE/MA winter flounder even with a possession limit of 5,000 lb (2,268 kg) per DAS up to 15,000 lb (6,803.9 kg) per trip. As a result, NMFS implements this initial trip limit for FY 2013 for common pool vessels. The RA may adjust the trip limit inseason, so if available catch information shows that the common pool fishery will exceed its sub-ACL, the RA would reduce the trip limit for common pool vessels to prevent an overage.

The RA is not implementing any differential DAS counting in any area for FY 2013 for common pool vessels.

Comment 19: One industry group opposes the Trimester TAC management system for the common pool fishery especially given the extremely low quotas for the common pool fishery. The commenter suggested eliminating this regulation in the next framework or amendment to the FMP.

Response: The Trimester TAC AM provision was adopted in Amendment 16 in 2010. Indeed, this AM is only one type of reactive AM that the Council may use, and the Council could develop a different AM for the common pool fishery if it chooses. As the commenter correctly stated, any changes to the Trimester TAC provision would have to be developed through the Council process in a future management action. However, if trip limits continue to be an effective proactive AM that keeps common pool catch within allowable levels, the Trimester TAC AM will likely not be triggered.

FY 2013 Recreational Management Measures

Comment 20: Twenty eight commenters (27 individuals and the one charter boat organization) supported the FY 2013 recreational management measures for FY 2013. The commenters stated that the bag limits are reasonable and allow charter/party and recreational vessels to make a worthwhile trip.

Response: NMFS agrees. The FY 2013 recreational measures implemented in this final rule will balance the need for a reasonable bag limit, and help ensure that the recreational fishery does not exceed its sub-ACL for GOM cod or

haddock. Item 9 of this preamble more fully discusses these measures, and detailed analysis is provided in the EA prepared for this action (see **ADDRESSES**). These discussions are not repeated here.

Comment 21: One industry group and two individuals opposed the proposed FY 2013 recreational management measures and stated that the bag limits for GOM cod and haddock should be lower.

Response: NMFS disagrees. Analysis shows that the FY 2013 recreational measures implemented in this action would have more than a 50-percent probability of preventing overages of the recreational sub-ACLs for GOM cod and haddock. As the preamble to this rule discusses (Item 9 of this preamble), given the large reductions in the GOM cod and haddock quotas, it would seem that the recreational measures should be drastically different than the FY 2012 measures. The minimum size for GOM haddock for recreational vessels will increase from 18 in (45.7 cm) to 21 in (53.3 cm). Due to changing stock conditions, the analysis shows that recreational angler encounters of haddock that are 18 in (45.7 cm) or larger will decline in FY 2013. For GOM cod, though recreational anglers can keep up to nine fish that are 19 in (48.3 cm), FY 2012 data shows that only a small fraction of trips encountered 9 or more fish. Less than 15 percent of party/charter trips encountered 9 or more fish in FY 2012, and only 25 percent of private boat anglers encountered 5 or more fish. These low encounter rates of legal-sized fish are based on the current assessment. In addition, FY 2012 recreational catch is expected to be well below the GOM cod sub-ACL, and the relatively low effort is expected to continue in FY 2013. This expected low effort is based on available analysis of what drives people to fish, how much they are willing to pay for specific bag limits, etc.

The commenter stated that considering the discard mortality estimates for haddock, there must be a GOM haddock bag limit for recreational vessels to prevent increased mortality by recreational vessels. However, a key factor in the model results is that all haddock discards are assumed to survive, consistent with the most recent GOM haddock assessment. Thus, because fewer trips will encounter legal-sized haddock, recreational landings for GOM haddock are expected to decline, and therefore, only an increase in the minimum fish size was required to ensure the recreational fishery does not exceed its sub-ACL in FY 2013. In addition, there was no data to suggest that a bag limit for GOM haddock would be effective. With respect to the bag limit for GOM cod, as mentioned above, analysis shows that recreational removals of this stock will also decline, primarily due to changing stock conditions.

Economic Analysis

Comment 22: One individual commented that the socio-economic impacts of the proposed measures lack clarity. The commenter also requested that the socio-economic assessments need to be part of the main document because they may not always be technologically available to the public.

Response: NMFS disagrees. The analysis prepared for this action meets all of the requirements of the relevant law and guidelines available, and was actually expanded to provide a more meaningful and informative analysis. There were only two alternatives for the FYs 2013–2015 specifications (No Action and the preferred alternative). Under the No Action alternative, no catch limits would be specified, and as a result, sector vessels would be unable to fish with ACE for most groundfish stocks. Thus, comparing the impacts of the preferred alternative to No Action (i.e., no fishing) would not provide a meaningful or informative analysis for the public. This analysis would have made it difficult for the public to understand the impacts of the catch limit reductions in FY 2013. Therefore, in order to provide a more meaningful analysis, the impacts of the proposed measures were also compared to FY 2011. This comparison provides a more clear understanding of the anticipated impacts of FY 2013 relative to the most recent fishing year in which complete data are available.

NMFS assumes that the commenter meant that the socio-economic assessments should be published as part of the proposed rule. NMFS disagrees. The socio-economic impacts of the proposed measures are contained in the EA/RIR/IRFA for this action. Publishing this analysis as part of the proposed rule would result in an unwieldy document that would likely be difficult and confusing for the public to read. Further, in the proposed rule, the public was provided with multiple options for accessing the EA/RIR/IRFA. The document is available on both the Council and NERO Web site and *http://www.regulations.gov/*, which is the same rulemaking portal that the public could use to submit comments on the proposed measures. Further, the public was provided with instructions on how to obtain a hard copy of the analysis completed for this rulemaking. The proposed rule also provided the public with a NERO staff contact, in the event that any assistance was needed in: (1) Understanding the proposed measures and the associated analyses; (2) accessing the proposed rule or associated analyses; and (3) submitting public comments.

Sector Carryover

Comment 23: Three commercial fishery organizations, one state marine fisheries agency, and the Council commented that NMFS cannot adjust the Amendment 16-provided carryover of up to 10 percent of previous fishing year unused ACE. These commenters assert that only a Council action and/or Council recommendation to NMFS can modify the previously implemented Amendment 16 carryover program. They object to NMFS's use of Magnuson-Stevens Act 305(c) emergency rulemaking authority to reduce the GOM cod FY 2012 to FY 2013 carryover from a maximum of 10 to 1.85 percent.

Response: NMFS disagrees that it cannot modify carryover measures through emergency rulemaking. One of the key objectives of the Magnuson-Stevens Act, and mandates to NMFS, is the prevention of overfishing. National Standard 1, as stated in section 301 of the Magnuson-Stevens Act states:

> Conservation and management measures shall prevent overfishing while, achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

Additionally, section 304(e)(3)(A) requires that management measures for overfished fisheries ''end overfishing immediately.''

NMFS's use of the emergency GOM cod measures implemented by this rule pursuant to 305(c) are necessary to ensure that the total potential GOM cod catch in FY 2013 does not exceed the overfishing limit. Analysis of the total potential catch (i.e., the fishery level ACL + available carried over catch), if the full 10 percent of FY 2012 ACE provided under the Amendment 16 implemented regulations is carried over, would exceed the overfishing limit by 12 percent. NMFS has reduced by emergency measures the available GOM cod carryover to ensure the total potential catch is approximately 6 percent below the overfishing limit.

Amendment 16 briefly contemplated the potential for carryover to increase the overfishing risk in situations where large reductions in available catch occurred from one year to the next. However, the amendment was silent on how to account for carryover catch as it

relates to National Standard 1 regarding preventing overfishing and how to adjust carryover where carryover would result in potential catch higher than the overfishing limit in clear violation of statutory provisions of the Magnuson-Stevens Act.

As stated in the preamble, because the Council did not recommend measures to address the GOM cod carryover issue in Framework 50, NMFS is obligated to take action to reduce the total potential catch to a level below the overfishing limit, to ensure that overfishing of GOM cod does not occur. The only available option for so in a timely fashion before the beginning of the 2013 FY is through use of emergency rulemaking under section 305(c) of Magnuson-Stevens Act. As explained in response to the next comment and elsewhere in this rule and the proposed rule, emergency rulemaking to reduce the amount of carryover of GOM cod is consistent with NMFS guidelines.

Comment 24: Some NGOs stated that the Magnuson-Stevens Act and NMFS criteria for emergency rulemaking have not been met with respect to carryover of GOM cod. The commenters indicate that the substantial reduction in GOM cod catch and the potential for carryover when paired with the long-anticipated low FY 2013 catch limit does not meet the necessary emergency rulemaking criteria as the situation was not unforeseen. These commenters cite in support of their argument several letters between the Council and NMFS with respect to carryover concerns. They also state that there is no evidence in the record that the reduced carryover amount is needed to meet a serious conservation or management problem. The commenters assert that the emergency action should not be taken and the carryover issue addressed through the deliberative and participatory Council process.

Response: NMFS disagrees that it is inappropriate to use Magnuson-Stevens Act section 305(c) emergency regulation authority to reduce the amount of available GOM cod ACE carried over from FY 2012. As stated in the NMFS guidelines for emergency rulemaking (62 FR 44421; August 21, 1997), and as explained in the preamble, NMFS is authorized to implement emergency measure to address serious conservation and management concerns resulting from recent, unforeseen events. Analysis indicates that providing up to 10 percent of the FY 2012 GOM cod sector ACE as carryover in FY 2013 would result in a total potential catch that is 12 percent above the OFL of 1,635 mt. Though the potential catch may not be fully caught in FY 2013, NMFS considers that allowing a potential catch in excess of OFL poses a serious conservation and management threat to the GOM cod fishery that results from recent, unforeseen events. Overfishing, therefore, could occur for GOM cod without the measures contained in NMFS's emergency rulemaking.

Regarding the criterion for the need for the emergency to be based on recent, unforeseen events, the commenters mischaracterize the nature and timing of events which NMFS considers both recent and unforeseen for both emergency actions. The updated stock status and catch advice resulting from the December 2012 GOM cod stock assessment, which the Council relied on, in part, to make its ABC recommendation, was not finalized and presented until January 2013, just before the January 29–31 Council meeting. It was not until March 22, 2013, that the Council formally submitted Framework 50 which contained the critical examination of the potential impact of not only the Council's recommended catch limits, but also the potential impact of allowing up to 10 percent carryover for all stocks. By this time it was clearly too late for the Council to act before the beginning of FY 2013 and the only recourse to address the very real potential of overfishing of GOM cod due to the carryover provision was this emergency action.

The commenters assert that the GOM cod situation was predictable and, therefore, foreseen based on the assumption that the stock assessment for GOM cod conducted in December 2012 would produce stock status and catch advice similar to the assessment conducted in December 2011. It would have been inappropriate to presuppose the results of the 2012 updated assessment and how the Council's SSC and ultimately the Council would use the 2012 GOM cod assessment stock information to recommend catch advice to NMFS at the Council's January 29–31 meeting. In any event, because the Council did not address the carryover concern—which NMFS did bring to their attention on several occasions—without NMFS action, the full 10 percent carryover for GOM cod would be allowed, thereby risking overfishing on this stock. Appendix V to the Framework 50 EA has a detailed timeline and description of events in the post-Amendment 16 carryover discussion spanning from late 2011 through the development of Framework 50 over 2012 and early 2013. This includes description of two guidance letters sent by NMFS to the Council on May 25, 2012, and July 26, 2012. To send this issue again back to the Council, without any assurance that the Council would reduce the carryover amount in a timely way, would leave the potential that the full carryover for GOM cod could be fished in the meantime, in excess of the overfishing limit.

With no possibility of the Council addressing the GOM cod carryover concern in a timely way, NMFS's only available mechanism for so doing is emergency rulemaking as provided for by section 305(c) of the Magnuson-Stevens Act. For these reasons, NMFS contends there is a clear fulfillment of the emergency rulemaking criteria.

Comment 25: One comment stated the emergency rule implemented GOM cod unused ACE carryover amount should not be touted as ''mitigating adverse impacts to the extent possible,'' stating that such statements were disingenuous because the carryover amount would provide approximately $50,000 to the groundfish fleet. The commenter seemed to infer that the reduced carryover does not sufficiently mitigate the universe of negative impacts resulting from reduced catch limits across the board.

Response: The comment pertains to information conveyed in the Framework 50 proposed rule classification section IRFA summary pertaining to carryover (78 FR 19389; March 29, 2013). The commenter did not accurately cite the information. NMFS believes the commenter misinterpreted the statement to suggest that the relatively minor carryover and economic contribution in the context of the entire groundfish fishery would somehow provide mitigation for the suite of reduced catch limits for FY 2013. This is not the statement's intent. To clarify, the IRFA summary conclusion in the specific carryover discussion section states,

> The proposed carryover amounts mitigate adverse economic impact to the maximum extent possible while ensuring NMFS meets its statutory obligation to propose catch limits, in this case FY 2013 ACLs plus the potential carryover that do not result in overfishing stocks.

This statement refers to the NMFS clarification that allowing full carryovers, except for GOM cod, help mitigate reduced catch limits across the board. The reduced carryover amount for GOM cod, while mitigating negative impacts to a lesser degree, is still the maximum possible mitigation in light of legal requirement of the Magnuson-Stevens Act. The Regulatory Flexibility Act (RFA) analysis is required to evaluate the impact of Federal proposed and final rules on small business entities. Federal agencies are required in this analysis to identify reasonable

alternatives that may mitigate impacts on small business entities. The RFA does not compel specific regulatory outcomes. Moreover, the RFA does not require agencies to consider or adopt alternatives that are inconsistent with law or outside the scope and purpose of the regulations.

With respect to the carryover analysis quoted here, the alternatives under consideration were status quo wherein 10 percent of the unused FY 2012 GOM cod ACE could be carried over or the NMFS emergency action 1.85 percent of the unused FY 2012 ACE. An alternative of no carryover was considered, and rejected by the agency. Because the status quo would permit catches that exceed the overfishing limit, it is inconsistent with NMFS's statutory obligation to prevent overfishing and cannot be adopted by NMFS. The only remaining alternative, the 1.85 percent GOM carryover alternative, is the only alternative that best meets the statutory requirements in light of conservation requirements and mitigation of negative impacts. As such, it is the alternative selected by NMFS and is the alternative that mitigates impacts to small business entities to the extent possible, with respect to that particular carryover measures, under law and within the scope and purpose of this action. The IRFA and FRFA statements convey this. Overall impacts of the suite of alternatives proposed by NMFS were also analyzed in the IRFA summary contained in the proposed rule and are not repeated here. In addition, as referred to in the IRFA and FRFA, numerous other alternatives for mitigating negative impacts are already included in the FMP, and in the recently announced emergency monkfish action, Framework 48, and other measures included in Framework 50. See response to comments 5 and 8 for a description of measures expected to provide some level of small business impact mitigation in FY 2013.

Comment 26: One commenter objected to carryover of up to 10 percent unused FY 2012 GB cod ACE because it increases the risk that overfishing will occur. The commenter stated the stock is in bad shape, in need of extreme protection, and the FY 2012 quota will go uncaught because the assessment indicates fish available for harvest that simply don't exist.

Response: NMFS agrees that that overfishing should be avoided on GB cod. NMFS asserts that the Amendment 16 carryover amount of 10 percent maintains a low risk of overfishing, even if fully utilized in FY 2013. Analysis conducted in support of the continuation of 10 percent carryover of unused ACE from FY 2012 to FY 2013 indicates that the total potential catch (i.e., total ACL + maximum carryover) if realized would be roughly 72 percent of the overall overfishing limit. Analysis of projected FY 2013, performed as part of the Framework 50 impact analysis, indicates projected GB cod utilization inclusive of carryover would be 85 percent of the available sector sub-ACL. These data suggest the likelihood of overfishing remains low in FY 2013, particularly as a 1-year transitional measure. NMFS is cognizant of the accuracy of past stock projections and the propensity for fishing mortality to be greater and stock size smaller than indicated by the most recent assessment. However, even in considering this possibility, NMFS concludes that the projected catch for FY 2013 presents a low risk of overfishing even with 10 percent of unused catch carried over from FY 2012.

NMFS also notes a logical flaw in the commenter's arguments: They state that ''. . .the fish are not there and they can't be caught. . .'' when explaining why the FY 2012 GB cod quota will be substantially underutilized. Current catch through early April was roughly 33 percent of the FY 2012 sector sub-ACL and 15 percent below the FY 2013 sector sub-ACL implemented by this rule. If the fish are not there and cannot be caught, it is unlikely that catch will meet or exceed the potential catch level in FY 2013 which, in turn, would mean the likelihood of overfishing would be low.

Comment 27: Three NGOs submitted the most substantive carryover-related comments. All three provided extensive comments, legal opinion, and supporting documentation in opposition to carryover, both the emergency action to reduce the GOM cod carryover amount and the continuation of the Amendment 16 provision that provides up to 10 percent of unused FY 2012 ACE to be used in FY 2013.

The overarching general points raised in the comments in opposition to NMFS's approach are: NMFS may not establish an ACL that exceeds the SSC-recommended ABCs; it is not appropriate to use the overfishing limit as the level total ACL may not exceed; permitting carryover threatens the recovery of recovering groundfish stocks; and the NMFS approach is inconsistent with the Magnuson-Stevens Act, National Standard 1, and carryover-related advice provide to the Council by NMFS.

Response: As discussed in the preamble, NMFS acknowledges that permitting carryover in FY 2013 such that ACLs and ABCs could be exceeded by the total catch deviates from the standard guidance. NMFS finds that the alternative approach for dealing with carryovers for 2013 as a 1-year transitional measure is consistent with the Magnuson-Stevens Act and authorized under the flexibility provision of the National Standard 1 guidelines at 50 CFR 600.310 (h)(3). This response elaborates on the rationale justifying this alternative approach.

As more fully explained and justified in the proposed and final rule preambles, the continuation of accounting for carryover consistent with the prior 2 years is intended as a 1-year transitional approach resulting from the exceptional and intractable circumstances of the 2012 and 2013 FYs. This approach is intended to balance the need to preserving consistency with the overarching statutory requirement to prevent overfishing with the expectations concerning the specific carryover intentions between FY 2012 and 2013 which have safety and management consequences. NMFS believes it could not sufficiently overcome reliance on carryover for the groundfish fleet to provide end-of-year safety and business planning by taking a course of action late in the fishing year that was completely different than the first two years of sector ACE carryover.

As stated in the proposed rule, to do so would have raised conflict with National Standard 10 by potentially compelling fishermen to make additional trips before the end of the year to more fully harvest available ACE on short notice. Neither the Council nor NMFS took a positive action or alerted industry with sufficient advanced notice that carryover might be modified or prohibited in FY 2013 in light of the precipitous drops in 2012 catch limits. Indeed, none of the commenters raised concerns about the potential for allowing full carryover from year to year with respect to either Amendment 16 or last year's specifications of catch limits in Framework 47. Faced with these unusual circumstances, NMFS finds that it has the authority under the National Standard 1 guidelines to propose this alternative approach for carryover of 1-year only provided it is consistent with statutory requirements to prevent overfishing.

In addition, through this action, NMFS is taking the proactive step of clarifying the carryover accounting by proposing a system of carryover accounting that is consistent with the standard provisions of the National Standard 1 guidelines for FY 2014 and

into the future (see responses to Comment 24 for additional information on FY 2014 carryover). As discussed in the preamble, NMFS will continue to solicit and consider additional public comment on the proposed clarification in order to foster additional public discussion and possible Council development of legally consistent carryover provisions prior to the start of FY 2014.

To be clear, the actions of this rule do not change Amendment 16's carryover provision nor do they increase ABCs or ACLs above ABCs as specified by the SSC. Commenters incorrectly equate NMFS's characterization of the total potential catch (total ACL + available carryover catch) as a new ''ACL.'' NMFS has made no such distinction and taken no such action. This action merely adjusts how, for the purposes of AMs, to account for carryover amounts. The difference is important. NMFS has provided rationale and analysis indicating that despite the total potential catch exceeding the ACL and ABC, it can be reasonably demonstrated that stocks will not be subject to overfishing. Appendix V to the Framework 50 EA outlines these analyses and is not repeated here. NMFS finds that in light of the flexibility afforded under National Standard 1 guidelines, the limited temporal scope of these actions, and the aforementioned overfishing analysis, the allowance of carryover in the manner described in this final rule is consistent with the Magnuson-Stevens Act.

Comment 28: Many of the same commenters mentioned in the previous Comment made very specific points about the carryover approach of this action, which are enumerated and responded to point by point as follows:

1. *The approach NMFS is using is illegal and violates both the Magnuson-Stevens Act and National Standard 1 because ACL cannot exceed ABC.*

Response: As explained in the previous response, NMFS concedes that continuing to allow carryover following the approach undertaken in FY 2011 and FY 2012, including the emergency rule modified GOM cod amount, is not wholly consistent with the standard approach specified in the National Standard 1 guidelines; but, the alternative approach is authorized by the National Standard 1 flexibility provision at 50 CFR 600.310(h)(3). Moreover, it is consistent with the statutory requirement to prevent overfishing because the approach is designed to prevent overfishing while maintaining consistency with other provisions of the Magnuson-Stevens Act.

2. *The commenters object to NMFS's FY 2013 carryover approach stating that risk of overfishing should be tightly limited consistent with National Standard 1 and the approach taken does not minimize such risk.*

Response: As outlined in NMFS's analysis, the risk of overfishing, given the buffers between allowed mortality and overfishing levels and the 1-year duration of this carryover approach, is low based on both recent historic catch utilization information and model-predicted FY 2013 catch. NMFS believes the level of risk is acceptable for FY 2013 only as a clearly identified transition year to a revised, consistent carryover system to be implemented in FY 2014.

3. *The commenters state it is inappropriate to identify the OFL as the level ACL cannot exceed, as NMFS has done in attempting to justify the FY 2013 carryover approach.*

Response: NMFS believes the 1-off reduction in the full scientific and management uncertainty buffers is an acceptable risk for the FY 2013 transitional period. Although reduced, the remaining buffers between the overfishing level and the catch level at which AMs will be triggered are adequate for this 1-year transitional period and consistent with the flexibility provision in National Standard 1 guidelines. This approach ultimately satisfies the statutory requirement to prevent overfishing.

4. *The commenters state that the requirement to set catch that does not exceed the SSC-recommended ABC found at section 302(h)(6) of the Magnuson-Stevens Act outlines the specific functions applicable to Regional Fishery Management Councils.*

Response: NMFS has specifically not modified or increased ACLs for FY 2013 such that they are established above the SSC-recommended ABCs. As previously explained, the total potential catch (i.e., ACL + available carryover catch) is greater than the ABC for all stocks. NMFS has outlined in this section why it believes this to be an acceptable approach and risk for FY 2013.

5. *The commenters state that the impact of allowing carryover was never analyzed by the SSC. Carryover will hamper recovery of stocks.*

Response: The FY 2012 catch projections for some stocks did consider the expected utilization for the fishing year. For FY 2013 projections, the catch assumption is typically the ABC. The additional fishing mortality above ABC but below OFL that would result if the amount of carryover catch exceeds the ABC level would not have been considered by the SSC. However, Council staff conducted analyses of the potential biological impact of carryover utilization in FY 2013 (EA, pp 188–192). These analyses concluded that full utilization of carryover (i.e., 10 percent of FY 2012 ACE) in FY 2013 is projected to have minor and small impacts on fishing mortality (i.e., increased) and spawning stock size (i.e., decreased) in comparison to the baseline catch evaluation that did not consider carryover. This analysis indicted that the 10 percent carryover for GOM cod would result in overfishing. This is why NMFS has reduced the GOM carryover from 10 to 1.85 percent of the FY 2012 ACE. Overfishing is not projected to occur at this reduced level.

Carryover cannot be said to have absolutely no impact on stocks, particularly those in rebuilding plans. However, from a biological impact perspective, carryover can be demonstrated through analysis like that contained in Framework 50 to have only minor impact to stocks, particularly considering the carryover accounting approach is for 1-year only. These impacts could be easily accounted for in catch projections and stock analyses to ensure that rebuilding objectives are not compromised. The more substantive issue with carryover is not the biological impact but rather the regulatory requirements established for annual catch limits through the National Standard 1 guidelines. As outlined by the commenters and NMFS, going forward, carryover should be accounted for in setting annual catch limits such that its use does not cause catch in excess of ACLs or ABCs.

6. *The commenters cite and provide correspondence from NMFS to the Council that contradicts the carryover approach being permitted in FY 2013.*

Response: NMFS acknowledges that previously provided guidance on carryover contradicts the approach being used in FY 2013. However, NMFS believes there is sufficient justification for this approach as a limited, 1-year transitional approach.

7. *Several objections were raised pertaining to the analysis and rationale use by NMFS to support the determination that up to 10 percent of unused FY 2012 ACE can be carried over to FY 2013 for all eligible stocks except GOM cod, which is reduced by emergency measures to no more than 1.85 percent of the FY 2012 ACE.*

Response: NMFS is relying heavily on the analysis as an important component justifying the FY 2013 transitional approach. As outlined in the Framework 50 Appendix V analysis, there is sufficient reason to believe based on recent past catch limit utilization and

model predicted FY 2013 catches, that the OFLs will not be exceeded. This analysis was necessarily conducted *post hoc* because the Council took no carryover-related action in either Framework 48 or Framework 50.

In summary, NMFS asserts that the culmination of events leading into FY 2013—Inaction by the Council to address carryover; protracted discussions on carryover guidance that were not fully resolved until late in the development cycle; late arriving stock assessment results; later than usual catch limit recommendations from the Council; and potential late season notice of a change to an already approved and implemented program that would have potential safety and business impacts—all coincided to create a challenging situation with no clear solution.

Comment 29: The Council and some NGOs raised concerns with NMFS's proposed Magnuson-Stevens Act section 305(d) clarification for carryover accounting beginning in FY 2014. The Council specifically objected to the use of section 305(d), stating that by doing so, NMFS was subjectively evaluating the Council's Amendment 16 intent with respect to carryover. The NGOs had specific objections with some components of the proposed measures and offered various suggestions on other ways carryover could be approached. These suggestions ranged from ensuring that carryovers are counted against ACLs for AM determinations to constraining carryover use only for stocks that are not overfished, have recently been assessed, and have similar year-to-year ABCs.

Response: NMFS is not interpreting Council intent as to allowing for carryover because this action does not change that provision. Except for the emergency action reducing temporarily the amount of carryover allowed for GOM cod, all of the carryover provisions remain intact in the groundfish FMP. As explained several times, NMFS is merely clarifying how carryover will be accounted for purposes of AMs in order to ensure that NMFS can discharge its responsibility to implement the carryover provisions in a manner consistent with the Magnuson-Stevens Act, particularly provisions requiring the prevention of overfishing.

NMFS believes that the proposed approach for FY 2013, as a transitional measure, and a long-term approach for 2014 and beyond best balances the Council's intent to allow for carryover and its benefits and the need to prevent overfishing. The 2014 approach still allows fishermen to rely on some guarantee of a *de minimus* amount of carryover without consequences so as to promote safety at sea and management predictability. In addition, this approach allows fishermen to manage their carryover accountability measures by deciding whether to fish their carryover on top of their ACE and defer accountability measure until the next fishing year or to preserve their carryover from year to year so as to maximize their catch level in any given year.

NMFS believes that it is in the public interest to allow for additional public comment on the carryover provisions for 2014 and beyond. As a result, to ensure sufficient dialog, NMFS will implement the 305(d) clarification as an interim final rule and accept additional public comment for 45 days. This will also allow additional time for discussion and potentially the development of alternative carryover approaches through the Council process. As a result, NMFS will respond in full to the comments submitted on Framework 50 regarding the FY 2014 interim final carryover approach as well as additional comments submitted during the interim final comment period.

NMFS believes this is the best possible approach to take at this time. This approach provides, and encourages, more thorough public review and comment, opportunity for Council review and deliberation, as well as a default provision for FY 2014 in case the Council does not develop additional measures to address the accounting for carryover from year to year consistent with other Magnuson-Stevens Act provisions. Allowing additional public comment will also better allow NMFS to modify and refine the interim final measures based on additional public comment, should the Council not take independent action.

Other Comments

Comment 30: One NGO commented that Framework 48, Framework 50, and the FY 2013 Sector Operations Plans and Contracts and Allocation of ACE constitute segmentation of the environmental review process. The NGO also commented that the management actions are a patchwork and burden the public with multiple, overlapping public comment periods, which is confusing to the public.

Response: The NGO's comment in this regard is based on the presumption that the various actions at issue are either interdependent or interrelated, connected actions, such that NEPA compels their consideration and evaluation within the scope of a single NEPA document prior to approval of the initial action. This is not the case. The actions identified by the NGO are neither components of a larger single action or connected. While they relate to similar issues and may have synergistic impacts, Framework 48 and Framework 50 and sector operating plans are discrete actions with independent utility, each supported by an independent rationale. One action does not compel the other or irretrievably commit resources as NMFS, through the Magnuson-Stevens Act review and approval process, retains discretion at each decision-making stage to choose to take action or not take action. While NMFS has discretion to include similar actions in a single EA or Environmental Impact Statement (EIS) in appropriate circumstances, it is not compelled to do so. Here, given the complexities and timing challenges of the fishery management scenario with which it was presented, NMFS chose to prepare the level of NEPA analysis appropriate to the decisions being made. The EA for Framework 50 takes a hard look at the direct, indirect, and cumulative impacts of this action, and properly supports a Finding of No Significant Impact. Importantly, the EA includes a robust cumulative effects analysis which identifies Framework 50 as a reasonably foreseeable future action and predicts its synergistic effects. NMFS has prepared a separate NEPA analysis for Framework 48, which takes into account the pre-existing effects of Framework 50, as it evaluates the direct, indirect, and cumulative effects of Framework 48. Using this approach, NMFS will avoid the perils of segmentation by ensuring that all effects of the related actions are evaluated at the appropriate time and holding open the option of preparing an EIS should any environmental impact prove to be significant.

NMFS understands that there are multiple management actions under review for implementation by the start of the 2013 fishing year on May 1, 2013. However, this year has presented a number of unusual circumstances that has led to three separate management actions. NMFS completes an annual rulemaking to implement sector operations plans and allocate ACE to sectors. In addition, the Council typically completes a framework action to respond to updated or new stock information and implement the necessary specifications or management measures. However, as described more fully in the background section of this preamble, Framework 48 and 50 are parallel actions, and the specifications adopted in Framework 50 were initially proposed in Framework 48. Due to the drastic reductions in catch limits for FY

2013, the Council needed additional time to complete the specifications portion of the action, and as a result, the specifications were removed from Framework 48.

Although there were three ongoing rulemakings, and three public comments periods with some overlap, NMFS does not believe this impeded the opportunity for individuals to comment on the proposed rules. Many individuals submitted one letter with comments that spanned multiple actions. In addition, opportunity for public participation has extended over 1 year, as development of Framework 48 began in spring 2012. There were extensive public comment periods at the various Groundfish Committee and Council meetings associated with the development of these actions. Also, because of the unusual circumstances, the Council did not take final action on Framework 50 until January 2013, which provided additional opportunities for public comment and participation on the development of this action. NMFS is also publishing the carryover measures for FY 2014 and beyond as interim final measures and is also implementing multiple emergency rules in this action, which allow for additional public comment on these measures.

Comment 31: The Council and one state marine fisheries agency opposed NMFS's modification of the Council's formally submitted management action, and that this action confounds the statutory roles of the Council and NMFS.

Response: To clarify, the alternatives, analyses, and recommendations that support the Council recommendations were not, and have not been, modified in analytical documents that the Council provided to NMFS. NMFS clearly delineates measures, or additional analyses, that were added by NMFS. NEPA is a process that requires Federal agencies to consider the effects of their actions on the quality of the human environment prior to making decisions. The current NMFS guidance for NEPA compliance acknowledges that due to the close relationship between NMFS and the regional fishery management councils, compliance with NEPA is most effective if NMFS and the councils coordinate. However, NMFS is responsible for the scope, objectivity, and content of the NEPA document, and for ensuring overall NEPA compliance. Although the Council prepares relevant sections of the NEPA document, upon submission by the Council, NMFS adopts this document and retains legal responsibility for NEPA compliance. Therefore, if NMFS determines that additional analysis or supplementary information is necessary to bring the document into full NEPA compliance, it is the agency's responsibility to incorporate this information into the NEPA document.

NMFS understands that, for multiple reasons, FY 2013 presented a series of unusual circumstances. The Council did not take final action on Frameworks 48 and 50 until December 20, 2012, and January 30, 2013, respectively. This is well after the time that the Council typically completes, and submits, management actions to NMFS for review and implementation by May 1. Framework 48 also includes a measure that gives the RA authority to adjust recreational management measures prior to the fishing year, and NMFS was required to adjust these measures for FY 2013 to ensure the recreational fishery does not exceed its sub-ACLs in FY 2013. In support of this measure, the Council convened its RAP in February 2013. All of this leaves an inordinately short amount of time for NMFS to analyze and review the Council's recommendations and complete the rulemaking process consistent with APA. Also, with no possibility of the Council addressing the GOM cod carryover concern, or the FY 2013 ABC for GB yellowtail flounder if it was disapproved, in a timely way, NMFS' only available mechanism for addressing these concerns was through emergency rulemaking, as provided for by section 305(c) of the Magnuson-Stevens Act.

Thus, for all of these reasons, and due to the unforeseen events, adding additional analysis to the Framework 50 document was the only way to ensure necessary management measures were in place by May 1, 2013. Incorporating the necessary analyses into the Framework 50 document also provides ease of public review due to the relatedness to the specifications adopted by the Council in Framework 50. NMFS is committed to working with the Council to avoid the issue raised by the Council. This issue has been added to the Northeast Region Coordination Council (NRCC) agenda to with the intent of resolving differences between the Council and NFMS concerning document timing and preparation The NRCC is an executive level committee of the New England and Mid-Atlantic Councils, the Atlantic States Marine Fisheries Commission, NERO, and NEFSC.

NMFS realizes there was some confusion on the availability of Appendix V, which was prepared by NMFS to analyze carryover provisions. This Appendix was not provided to the Council for posting on the Council Web site until well into the public comment period. However, this appendix was posted on the NERO Web site and *http://www.regulations.gov*, and links to both of these Web sites were provided in the proposed rule. Further, a NERO staff contact was provided in the proposed rule, and members of the public could have contacted this staff member for assistance in accessing the document, or any of the analyses supporting the proposed measures. As a result, the lateness in which the Appendix was posted to the Council's Web site likely did not impede access to the document.

Changes From the Proposed Rule

NMFS has made four changes to the proposed rule. First, this final rule disapproves the Council preferred FY 2013 ABC for GB yellowtail flounder, and implements an emergency rule to set a FY 2013 ABC of 500 mt. In the proposed rule, NMFS highlighted concerns with the ABC of 1,150 mt proposed in Framework 50, and requested specific comment on this measure, and its consistency with the Magnuson-Stevens Act and National Standards. In the event this ABC was disapproved, NMFS proposed an emergency rule to implement an ABC of 500 mt. Based on public comments received, and additional review, NMFS has determined that a FY 2013 ABC of 1,150 mt for GB yellowtail flounder is not consistent with the necessary provisions of the Magnuson-Stevens Act, and is disapproved this measure in Framework 50. This rule implements a FY 2013 ABC of 500 mt instead under emergency authority as further discussed in Item 4 of this preamble.

Second, although NMFS is approving the FY 2013 ABC of white hake that was proposed (3,638 mt), new information became available after the Council took final action on Framework 50, and after the proposed rule for this action published, that justifies a higher ABC for FY 2013. As discussed in more detail in Item 4 of this preamble, the FY 2013 ABC that was proposed in this action was based on the 2008 stock assessment for white hake, which was the best scientific information available to the Council when it developed and took final action on Framework 50. A new benchmark assessment for white hake was completed in February 2013, and the final results of this assessment became available in April 2013. In the proposed rule for this action, NMFS indicated that new assessment results were expected to become available soon, and that, should this new information indicate a change to the FY 2013 catch

limit for white hake, the Council or NMFS could consider a separate action to change the white hake catch limit for FY 2013. Thus, through emergency authority, and based on the best scientific information available, this final rule implements an increased FY 2013 ABC for white hake (4,177 mt) in place of the ABC proposed in this action (3,638 mt). This is a 15-percent increase.

In § 648.85, white hake is removed from the list of stocks of concern. The recent stock assessment for white hake indicates the stock is not overfishing, overfishing is not occurring, and the stock is projected to be rebuilt in 2014.

In § 648.90(a)(1)(4), SNE/MA yellowtail flounder is added to the re-estimation of expected scallop catch of yellowtail flounder for the purposes of adjusting the scallop and groundfish fisheries sub-ACL should expected scallop catch be less than 90 percent of the scallop fishery sub-ACL. Currently, the regulations state that the re-estimation will be completed for GB yellowtail flounder. This rule adds SNE/MA yellowtail flounder to the re-estimation process as adopted by the Council in Framework 50. As explained in Item 5 of this preamble, this revision was inadvertently omitted from the proposed rule. As a result, this measure is implemented in this action through an interim final rule, and NMFS is accepting public comment on this measure for 45 days (see **DATES**).

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that the management measures implemented in this final rule are necessary for the conservation and management of the NE multispecies fishery and consistent with the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be significant for purposes of Executive Order (E.O.) 12866.

This final rule does not contain policies with Federalism or ''takings'' implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

Under 5 U.S.C. 553(d)(1), the Assistant Administrator for Fisheries finds good cause to waive the 30-day delayed effectiveness of this action. Further, under 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries finds good cause to waive the general notice of proposed rulemaking for the emergency action to implement a higher FY 2013 ABC for white hake. As described more fully earlier in this preamble, and below, the reasons justifying promulgation of this rule on an emergency basis make solicitation of public comment, or a delay in effectiveness, contrary to the public interest. The effective date of this action affects a parallel rulemaking approving sector operations plans for the start of FY 2013 on May 1, 2013. In addition, this action sets FY 2013 catch limits, allocates SNE/MA winter flounder to sectors, and implements three parallel emergency actions. Therefore, these actions must be in effect at the beginning of FY 2013 to fully capture the conservation and economic benefits of Framework 50 measures, emergency rulemakings, and the FY 2013 sector operations plans. Due to unforeseen circumstances related to FY 2013 catch levels, and the drastic quota reductions necessary for many key groundfish stocks, the Council did not take final action on Framework 50 until January 2013, and the Council's submission of Framework 50 to NMFS was delayed until March 2013. Due to this time constraint, this rulemaking could not be completed further in advance of May 1, 2013. Therefore, in order to have this action effective at the beginning of FY 2013, it is necessary to waive the 30-day delayed effectiveness of this rule.

Failure to waive the 30-day delayed effectiveness would result in no catch limits being specified for FY 2013 for many groundfish stocks. Without ACE for most groundfish stocks, sector vessels would be unable to fish beginning on May 1, 2013. This would severely disrupt the fishery, and could result in foregone yield and revenue reductions. The groundfish fishery is already facing drastic cuts in the catch limits for many key groundfish stocks. A delay in implementation of this action would prevent groundfish vessels from fishing, which could worsen the severe economic impacts groundfish vessels, and associated fishing communities are facing in FY 2013. This action also allocates SNE/MA winter flounder to sectors and allows commercial and recreational vessels to land the stock. So, a delay in this action could prevent vessels from maximizing the benefit of this measure. Further, because recreational vessels would not be prevented from fishing on May 1, 2013, if this action is delayed, there could be significant confusion for recreational vessels and enforcement on whether it is legal to land SNE/MA winter flounder. Thus, a delay in this action could severely disrupt the fishery. Further, this action implements FY 2013 recreational measures to help ensure the recreational fishery does not exceed its GOM cod and haddock sub-ACLs. If this action is delayed, recreational vessels could fish under the old, less restrictive measures, which increases the likelihood that the recreational fishery would exceed its sub-ACLs and trigger an AM. Also, because the ACLs for GOM cod and haddock are so small in FY 2013, a delay in implementing revised recreational measures could increase the likelihood that overfishing would occur. For all of these reasons, a 30-day delay in the effectiveness of this rule is impracticable and contrary to the public interest.

A FRFA was prepared for this action, as required by section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604. The FRFA includes the summary and responses to comments in this rule, the analyses contained in Framework 50 and its accompanying EA/RIR/IRFA, and the IRFA summary in the proposed rule. The FRFA describes the economic impact of this action on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in Framework 50 and in the preamble to the proposed rule, as well as this final rule, and are not repeated here. A copy of the full analysis is available from the NMFS (see **ADDRESSES**).

NMFS's response to all comments received on the proposed rule, including those that raised significant issues with the proposed action, or commented on the economic analyses summarized in the IRFA, can be found in the Comments and Responses section of this rule. As outlined in that section, significant issues were raised by the public with respect to:

- The revised SNE/MA winter flounder rebuilding program;
- FYs 2013–2015 ABCs for GOM cod;
- the FY 2013 ABC for GB yellowtail flounder;
- FY 2013 GOM cod carryover;
- the FY 2014 and beyond carryover measures; and
- the FY 2013 recreational management measures.

Comments 4, 5, 8, 10, and 25 discussed the economic impacts of this action, or the IRFA prepared for the proposed rule. In addition, public comments received on alternatives to the proposed ABCs that would result in higher catch limits (e.g., 2013 interim action for GOM cod) were considered to be indirectly related to the IRFA with respect to alternatives to the proposed action that would help mitigate economic impacts. Detailed responses are provided to the specific significant issues raised by public comment, and are not repeated here.

As a result of the public comment received, the proposed FY 2013 ABC of

1,150 mt for GB yellowtail flounder was disapproved, and NMFS is instead implementing an ABC of 500 mt, No other changes to the proposed rule measures were required to be made as a result of public comments.

Description and Estimate of the Number of Small Entities to Which the Final Rule Would Apply

The Small Business Administration (SBA) defines a small business as one that:

(1) Is independently-owned and operated;

(2) Is not dominant in its field of operation; and

(3) Has annual gross revenues that do not exceed—

○ $4.0 million in the case of commercial harvesting entities, or

○ $7.0 million in the case of for-hire fishing entities; or

(4) Has fewer than—

○ 500 employees in the case of fish processors, or

○ 100 employees in the case of fish dealers.

This action would mainly impact commercial harvesting entities engaged in the limited access groundfish fishery, as well as both the limited access general category and limited access scallop fisheries. The limited-access groundfish fishery is further classified as vessels enrolled in the sector program and those in the common pool. In general, sector-enrolled businesses rely more heavily on sales of groundfish species than common pool-enrolled vessels. At the beginning of the 2012 groundfish fishing year on May 1, 2012, there were 1,382 individual limited access permits. Each of these permits was eligible to join a sector or enroll in the common pool. Alternatively, they could allow their permit to expire by failing to renew it. There were 827 permits enrolled in the sector program and 584 enrolled in the common pool. The limited access (LA) scallop fisheries can be further classified as limited access and limited access general category (LAGC) scallop permits. At the beginning of the 2012 scallop fishing year on March 1, 2012, there were 342 active LA scallop and 603 active LGC permits.

Individually permitted vessels may hold permits for several fisheries, and may harvest species of fish that are regulated by several different fishery management plans, even beyond those impacted by this action. In addition, multiple permitted-vessels, and/or permits, may be owned by entities affiliated by stock ownership, common management, identity of interest, contractual relationships, or economic dependency. For the purposes of this analysis, ownership entities are defined by those entities with common ownership personnel as listed on permit application documentation. Only permits with identical ownership personnel are categorized as an ownership entity. For example, if five permits have the same seven personnel listed as co-owners on their application paperwork, those seven personnel form one ownership entity, covering those five permits. If one or several of the seven owners also own additional vessels, with sub-sets of the original seven personnel or with new co-owners, those ownership arrangements are deemed to be separate ownership entities for the purpose of this analysis.

Ownership data are available from 2010 onward for the four primary sub-fisheries potentially impacted by this action. These are the sector and common pool segments in the groundfish fishery, and the LA and LAGC scallop fisheries. Due to data limitations, only 1 year's gross receipts are reported, and calendar year 2011 serves as the baseline year for this analysis. Calendar year 2012 data are not yet available in a fully audited form.

In 2011, there were 1,370 distinct ownership entities identified. Of these, 1,312 are categorized as small entities, and 58 are large entities, based on SBA guidelines. These totals may mask some diversity among the entities. Many, if not most, of these ownership entities maintain diversified harvest portfolios and obtain gross sales from many fisheries, and are not dependent on any one fishery. However, not all are equally diversified. The entities that depend most heavily on sales from harvesting species that are impacted by this action are most likely to be affected. So, for this analysis, we identified ownership groups that are most likely to be impacted by the measures implemented in this action. We identified these groups as those that derive greater than 50 percent of their gross sales from sales of either regulated groundfish or scallops. Using this threshold, 135 entities are groundfish-dependent, of which 131 are small entities, and four are large entities. There are 47 entities that are scallop-dependent, of which 39 are small entities, and 8 are large entities.

This action also regulates the Atlantic herring fishery. The herring fishery receives an allocation of GB and GOM haddock as a result of bycatch of these stocks that occurs in the fishery. In 2012, there were 3 large entities and 86 small entities that had limited access herring permits. There were 1,984 small entities that had an open access herring permit. Open access permits make up a very small proportion of the landings in the herring fishery, and derive little revenue from this fishery. Some entities that hold a limited access herring permit have gross revenues greater than $4 million. However, none of these entities reported any herring revenues during 2010–2012, and as a result, these entities are unlikely to be affected by this action. In addition, analysis predicts that it is unlikely that the midwater trawl herring fleet would exceed its sub-ACLs for GOM or GB haddock. As a result, the small regulated entities that derive revenues from the herring fishery are not expected to be impacted by this action.

In addition to the commercial harvesting entities, this action would also impact the recreational harvesting entities that participate in the groundfish fishery. Party/charter permits for the groundfish fishery are open access. All party/charter fishing businesses that catch cod or haddock may be affected by this action. During FY 2010, 762 party/charter permits were issued. Of these 762 permits, 332 permit holders reported taking and retaining any species on at least one for-hire trip. In FY 2010, 285 of these permit holders reported catching at least one cod or haddock. Of the 285 permit holders that reported catching at least one cod or haddock in FY 2010, 148 reported fishing in the GOM stock area (the recreational fishery only has a quota for GOM cod and haddock). In 2011, 170 party/charter vessels reported landings of GOM cod or haddock. All regulated party/charter operators are small entities. The median value of gross revenues from passengers was just over $9,000, and did not exceed $500,000 in any year from 2001 to 2010.

Economic Impacts of the Approved Measures and Steps Taken To Mitigate Adverse Economic Impacts of the Action

The economic impacts of the measures implemented in this action are summarized below and are discussed in more detail in sections 7.4 and 8.11 of the Framework 50 EA. All of the measures are expected to have impacts on a substantial number of small entities. The economic impacts of this action on the groundfish fishery are expected to be severe and negative. This action may also place small entities at a significant competitive disadvantage relative to large entities, particularly those small entities engaged in the commercial groundfish fishery. Analysis shows that smaller entities, those generating less than $500K in annual gross sales, will likely be the most

impacted. Total gross sales losses for these entities are estimated to be approximately 20–25 percent. Gross sales losses from groundfish are estimated to be 50–80 percent. Profitability of many small entities will also likely be significantly reduced under the groundfish catch limits.

Southern New England/Mid-Atlantic Winter Flounder Management Measures

The revision to the SNE/MA winter flounder rebuilding strategy is expected avoid a loss of an estimated $40.2 million in net present value compared to the no action. Five rebuilding scenarios were analyzed in addition to the no action alternative. Two of these scenarios failed to rebuild the stock within 10 years, and thus, would violate rebuilding requirements of the Magnuson-Stevens Act. The other rebuilding strategies would meet Magnuson-Stevens Act requirements, but would rebuild in a shorter timeframe than 10 years, and as a result would have lower net economic benefits than the revised rebuilding program implemented in this action. As a result, the revised rebuilding program implemented in this action help mitigate the economic impacts of this action to the maximum extent practicable compared to the other rebuilding scenarios analyzed, and results in the largest net economic benefit.

In FY 2013, landings of SNE/MA winter flounder are estimated to be worth $5.4 million in ex-vessel gross revenues. Approximately $4.3 million of these estimated revenues will likely accrue to sector vessels, and the rest to common pool vessels. Landing of this stock has been prohibited since FY 2009. As a result, it is difficult to anticipate the economic impacts of the revised ABC/ACL for this stock because there are not enough trips to help characterize future fishing activity. If the Council did not take any action, possession of SNE/MA winter flounder would be prohibited, and fishing vessel revenues would have been lower than those expected from this action. In addition, if possession of the stock remained prohibited, revenues of other groundfish stocks would have also been reduced since there would have been fewer groundfish trips as a result of the inability to land SNE/MA winter flounder.

This action also modifies the commercial fishery AM for SNE/MA winter flounder in conjunction with allocating the stock to sectors. There is a risk that sectors could catch their ACE prematurely within the fishing year and no longer be able to fish in the SNE/MA winter flounder stock area. This would be expected to have negative economic impacts due to lost revenue from the catch of other species, or increased costs as a result of having to fish outside of the area. However, analysis shows that it is unlikely that sector vessels will catch their entire allocation of SNE/MA winter flounder. As a result, this action provides sector vessels greater flexibility and will likely result in higher revenues and lower costs, which is expected to help mitigate some of the negative impacts anticipated in FY 2013.

Annual Catch Limit Specifications

This action also sets specifications for FYs 2013–2015 for most groundfish stocks. The new ABCs are based on the latest benchmark stock assessment information, which is considered the best scientific information available and consistent with the Magnuson-Stevens Act requirements, and other applicable law. Because NFMS can only approve or disapprove measures recommended in Framework 50, the only other possible alternatives to the ABCs implemented in this action that would mitigate negative impacts would be higher catch limits. Alternative higher catch limits are not viable or permissible under the law because they would not be consistent with the goals, objectives, and requirements of the Magnuson-Stevens Act and the FMP, particularly the requirement to end overfishing immediately. The Magnuson-Stevens Act and case law prevent implementation of measures that conflict with conservation requirements even if it means negative impacts are not mitigated. For all stocks, except GB yellowtail flounder, the Council recommended the highest ABCs allowed given the best available science, the SSC's recommendations, and Magnuson-Stevens Act and FMP requirements to end overfishing and rebuild fish stocks. The only other legally available alternatives to the catch limits in this action would be lower limits, which would not mitigate the economic impacts of this action to the fishery. Further information on the GOM cod specifications adopted in this action, and why higher ABCs for this stock would not be consistent with the Magnuson-Stevens Act, is provided in the response to Comment 11. Also, this action disapproves the Council's recommendation for GB yellowtail flounder because it is not consistent with the Magnuson-Stevens Act, and this is described in more detail in the response to Comment 6. The ABC implemented in this action through emergency rulemaking is the highest ABC possible to avoid overfishing based on the best scientific information available.

For the reasons mentioned above, the specifications implemented in this action are the only reasonable and legal alternatives for catch limits that would mitigate the economic impacts of this action to the extent possible. Although there are no other viable alternatives to mitigate negative impacts in the narrow scope and context of Framework 50 regarding catch limits per se, there are numerous mitigation measures that have been extensively discussed, considered, and implemented in Amendment 16, and parallel measures that are being implemented for implementation in FY 2013. All of these mitigating measures are discussed previously in this preamble, and are not repeated here. All of these existing and new measures can be found at: *http://www.nero.noaa.gov/sfd/sfdmulti.html*.

The analysis to estimate the economic impacts of this action considered three different scenarios using a low (Scenario 1) and high (Scenario 2) ACL for both GOM cod and GB yellowtail flounder, as well as the increased ACL for white hake implemented in this action through emergency rulemaking (Scenario 3). All of these scenarios have similar estimated groundfish gross revenues for FY 2013. Compared to FY 2011, groundfish gross revenues are expected to be approximately 28–30 percent lower. Gross groundfish revenues are expected to be 18 to 20 percent lower than those predicated for FY 2012. Under this action, gross revenues for all species on groundfish trips are expected to be 23 to 25 percent less in FY 2013 when compared to FY 2011, and 11 to 13 percent lower compared to the predicated FY 2012 revenues. However, the emergency action to increase the FY 2013 white hake quota is expected to increase gross revenues by approximately $400K compared to the lower white hake quota that was proposed in Framework 50. This is expected to help mitigate some of the economic impacts of this action.

Net revenues are expected to decline much less substantially than gross revenues. Gross revenues on sector trips in FY 2013 are expected to decline by approximately $26 million to $27 million from FY 2011, which is a 23 to 25-percent decrease. Net revenues are expected to decline by a range of only $2 to $3 million, or approximately 4 to 6 percent, from FY 2011. This is due in part to limitations of the analysis, which underestimates actual trip costs, and in part to efficiency gains that are predicted to occur. Maintaining net revenues would most likely occur at the

expense of smaller vessels operating at a low profit margin that would be forced to lease their quota, or sell their permits. Crew-days, days absent, and total sector trips are also be expected to decline substantially compared to FY 2011, since only the most efficient trips are expected to occur under such highly restrictive quota allocations. Fewer operating vessels and days absent would translate into a reduction in earning opportunities for crew members.

The home port states of Connecticut, New Hampshire, and New Jersey are expected to have the largest percentage declines in landings value compared to FY 2011. Massachusetts would likely see the largest overall decline in gross revenue since FY 2011, with an expected decrease of approximately $21 million. All ports are expected to be negatively affected by this action. Chatham, MA, is expected to have the largest percentage decline in landings value since FY 2011.

The impacts of this action are expected to be non-uniformly distributed across vessel length classes. The economic impact is expected to fall heaviest on the smallest vessel length class (less than 30 feet (9.1 m)), and is expected to taper off as vessel length increases up to the largest vessel length class (greater than 75 feet (22.9 m)). This result is not surprising; relative to larger vessels, small vessels have less scalability in terms of landings, and have a smaller geographic range.

This ABCs implemented in this action will reduce the scallop fishery allocation for GB and SNE/MA yellowtail flounder by 47 and 52 percent, respectively, compared to FY 2012. If the scallop fishery exceeds its GB yellowtail flounder allocation by more than 56 percent in FY 2013, scallop vessels would not have access to Closed Area II the following fishing year, and revenues would decline by $16.2 million. If an overage occurs, and is less than 56 percent, the AM areas for the scallop fishery would be open to fishing part of the year, and fishing effort could likely be moved to other months. Shorter scallop fishing windows could increase operating costs and have potential negative price impacts from short-term supply increases. If effort was shifted to other seasons when the meat weights are highest, there could be some positive impacts on the long-term revenues, which could offset some negative economic effects. The response to comment 10 discusses some mitigating measures available to the scallop fishery.

Carryover

This action continues to allow up to 10 percent of unused FY 2012 sector ACE to be used in FY 2013 in conjunction with the catch limits implemented by this action, except for GOM cod. This action reduces the allowable GOM cod unused ACE from a maximum of 10 percent down to a maximum of 1.85 percent to better ensure overfishing does not occur. The actual amount of carryover to FY 2013 depends on the amount of ACE not harvested in FY 2012.

The economic impact analysis conducted for Framework 50 assumed that the full 10-percent carryover amount, including GOM cod, was available and utilized for all carryover-eligible stocks. As such, carryover contributes to the projected $64.3 million gross groundfish revenues expected from the catch limits in this action. The analysis also evaluated if no carryover of GOM cod was permitted in FY 2013. This reduced projected gross groundfish revenue by $2.6–61.7 million. NMFS estimates that the 1.85-percent GOM cod carryover will likely contribute approximately $50,000 to the FY 2013 gross groundfish revenue (i.e., roughly 1.85 percent of the $2.6 million value of GOM cod carryover). Consistent with the overall findings on FY 2013 catch limit economic impacts, the reduction in GOM cod carryover implemented in this action through emergency authority is expected to have the largest impact on vessels under 30 feet (9.1 m) in length. The carryover amounts are expected to help mitigate adverse economic impacts in FY 2013 to the maximum extent possible while ensuring NMFS meets its statutory obligation to implement catch limits, in this case FY 2013 ACLs plus the potential carryover from FY 2012), that will not result in overfishing.

FY 2013 Recreational Management Measures

This action increases the minimum fish size for GOM haddock in the recreational fishery. Total potential losses in gross revenues for party/charter vessels operating in the GOM as a result are estimated to be approximately $974 thousand. Total potential losses in gross revenues were estimated by multiplying the projected FY 2013 decline in fishing trips (7,109 trips) by the estimated average access fee paid by party/charter anglers ($137). Assuming the number of actively participating party/charter vessels in FY 2013 is the same as in FY 2011, this action is expected to result in an average gross revenue loss of $5,729 per vessel ($974 thousand divided by 170 vessels). Actual losses may be lower than estimated, since some anglers may switch to other species besides haddock and cod (striped bass, bluefish, black sea bass, scup, etc.) not considered in this analysis. For-hire businesses that are able to offer more non-groundfish fishing trips specifically marketed towards alternative species may be able offset some of the estimated losses.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

This action contains no new collection-of-information, reporting, or recordkeeping requirements. This action does not duplicate, overlap, or conflict with any other Federal law.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide will be sent to all holders of Federal permits issued for the NE multispecies fisheries, as well as the scallop and herring fisheries that receive an allocation of some groundfish stocks. In addition, copies of this final rule and guides (i.e., information bulletins) are available from NMFS (see **ADDRESSES**) and at the following Web site: *http://www.nero.noaa.gov/*.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: April 29, 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 stated in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

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

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

■ 2. Section 648.82 is amended by adding paragraph (n)(2)(vii) to read as follows:

§ 648.82 Effort-control program for NE multispecies limited access vessels.

* * * * *

(n) * * *

(2) * * *

(vii) *SNE/MA winter flounder AM.* If the common pool fishery sub-ACL for SNE/MA winter flounder is exceeded, including the common pool's share of any overage of the total ACL, as specified at § 648.90(a)(5), by an amount that exceeds the management uncertainty buffer, the AM described in this paragraph would be implemented in the following fishing year. The AM would be effective for the entire fishing year. Common pool vessels fishing on a NE Multispecies DAS with trawl gear may only use a haddock separator trawl, as specified in § 648.85(a)(3)(iii)(A); a Ruhle trawl, as specified in § 648.85(b)(6)(iv)(J)(*3*); a rope separator trawl, as specified in § 648.84(e); or any other gear approved consistent with the process defined in § 648.85(b)(6) in the SNE/MA Winter Flounder Trawl Gear AM Areas. The AM areas are defined below, and are bounded by the following coordinates, connected in the order listed by straight lines, unless otherwise noted.

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 1

Point	N. Latitude	W. Longitude
1	41°10′	71°40′ [1]
2	41°10′	71°20′
3	41°00′	71°20′
4	41°00′	71°40′

[1] Point 1 connects to Point 2 along 41°10′ N or the southern coastline of Block Island, RI, whichever is farther south.

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 2

Point	N. Latitude	W. Longitude
1	41°20′	70°30′
2	41°20′	70°20′
3	41°00′	70°20′
4	41°00′	70°30′

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 3

Point	N. Latitude	W. Longitude
1	41°20′	69°20′
2	41°20′	69°10′
3	41°10′	69°10′
4	41°10’	69°20’

SNE/MA WINTER FLOUNDER TRAWL GEAR AM AREA 4

Point	N. Latitude	W. Longitude
1	41°20′	69°20′
2	41°20′	([1])
3	([1])	69°00′
4	41°00′	69°00′
5	41°00′	69°10′
6	41°10′	69°10′
7	41°10′	69°20′

([1]) The southwest-facing boundary of Closed Area I.

* * * * *

■ 3. Section 648.85 is amended by:

■ a. Revising paragraphs (b)(5) introductory text, (b)(5)(i), (b)(6)(iv)(D), (b)(8)(v)(F), and (b)(8)(v)(H), and

■ b. Adding paragraph (b)(5)(iii).

The added and revised text reads as follows:

§ 648.85. Special management programs.

* * * * *

(b) * * *

(5) *Incidental Catch TACs.* Unless otherwise specified in this paragraph (b)(5), Incidental Catch TACs shall be based upon the portion of the ACL for a stock specified for the common pool vessels pursuant to § 648.90(a)(4), and allocated as described in this paragraph (b)(5), for each of the following stocks: GOM cod, GB cod, GB yellowtail flounder, CC/GOM yellowtail flounder, American plaice, SNE/MA winter flounder, and witch flounder. Because GB yellowtail flounder and GB cod are transboundary stocks, the incidental catch TACs for these stocks shall be based upon the common pool portion of the ACL available to U.S. vessels. NMFS shall send letters to limited access NE multispecies permit holders notifying them of such TACs.

(i) *Stocks other than GB cod and GB yellowtail flounder.* With the exception of GB cod and GB yellowtail flounder, 100 percent of the Incidental Catch TACs specified in this paragraph (b)(5) shall be allocated to the Regular B DAS Program described in paragraph (b)(6) of this section.

* * * * *

(iii) *GB yellowtail flounder.* The Incidental Catch TAC for GB yellowtail flounder specified in this paragraph (b)(5) shall be subdivided as follows: 50 percent to the Regular B DAS Program described in paragraph (b)(6) of this section and 50 percent to the Eastern U.S./Canada Haddock SAP described in paragraph (b)(8) of this section.

* * * * *

(6) * * *

(iv) * * *

(D) *Landing limits.* Unless otherwise specified in this paragraph (b)(6)(iv)(D), or restricted pursuant to § 648.86, a NE multispecies vessel fishing in the Regular B DAS Program described in this paragraph (b)(6), and fishing under a Regular B DAS, may not land more than 100 lb (45.5 kg) per DAS, or any part of a DAS, up to a maximum of 1,000 lb (454 kg) per trip, of any of the following species/stocks from the areas specified in paragraph (b)(6)(v) of this section: Cod (both GOM and GB), American plaice, witch flounder, SNE/MA winter flounder, and GB yellowtail flounder; and may not land more than 25 lb (11.3 kg) per DAS, or any part of a DAS, up to a maximum of 250 lb (113 kg) per trip of CC/GOM yellowtail flounder. In addition, trawl vessels, which are required to fish with a haddock separator trawl, as specified in paragraph (a)(3)(iii)(A) of this section, or a Ruhle trawl, as specified in paragraph (b)(6)(iv)(J) of this section, and other gear that may be required in order to reduce catches of stocks of concern as described in paragraph (b)(6)(iv)(J) of this section, are restricted to the trip limits specified in paragraph (e) of this section.

* * * * *

(8) * * *

(v) * * *

(F) *Landing limits.* Unless otherwise restricted under this part, a vessel fishing any portion of a trip in the Eastern U.S./Canada Haddock SAP under a NE multispecies DAS may not fish for, possess, or land more than 1,000 lb (453.6 kg) of cod, per trip, regardless of trip length. A common pool vessel fishing in the Eastern U.S./Canada Haddock SAP under a NE multispecies DAS is subject to the haddock requirements described in § 648.86(a), unless further restricted under paragraph (a)(3)(iv) of this section. A common pool vessel fishing in the Eastern U.S./Canada Haddock SAP may not land more than 100 lb (45.5 kg) per DAS, or any part of a DAS, of GB yellowtail flounder, up to a maximum of 500 lb (227 kg) of all flatfish species, combined. Possession of monkfish (whole weight) and skates (whole weight) is limited to 500 lb (227 kg) each, unless otherwise restricted by § 648.94(b)(3), and possession of lobsters is prohibited. Possession limits for all other stocks are as specified in § 648.86.

* * * * *

(H) *Incidental TACs.* The maximum amount of GB cod and GB yellowtail flounder, both landings and discards, that may be caught when fishing in the Eastern U.S./Canada Haddock SAP Program in a fishing year by vessels fishing under a Category B DAS, as

authorized in paragraph (b)(8)(v)(A) of this section, is the amount specified in paragraphs (b)(5)(ii) and (iii) of this section. All regulated species and ocean pout caught by a vessel on a sector trip will be applied against the ACE for each stock that is specified for the sector in which the vessel participates.

* * * * *

■ 4. Section 648.86 is amended by revising paragraph (l) to read as follows:

§ 648.86 NE Multispecies possession restrictions.

* * * * *

(l) *Ocean pout, windowpane flounder, and Atlantic wolffish.* A vessel issued a limited access NE multispecies permit, an open access NE multispecies Handgear B permit, or a limited access monkfish permit and fishing under the monkfish Category C or D permit provisions may not fish for, possess, or land ocean pout, windowpane flounder, or Atlantic wolffish.

* * * * *

■ 5. Section 648.87 is amended as follows:

■ a. Revise paragraphs (b)(1)(i)(A) and (c)(2)(ii)(A);

■ b. Suspend paragraph (b)(1)(i)(C); and

■ c. Add paragraphs (b)(1)(i)(F) and (b)(1)(i)(G).

The added and revised text reads as follows:

§ 648.87 Sector allocation.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(A) *Allocated stocks.* Each sector shall be allocated a TAC in the form of an ACE for each NE multispecies stock, with the exception of Atlantic halibut, ocean pout, windowpane flounder (both the GOM/GB and the SNE/MA stocks), and Atlantic wolffish based upon the cumulative PSCs of vessels/permits participating in each sector during a particular fishing year, as described in paragraph (b)(1)(i)(E) of this section.

* * * * *

(F) (*1*) *Carry-over.* For FY 2013, with the exception of GB yellowtail flounder, a sector may carry over an amount of ACE equal to up to 10 percent of its original ACE allocation for each stock that is unused at the end of one fishing year into the following fishing year; except that for GOM cod, for a period of 180 days after publication of this rule, a sector may only carry over an amount of ACE equal to up to 1.85 percent of its original GOM cod ACE.

(*2*) *Eastern GB cod and haddock carryover.* Any unused ACE allocated for Eastern GB stocks pursuant to paragraph (b)(1)(i)(B) of this section will contribute to the 10-percent carry-over allowance for each stock, as specified in paragraph (b)(1)(i)(F)(*1*) of this section, but will not increase an individual sector's allocation of Eastern GB stocks during the following year.

(*3*) *Carry-over when vessels leave or change sectors.* Carry-over ACE remains effective during the subsequent fishing year even if vessels that contributed to the sector allocation during the previous fishing year are no longer participating in the same sector for the subsequent fishing year.

(G) *Carryover accounting.* (*1*) For FY 2013, carryover of a particular stock attributed to a sector shall not be counted against a sector's ACE or the overall ACL for groundfish stocks.

(*2*) Beginning in FY 2014, carryover of a particular stock attributed to a sector, other than the NMFS-specified *de minimus* amount, shall be counted against the sector's ACE only for purposes of determining an overage subject to the AM in paragraph (b)(4)(iii) of this section in circumstances when the overall stock-level ACL has been exceeded.

(*3*) NMFS shall determine and announce the *de minimus* amount for FY 2014 and may modify each subsequent year. *De minimus* announcements shall be made consistent with the APA on or about 6 months before the end of the fishing year.

(*4*) In instances where the overall stock-level ACL has been exceeded and sectors have utilized available carryover in excess of the NMFS specified *de minimus* amount, the sector will be subject to the AM provision, inclusive of the carryover amount in excess of the stock-level ACL, as outlined in paragraph (b)(4)(iii) of this section.

(5) The Council may request, on an annual basis, for NMFS to reduce the amount of the available eligible carryover amount to ensure the total potential catch, the stock-level ACL plus the carryover amount, does not exceed the stock overfishing limit. Any such reduction of carryover amount shall be done consistent with the APA.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(A) Trip limits on NE multispecies stocks for which a sector receives an allocation of ACE pursuant to paragraph (b)(1)(i) of this section (i.e., all stocks except Atlantic halibut, ocean pout, windowpane flounder, and Atlantic wolffish);

* * * * *

§ 648.89 [Amended]

■ 6. Section 648.89 is amended as follows:

■ a. Remove paragraph (c)(7); and

■ b. Redesignate paragraph (c)(6) as paragraph (c)(5); paragraph (c)(8) as paragraph (c)(6) and paragraph (c)(9) as paragraph (c)(7).

■ 7. Section 648.90 is amended to read as follows:

■ a. Revise paragraphs (a)(4)(iii)(C) and (a)(5)(i)(A); and

■ b. Remove paragraph (a)(5)(i)(D)(*4*).

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(a) * * *

(4) * * *

(iii) * * *

(C) *Yellowtail flounder catch by the Atlantic sea scallop fishery.* Yellowtail flounder catch in the Atlantic sea scallop fishery, as defined in subpart D of this part, shall be deducted from the ABC/ACL for each yellowtail flounder stock pursuant to the restrictions specified in subpart D of this part and the process to specify ABCs and ACLs, as described in paragraph (a)(4) of this section. Unless otherwise specified in this paragraph (a)(4)(iii)(C), or subpart D of this part, the specific value of the sub-components of the ABC/ACL for each stock of yellowtail flounder distributed to the Atlantic sea scallop fishery shall be specified pursuant to the biennial adjustment process specified in paragraph (a)(2) of this section. The Atlantic sea scallop fishery shall be allocated 40 percent of the GB yellowtail flounder ABC (U.S. share only) in fishing year 2013, and 16 percent in fishing year 2014 and each fishing year thereafter, pursuant to the process for specifying ABCs and ACLs described in this paragraph (a)(4). An ACL based on this ABC shall be determined using the process described in paragraph (a)(4)(i) of this section. Based on information available, NMFS shall project the expected scallop fishery catch of GB and SNE/MA yellowtail flounder for the current fishing year by January 15. If NMFS determines that the scallop fishery will catch less than 90 percent of its GB or SNE/MA yellowtail flounder sub-ACL, the Regional Administrator may reduce the pertinent scallop fishery sub-ACL to the amount projected to be caught, and increase the groundfish fishery sub-ACL by any amount up to the amount reduced from the scallop fishery sub-ACL. The revised GB or SNE/MA yellowtail flounder groundfish fishery sub-ACL shall be distributed to the common pool and sectors based on the

process specified in paragraph (a)(4)(iii)(H)(*1*) of this section.

* * * * *

(5) * * *

(i) * * *

(A) *Excessive catch by common pool vessels.* If the catch of regulated species and ocean pout by common pool vessels exceeds the amount of the ACL specified for common pool vessels pursuant to paragraph (a)(4)(iii)(H)(*2*) of this section, then the AMs described in § 648.82(n) shall take effect. Pursuant to the distribution of ABCs/ACLs specified in paragraph (a)(4)(iii)(H)(*2*) of this section, for the purposes of this paragraph (a)(5)(i)(A), the catch of each regulated species or ocean pout stock not allocated to sectors pursuant to § 648.87(b)(1)(i)(E) (i.e., Atlantic halibut, ocean pout, windowpane flounder, and Atlantic wolffish) during fishing years 2010 and 2011 shall be added to the catch of such stocks by common pool vessels to determine whether the differential DAS counting AM described in § 648.82(n)(1) shall take effect. If such catch does not exceed the portion of the ACL specified for common pool vessels pursuant to paragraph (a)(4)(iii)(H)(*2*) of this section, then no AMs shall take effect for common pool vessels.

* * * * *

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Part IV

The President

Proclamation 8965—Asian American and Pacific Islander Heritage Month, 2013
Proclamation 8966—Jewish American Heritage Month, 2013
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Federal Register
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Presidential Documents

Title 3—

The President

Proclamation 8965 of April 30, 2013

Asian American and Pacific Islander Heritage Month, 2013

By the President of the United States of America

A Proclamation

Each May, our Nation comes together to recount the ways Asian Americans and Pacific Islanders (AAPIs) helped forge our country. We remember a time 170 years ago, when Japanese immigrants first set foot on American shores and opened a path for millions more. We remember 1869, when Chinese workers laid the final ties of the transcontinental railroad after years of backbreaking labor. And we remember Asian Americans and Pacific Islanders who have made our country bigger and brighter again and again, from Native Hawaiians to the generations of striving immigrants who shaped our history—reaching and sweating and scraping to give their children something more. Their story is the American story, and this month, we honor them all.

For many in the AAPI community, that story is one also marked by lasting inequality and bitter wrongs. Immigrants seeking a better life were often excluded, subject to quotas, or denied citizenship because of their race. Native Hawaiians and Pacific Islanders endured decades of persecution and broken promises. Japanese Americans suffered profoundly under internment during World War II, even as their loved ones fought bravely abroad. And in the last decade, South Asian Americans—particularly those who are Muslim, Hindu, or Sikh—have too often faced senseless violence and suspicion due only to the color of their skin or the tenets of their faith.

This year, we recognize the 25th anniversary of the Civil Liberties Act of 1988 and the 70th anniversary of the Chinese Exclusion Act's repeal—milestones that helped mend deep wounds of systemic discrimination. And with irrepressible determination and optimism, Asian Americans and Pacific Islanders have prevailed over adversity and risen to the top of their fields—from medicine to business to the bench. But even now, too many hardworking AAPI families face disparities in health care, education, and employment that keep them from getting ahead.

My Administration remains committed to addressing those disparities. Through the White House Initiative on AAPIs, we are working to ensure equal access to Federal programs that meet the diverse needs of AAPI communities. We are standing up for civil rights, economic opportunity, and better outcomes in health and education. We are fighting for commonsense immigration reform so America can continue to be a magnet for the best and brightest from all around the world, including Asia and the Pacific.

Meeting those challenges will not be easy. But the history of the AAPI community shows us how with hope and resolve, we can overcome the problems we face. We can reaffirm our legacy as a Nation where all things are possible for all people. So this month, as we recognize Asian Americans and Pacific Islanders who are fulfilling that promise in every corner of our country, let us recommit to giving our children and grandchildren the same opportunity in the years ahead.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2013 as Asian

American and Pacific Islander Heritage Month. I call upon all Americans to visit www.WhiteHouse.gov/AAPI and www.AsianPacificHeritage.gov to learn more about the history of Asian Americans and Pacific Islanders, and to observe this month with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10744
Filed 5–2–13; 11:15 am]
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Presidential Documents

Proclamation 8966 of April 30, 2013

Jewish American Heritage Month, 2013

By the President of the United States of America

A Proclamation

In his second year in office, President George Washington wrote a letter to the Touro Synagogue in Newport, Rhode Island—one of our Nation's first Jewish houses of worship—and reaffirmed our country's commitment to religious freedom. He noted that the Government of the United States would give ''to bigotry no sanction [and] to persecution no assistance,'' and that all Americans are entitled to ''liberty of conscience and immunities of citizenship.'' Those words ring as true today as they did then, and they speak to a principle as old as America itself: that no matter who you are, where you come from, or what faith you practice, all of us have an equal share in America's promise.

It was such a belief that drew generations of Jewish immigrants to our shores. It is what brought Jewish families westward when pogroms and persecution cast a shadow over Europe in the last century. It is what led Holocaust survivors and Jews trapped behind the Iron Curtain to rebuild their lives across the Atlantic. And with every group that arrived here, the Jewish American community grew stronger. Our Nation grew stronger. Jewish immigrants from all over the world wove new threads into our cultural fabric with rich traditions and indomitable faith, and their descendants pioneered incredible advances in science and the arts. Teachings from the Torah lit the way toward a more perfect Union, from women's rights to workers' rights to the end of segregation.

That story is still unfolding today. Jewish Americans continue to guide our country's progress as scientists and teachers, public servants and private citizens, wise leaders and loving parents. We see their accomplishments in every neighborhood, and we see them abroad in our unbreakable bond with Israel that Jewish Americans helped forge. More than 350 years have passed since Jewish refugees first made landfall on American shores. We take this month to celebrate the progress that followed, and the bright future that lies ahead.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2013 as Jewish American Heritage Month. I call upon all Americans to visit www.JewishHeritageMonth.gov to learn more about the heritage and contributions of Jewish Americans and to observe this month with appropriate programs, activities, and ceremonies.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10745
Filed 5–2–13; 11:15 am]
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Presidential Documents

Proclamation 8967 of April 30, 2013

National Building Safety Month, 2013

By the President of the United States of America

A Proclamation

When natural disasters and other hazards put American lives at risk, robust codes and standards for our buildings play an important role in keeping us safe. They ensure our homes and businesses are resilient to the challenges of our time—not just by making them structurally sound, but also by boosting their energy efficiency. This month, as we pay tribute to professionals who design, construct, and secure our infrastructure, let us raise awareness about building safety and rededicate ourselves to improving it in the days to come.

Protecting our communities from harm requires commitment from all of us. Alongside partners in government and industry, my Administration is encouraging stakeholders across our country to adopt disaster-resistant building codes and standards. We are collaborating with experts to issue modern guidance on construction and retrofitting techniques. And we are supporting cities and towns from coast to coast as they pursue disaster preparedness, mitigation, and redevelopment. To get involved, visit www.Ready.gov.

Time and again, devastating natural disasters have tested the strength of our communities and the resilience of our people. Our capacity to withstand these threats depends on what we do to prepare today—from reinforcing critical infrastructure to making sure our buildings adhere to local codes and standards. This month, we take up those tasks once more and recommit to safety in the year ahead.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2013 as National Building Safety Month. I encourage citizens, government agencies, businesses, nonprofits, and other interested groups to join in activities that raise awareness about building safety. I also call on all Americans to learn more about how they can contribute to building safety at home and in their communities.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10747
Filed 5–2–13; 11:15 am]
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Presidential Documents

Proclamation 8968 of April 30, 2013

National Foster Care Month, 2013

By the President of the United States of America

A Proclamation

As a Nation, we have no task more important than ensuring our children grow up healthy and safe. It is a promise we owe to the hundreds of thousands of youth in foster care—boys and girls who too often go without the love, protection, and stability of a permanent family. This month, we recommit to giving them that critical support, and we recognize the foster parents and professionals who work every day to lift up the children in their care toward a bright, productive future.

Thanks to those efforts, the number of young people in foster care is falling and fewer children are waiting for adoption. But even now, more than 400,000 kids are looking for permanency with caring parents. Many are struggling to find the meaningful, long-term relationships that will help them transition into adulthood. Some young men and women are aging out of the system without a permanent home, making it harder for them to get a good education, find a job, and build a better life.

To give foster youth the support they need, Americans in every community are stepping up to serve. They are mentors, teachers, faith leaders, caseworkers, advocates, family members—individuals dedicated to making a difference. As they lend their strength to our most vulnerable children, my Administration will continue to invest in services that strengthen the foster care system and encourage adoption. We will keep working to ensure every qualified caregiver has the chance to be an adoptive or foster parent. And we will support programs that help increase permanency, reduce rates of re-entry into foster care, and address the issues that bring young people in the child welfare system in the first place.

Whether as a friend, a role model, or a guardian, any of us can be a supportive adult for a child in need. As we honor the countless Americans who are answering that call to action, let us mark this month by showing children and youth in foster care the best our country has to offer.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2013 as National Foster Care Month. I call upon all Americans to observe this month by taking time to help youth in foster care and recognizing the commitment of all who touch their lives at a most challenging time.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10748
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Presidential Documents

Proclamation 8969 of April 30, 2013

National Mental Health Awareness Month, 2013

By the President of the United States of America

A Proclamation

Today, tens of millions of Americans are living with the burden of a mental health problem. They shoulder conditions like depression and anxiety, post-traumatic stress and bipolar disorder—debilitating illnesses that can strain every part of a person's life. And even though help is out there, less than half of children and adults with diagnosable mental health problems receive treatment. During National Mental Health Awareness Month, we shine a light on these issues, stand with men and women in need, and redouble our efforts to address mental health problems in America.

For many, getting help starts with a conversation. People who believe they may be suffering from a mental health condition should talk about it with someone they trust and consult a health care provider. As a Nation, it is up to all of us to know the signs of mental health issues and lend a hand to those who are struggling. Shame and stigma too often leave people feeling like there is no place to turn. We need to make sure they know that asking for help is not a sign of weakness—it is a sign of strength. To find treatment services nearby, call 1–800–662–HELP. The National Suicide Prevention Lifeline offers immediate assistance for all Americans, including service members and veterans, at 1–800–273–TALK.

Our commitment cannot end there. We must ensure people have access to the care they need—which is why the Affordable Care Act will expand mental health and substance use disorder benefits and Federal parity protections for 62 million Americans. For the first time, the health care law will prevent insurers from denying coverage because of a pre-existing condition. The Act already requires new health plans to cover recommended preventive services like depression screening and behavioral assessments for children at no extra cost to patients.

My Administration will keep building on those achievements. Earlier this year, I was proud to launch the BRAIN Initiative—a new partnership between government, scientists, and leaders in the private sector to invest in research that could unlock new treatments for mental illness and drive growth throughout our economy. We have made unprecedented commitments to improving mental health care for veterans suffering from traumatic brain injury and post-traumatic stress disorder. And we have proposed new funding for mental health programs that will help teachers and other adults recognize the signs of mental illness in children, improve mental health outcomes for young people, and train 5,000 more mental health professionals to serve our youth.

Mental health problems remain a serious public health concern, but together, our Nation is making progress. This month, I encourage all Americans to advance this important work by raising awareness about mental health and lending strength to all who need it.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2013 as National Mental Health Awareness Month. I call upon citizens, government agencies, organizations, health care providers, and research institutions to raise mental

health awareness and continue helping Americans live longer, healthier lives.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10749
Filed 5–2–13; 11:15 am]
Billing code 3295–F3

Presidential Documents

Proclamation 8970 of April 30, 2013

National Physical Fitness and Sports Month, 2013

By the President of the United States of America

A Proclamation

Over the past 3 years, communities all across America have joined First Lady Michelle Obama's *Let's Move!* initiative, which aims to help parents make healthy choices and give our children a strong start. Today, families have more of the tools and know-how they need to embrace a healthy lifestyle. Kids and adults are finding new ways to bring exercise into their daily lives. And by getting active, our youngest generation is not only improving their health, but also their ability to learn and be successful later in life. During National Physical Fitness and Sports Month, we celebrate that progress and keep striving for more.

To help more kids and families get moving and make exercise a lifelong habit, we are working to create more opportunities for physical activity—whether on the playground, in the classroom, or at work. Through *Let's Move!* and the President's Council on Fitness, Sports, and Nutrition, we continue to advance that mission by collaborating with partners in every corner of our country—public and private, large and small, national and neighborhood. Together, we are helping cities, towns, and counties raise a healthier generation of kids. And earlier this year, we built on that work by launching a new program to bring physical activity back to our schools. To learn more and join in, visit www.LetsMove.gov and www.Fitness.gov.

With simple steps, all of us can make physical activity a way of life. This month, we recognize Americans who are choosing that future for themselves and inspiring others to do the same. We also take this opportunity to renew the call to action. I encourage business, faith, and community leaders to uphold physical activity as an important way to enrich our neighborhoods. I call on schools to make good health and exercise part of a good education. And alongside our friends and family, let each of us recommit to leading a healthy, active lifestyle, and setting our children on the path to a bright future.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2013 as National Physical Fitness and Sports Month. I call upon the people of the United States to make daily physical activity, sports participation, and good nutrition a priority in their lives.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10752
Filed 5–2–13; 11:15 am]
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Presidential Documents

Proclamation 8971 of April 30, 2013

Older Americans Month, 2013

By the President of the United States of America

A Proclamation

For half a century, communities in every corner of our country have come together to honor older Americans in a special way during the month of May. We carry that tradition forward again this year by recognizing their accomplishments, sharing their stories, and showing support and appreciation for our elders.

With groundbreaking advances in medicine and health care, Americans are living longer and achieving more. Many seniors are using a lifetime of experience to serve those around them. Even after decades of hard work, men and women are taking on new roles after retirement—organizing, educating, innovating, and making sure they leave the next generation with the same opportunities they had. It is a commitment that shines brightly in programs like Senior Corps, which connects more than half a million people to service opportunities from coast to coast.

As older Americans strive to lift up their neighborhoods, my Administration is working to make sure they get the tools they need to make a difference. We are helping more seniors get involved in volunteer service and give back to those around them. We are also finding new ways to make sure seniors live with dignity as full members of their communities—from improving access to health care to broadening employment opportunities. And to ensure older Americans have resources they can count on, my Administration will continue to protect and strengthen Medicare and Social Security not just for this generation, but also for those to come.

Our seniors deserve the best our country has to offer. This month, we pay tribute to the men and women who raised us, and we pledge anew to show them the fullest care, support, and respect of a grateful Nation.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2013 as Older Americans Month. I call upon all Americans of all ages to acknowledge the contributions of older Americans during this month and throughout the year.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10753
Filed 5–2–13; 11:15 am]
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Presidential Documents

Proclamation 8972 of April 30, 2013

Law Day, U.S.A., 2013

By the President of the United States of America

A Proclamation

As a Nation, we are bound together not by the colors of our skin, the tenets of our faith, or the origins of our names. What unites us as Americans is our allegiance to an idea articulated more than two centuries ago: that ''all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.'' In the years since that declaration, we not only forged a Republic of, by, and for the people; we also set ourselves to the task of perfecting it, and bridging the meaning of those words with the realities of our time.

This Law Day, we look back on our long journey toward equality for all. We reflect on the Emancipation Proclamation, issued by President Abraham Lincoln 150 years ago to mend a Nation half-slave and half-free under the unifying promise of liberty. We remember when Dr. Martin Luther King, Jr., stood in Lincoln's shadow a century later and gave voice to a dream, sounding the call for an America that truly lives out the meaning of its founding creed. We honor the courageous men and women who fought to bring those ageless ideals of freedom and fairness into the rule of law—from the Civil Rights Act and the Voting Rights Act to Title IX and the Americans with Disabilities Act.

Even now, that work is not yet finished. Opportunity remains painfully unequal for too many among us; justice too often goes undone. Law Day is a chance to reaffirm the critical role our courts have always played in addressing those wrongs and aligning our Nation with its first principles. Let us mark this occasion by celebrating that history, upholding the right to due process, and honoring all who have sustained our proud legal tradition.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, in accordance with Public Law 87–20, as amended, do hereby proclaim May 1, 2013, as Law Day, U.S.A. I call upon all Americans to acknowledge the importance of our Nation's legal and judicial systems with appropriate ceremonies and activities, and to display the flag of the United States in support of this national observance.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10754
Filed 5–2–13; 11:15 am]
Billing code 3295–F3

Presidential Documents

Proclamation 8973 of April 30, 2013

Loyalty Day, 2013

By the President of the United States of America

A Proclamation

In the centuries since America broke from an empire and claimed independence, our people have come together again and again to meet the challenges of a changing world. We have reinvented our cities with advances in science and reformed our markets with new understanding of the forces that guide them. We have fought for freedom in the theater of war and expanded its reach during times of peace. We have revamped and recovered and remade ourselves anew, mindful that when times change, so must we. But with every step forward, we have reaffirmed our faith in the ideals that inspired our founding. We have held fast to the principles at our country's core: service and citizenship; courage and the common good; liberty, equality, and justice for all.

This is our Nation's heritage, and it is what we remember on Loyalty Day. It is an occasion that asks something of us as a people: to rediscover those ageless truths our Founders held to be self-evident, and to renew them in our own time. We look back to Americans who did the same, from generation to generation—citizens who strengthened our democracy, organizers who made it broader, service members who gave everything to protect it. These patriots and pioneers remind us that while our path to a more perfect Union is unending, with hope and hard work, we can move forward together.

Today, we rededicate ourselves to that enduring task. We do so knowing our journey is not complete until the promises of our founding documents are made real for every American, regardless of their station in life or the circumstances of their birth. Progress may come slow; the road may be long. But as loyal citizens of these United States, we have the power to set our country's course. Let us mark this day by pressing on in the march toward lasting freedom and true equality, grateful for the precious rights and responsibilities entrusted to each of us by our forebears.

In order to recognize the American spirit of loyalty and the sacrifices that so many have made for our Nation, the Congress, by Public Law 85–529 as amended, has designated May 1 of each year as ''Loyalty Day.'' On this day, let us reaffirm our allegiance to the United States of America, our Constitution, and our founding values.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim May 1, 2013, as Loyalty Day. This Loyalty Day, I call upon all the people of the United States to join in support of this national observance, whether by displaying the flag of the United States or pledging allegiance to the Republic for which it stands.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–10757
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